ONTARIO ENERGY BOARD

IN THE MATTER OF the *Electricity Act*, 1998, SO 1998, c 15, Sch A; and in particular section 33 thereof;

AND IN THE MATTER OF the *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B; and in particular section 21 thereof;

AND IN THE MATTER OF an application by Capital Power Corporation, Thorold CoGen L.P., Portlands Energy Centre L.P., dba Atura Power, St. Clair Power L.P., TransAlta (SC) L.P. (collectively the "NQS Generation Group") for a review of the Market Renewal Program Market Rule Amendments passed by the Board of Directors of the Independent Electricity System Operator ("IESO") on October 18, 2024.

PRE-HEARING CONFERENCE WRITTEN SUBMISSIONS

NQS GENERATION GROUP

November 25, 2024

Counsel for the NQS Generation Group
BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide St W Suite 3400
Toronto, ON M5H 4E3
John Vellone / Colm Boyle
Tel: 416.367.6730 / 416.367.7273
JVellone@blg.com / CBoyle@blg.com

I. Summary

1. The NQS Generation Group submits there is an important distinction between:

    a. the broad and plenary jurisdiction of the OEB to conduct a "review" of Market Rule amendments; and

    b. the remedy available under section 33(9) where the OEB makes a finding of unjust discrimination or inconsistency with the *Electricity Act* on completion of its review.

2. The OEB's power to "review" under section 33 of the *Electricity Act* provides the OEB with oversight of IESO Market Rule amendments.[1] Section 1(1) of the *Ontario Energy Board Act, 1998* charges the OEB with broad responsibilities with respect to the regulation of electricity, and to fulfil those broad responsibilities the OEB must have jurisdiction to consider evidence sufficient to weigh whether or not the proposed amendments are consistent with the purposes of the *Electricity Act, 1998* which again are quite broad. The IESO's submissions on the narrow jurisdiction of the OEB is directly inconsistent with legislative scheme and should be rejected. The Ontario Court of Appeal has confirmed that the OEB's power of review includes the power to reconsider and substitute its decision for that of the IESO. The court stressed the wide nature of "review" powers and notes that courts have been loathe to interpret the power narrowly.[2]

3. The IESO cannot contract out of OEB oversight under section 33 of the *Electricity Act* and impose Market Rule amendments on contracted market participants without any checks or balances. Doing so would be contrary to public policy, the intention of parliament, the purposes of the *Electricity Act*, and objectives of the *Ontario Energy Board Act*.

4. The IESO is a public body that holds a monopoly over the development and administration of Ontario's electricity markets. It is akin to negotiating in bad faith and is an absurd outcome for

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[1] EB-2024-0128, IESO – Application to Amend Licence EI-2013-0066, July 23, 2024, pg. 3, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/859958/File/document> [TAB 1]

[2] *Russell v. Toronto (City)*, 2000 CarswellOnt 4876, [2000] O.J. No. 4762, 101 A.C.W.S. (3d) 1188 (ONCA), at paras 14-15, leave to appeal to SCC refused: S.C.C. File No. 28428. S.C.C. Bulletin, 2001, p. 1413, online: <https://www.canlii.org/en/on/onca/doc/2000/2000canlii17036/2000canlii17036.pdf> [TAB 2]

market participants if the IESO can via contract rob the OEB of its jurisdiction to review Market Rule amendments for unjust discrimination or inconsistency with the *Electricity Act, 1998* in nearly all circumstances.

5. Finally, the NQS Generation Group disagrees that the Application only relates to out of market contracts. The Application is carefully and thoughtfully constructed to distinguish between the clear and unambiguous harms caused directly by the MRP Amendments (paragraph 9 of the Application), which harms are made worse (not better) when considered in the context of the deemed dispatch agreements (paragraph 23 of the Application). The IESO would no doubt seek to rely on its out-of-market contracts to the extent those contracts serve to alleviate any concern of unjust economic discrimination for a market participant or class of market participants. The IESO should not now be permitted to exclude consideration of contracts when they only make the harm worse, but include consideration of contracts if they serve to alleviate that harm.

II. The Applicable Law

A. Hansard

6. When the *Electricity Act, 1998* was enacted, and under nearly identical provisions, the legislature stated the function of the Ontario Energy Board ("**OEB**") was to "review" amendments to market rules without any restrictions on the scope of such an OEB review:[3]

> The IMO will have power to make and enforce market rules governing the transmission systems over which it has authority to direct operations and establishing and governing markets in electricity and ancillary services. Provision is made for reviews of the market rules by the Ontario Energy Board.

[3] Bill 35: *An Act to create jobs and protect consumers by promoting low-cost energy through competition, to protect the environment, to provide for pensions and to make related amendments to certain Acts*. Royal Assent. October 30, 1998. 36th Parliament, 2nd Session, pgs. i, 16, and 17, online: <https://www.ola.org/sites/default/files/node-files/bill/document/pdf/1998/1998-10/bill---text-36-2-en-b035.pdf>

7. In 2003, the legislature stated it is the responsibility of the OEB to monitor markets in the electricity sector:[4]

> The board also monitors markets in the electricity sector and reports to the ministry on the efficiencies, fairness, transparencies and competitiveness of the market, as well as reporting on any abuse or potential abuse of market power. The board may also be asked to review the IMO rules and market rules and consider appeals for IMO orders.

8. In 2004, the legislature went further to state that the OEB has the authority to "review and approve" amendments to the Market Rules when the Independent Electricity Market Operator was renamed the Independent Electricity System Operator. The Minister of Energy stated:[5]

> The Independent Electricity Market Operator would be renamed the Independent Electricity System Operator, the IESO, and continue to operate the wholesale market and be responsible for the operation and reliability of Ontario's power system. Responsibility for the market surveillance panel would be transferred from the IMO to the Ontario Energy Board. The Ontario Energy Board would have the authority to review and approve amendments to market rules for the IESO-administered markets.

9. The NQS Generation Group submits that the legislature intended for the OEB to have plenary power and authority when reviewing market rule amendments by the IESO.

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[4] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 37th Parl., 4th Sess., No. 27B (17 June 2003), at p. 1260, Hon John O'Toole, online: <https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2003/2003-06/house-document-hansard-transcript-4-en-2003-06-17_pdfL027B.pdf>

[5] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl., 1st Sess., No. 73B (18 October 2004), at p. 3466, Hon Dwight Duncan (Minister of Energy, Government House Leader), online: <https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2004/2004-10/house-document-hansard-transcript-1-en-2004-10-18_pdfL073B.pdf>

B. Interpretation of the Power to "Review" in Caselaw

10. As noted above, section 33 of the *Electricity Act, 1998* gives the OEB power to "review" amendments to the Market Rules. Section 78 of the *Legislation Act* allows the OEB to exercise all necessary incidental powers in the conduct of its review.[6]

11. In accordance with the Ontario Court of Appeal in *Russell v Toronto (City)*, the OEB's power of review is broad and includes the power to reconsider and substitute its decision for that of the IESO:[7]

> [15] On the whole, courts have been mindful of the uniqueness of the power of review in administrative proceedings and have been loath to interpret the power narrowly. For example, the Divisional Court has repeatedly stressed the wide nature of such powers and has refused to read them down: *Merrens*, supra, *St. Catharines*, supra, and *Hall v. Ontario (Ministry of Community and Social Services)* (1997), 154 D.L.R. (4th) 696.

12. The OEB confirmed in EB-2006-0322 / EB-2006-0338 / EB-2006-0340 the power granted to review is effectively the same as *Russell v Toronto (City)*, so the principles enunciated in *Russell v Toronto (City)* are applicable to the OEB.[8]

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[6] *Legislation Act*, 2006, SO 2006, c 21, Sch F, online: <https://www.canlii.org/en/on/laws/stat/so-2006-c-21-sch-f/latest/so-2006-c-21-sch-f.html>

[7] *Russell v. Toronto (City)*, 2000 CarswellOnt 4876, [2000] O.J. No. 4762, 101 A.C.W.S. (3d) 1188 (ONCA), at paras 14-15, leave to appeal to SCC refused: S.C.C. File No. 28428. S.C.C. Bulletin, 2001, p. 1413, online: <https://www.canlii.org/en/on/onca/doc/2000/2000canlii17036/2000canlii17036.pdf> [TAB 2]

[8] EB-2006-0322 / EB-2006-0338 / EB-2006-0340, Decision with Reasons – Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, pg. 11, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/180773/File/document> [TAB 3]

C. Market Rule Amendments are Subject to OEB Oversight

13. The *Ontario Energy Board Act, 1998* requires the OEB to monitor markets in the electricity sector.[9] The OEB acknowledges in EB-2019-0242 that Market Rule amendments are subject to OEB oversight:[10]

> The OEB acknowledges that the IESO is responsible for making and amending the market rules, but the fact remains that market rule amendments are subject to oversight by the OEB under section 33 of the Act (among others) and that this oversight is part of the legislative scheme even if as a proceeding separate from the IESO's market rule amendment process.

14. The NQS Generation Group submits that all aspects of the proposed Market Rule amendments in MR-00481-R00-R13: Market Renewal Program, are subject to OEB oversight under Section 33 of the *Electricity Act, 1998*.

D. Remedy in Section 33(9) of the Electricity Act

15. Section 33(9) is only engaged <u>on completion of the OEB's review</u>. If the OEB finds from its review that a Market Rule amendment is inconsistent with the purposes of this Act or unjustly discriminates against or in favour of a market participant or class of market participants, then the OEB is required to do two things:

    a. revoke the amendment on a date specified by the Board; and

    b. refer the amendment back to the IESO for further consideration.

16. The IESO is incorrect in stating that the OEB's review of market rule amendments are limited by section 33(9), only the remedy arising from the OEB's review is.

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[9] *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B, s. 87.

[10] EB-2019-0242, AMPCO – Decision on Cost Responsibility and Cost Eligibility, November 12, 2019, pg. 3, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/658562/File/document> [TAB 4]; See also EB-2024-0128, IESO – Application to Amend Licence EI-2013-0066, July 23, 2024, pg. 3, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/859959/File/document> [TAB 1]

III. Argument

A. The IESO cannot contract out of statutory review of Market Rule amendments

17. The IESO is, in effect, incorrectly arguing that the NQS Generation Group's exclusive remedy for the matters raised in the Application is negotiation or arbitration. This argument fails on two grounds. The first is that the IESO contracts make absolutely no reference to "unjust discrimination" or to "inconsistent with the purposes of the *Electricity Act, 1998*." While there are numerous contractual reopener provisions that can be triggered under a wide range of circumstances – the basis of those reopener provisions are fundamentally different from – and in no way conflict with – the scope of a statutory review under Section 33 of the *Electricity Act, 1998*.

18. The NQS Generation Group submits the OEB's statutory jurisdiction under section 33 of the *Electricity Act, 1998* to conduct a review of Market Rule amendments cannot be abdicated through IESO contracts with market participants. There is no authority in legislation for the IESO to do this, especially since the IESO is not an agent of the Crown for any purpose.[11]

19. The IESO is a public statutory body created by the Province of Ontario that has a monopoly over the electricity markets in Ontario.[12] Excluding rate regulated assets, most (if not all) generator market participants that operate pursuant to the Market Rules in IESO-administered markets have contracts with the IESO.[13]

20. If the IESO's position on the OEB's jurisdiction is accepted, the OEB would be effectively robbed of any meaningful jurisdiction under section 33 of the *Electricity Act* to review unjustly discriminatory Market Rule amendments in every circumstance where the IESO has entered into a contract with a market participant. This is an absurd outcome that would grant impunity to the IESO from applications to the OEB by nearly all generation market participants to review

[11] *Electricity Act, 1998*, SO 1998, c 15, Sch A, s. 8.
[12] *Electricity Act, 1998*, SO 1998, c 15, Sch A, s. 6(h).
[13] https://www.ieso.ca/en/Sector-Participants/Resource-Acquisition-and-Contracts/Contract-Data-and-Reports

of Market Rule amendments and is surely an outcome the Supreme Court of Canada in *Bell Canada v Canada* instructed administrative tribunals to avoid.[14]

21. Moreover, if the IESO's position is accepted, the OEB would be condoning the IESO's abuse of its monopoly position by inserting contractual terms in bad faith in an effort to limit review of Market Rule amendments. This would improperly allow the IESO to impose Market Rule amendments on market participants even if they are unjustly discriminatory or inconsistent with the *Electricity Act, 1998*. Per section II(A) above, this is not what the legislature intended. The OEB must avoid an interpretation that undermines the proper functioning of public institutions.

B. IESO's mischaracterization of the Application

22. The IESO continues to mischaracterize and misquote the Application, such as stating the "heart" of the Application is "…that the IESO's proposed Term Sheet amendments do not satisfy the Applicants' contractual demands."[15]

23. The NQS Generation Group does not intend to engage in contractual debates or negotiations before the OEB. The NQS Generation Group's contention is simply that the contracts (and the proposed Term Sheet amendments) are probative evidence in the OEB's assessment of the impacts of the MRP Amendments. Specifically, and for clarity this is not the case here, if it were the case that an IESO contract served to alleviate any unjust economic discrimination caused by a Market Rule amendment – wouldn't the OEB panel need to know this when making its determination under Section 33 of the *Electricity Act, 1998*? Similarly, and as in the present case, if an IESO contract only serves to exacerbate and make worse the unjust economic discrimination caused by the MRP Amendments – the NQS Generation Group submits that the OEB again should be informed of these directly relevant facts.

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[14] The Supreme Court of Canada has cautioned administrative tribunals to avoid sterilizing their powers through overly technical interpretations of enabling statutes: *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722, at para 1756, online: <https://www.canlii.org/en/ca/scc/doc/1989/1989canlii67/1989canlii67.pdf> [TAB 5]

[15] IESO Pre-Hearing Submission at para 18.

24. The Application clearly articulates that the heart of the Application is that the Market Rule amendments are causing the NQS Generation Group economic harm that is unjustly discriminatory and inconsistent with the purposes of the *Electricity Act*.[16]

25. Given that almost all generation resources are compensated under long-term contracts, it is only logical that demonstrating unjust economic discrimination suffered by generators from Market Rule amendments would be done with reference to the relevant contracts. The IESO Market Rules and procurement contracts are inextricably linked (note that Market Rule amendment MR-00481-R09 expressly relates to "Physical Bilateral Contracts and Financial Markets"). The IESO's evidence filings in both EB-2013-0029 and EB-2019-0242 section 33 review applications are similarly replete with references to IESO contracts.

26. The fact is that the IESO proceeded with approval and publication of the Market Rules without resolving the concerns raised by the NQS Generators.[17] The negotiations and term sheets are relevant as evidence that the IESO acknowledged unresolved issues existed, which was ultimately reflected in the Reasons of the IESO Board that the Market Rule amendments were adopted as "*the IESO will continue to assess the need for any additional amendments to market rules or market manuals and will obtain stakeholder feedback as required in advance of MRP go-live.*"[18]

C. The Legislative Scheme in Question

27. The IESO's position on jurisdiction of the OEB is not only absurd for the reasons set out above, it is entirely inconsistent with the legislative scheme in question.

28. The OEB is granted broad responsibilities under Section 1(1) of the *Ontario Energy Board Act, 1998*, including (emphasis added):

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[16] Application at paras 29-30.

[17] Application at paras 26-27

[18] Reasons of the IESO Board in respect of amendments to the market rules, October 18, 2024, online: <https://www.ieso.ca/-/media/Files/IESO/Document-Library/tp/2024/iesotp-20241018-board-reasons-mr-00481-R00-R13.pdf> [TAB 6]

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

29. In considering a review under Section 33 of the *Electricity Act, 1998*, the OEB must make a determination of whether or not the amendment is inconsistent with the purposes of the *Electricity Act, 1998* and unjustly discriminates against or in favour of a market participant or class of market participants.

30. The purposes of the *Electricity Act, 1998* at Section 1 includes (emphasis added):

> (d) to **promote the use of cleaner energy sources and technologies**, including alternative energy sources and renewable energy sources, **in a manner consistent with the policies of the Government of Ontario**;
>
> (g) **to promote economic efficiency and sustainability in the generation**, transmission, distribution and sale **of electricity**;
>
> (i) **to facilitate the maintenance of a financially viable electricity industry**.

31. The OEB would be unable to meet its broad responsibilities under Section 1 of the *Ontario Energy Board Act, 1998* or conduct the full scope of review required under Section 33 of the *Electricity Act, 1998* if the IESO's argument on narrow jurisdiction is accepted.

32. Words matter. The legislative scheme asks the OEB to, as an economic regulator, take on a much broader consideration of the relevant facts and circumstances to assess the impacts of the MRP Amendments on unjust economic discrimination for the **electricity industry** as a whole, on the **economic efficiency and sustainability of the generation of electricity in particular**, and on whether or not the MRP Amendments serve to promote the use of cleaner energy sources and technologies in a manner consistent with the policies of the Government of Ontario. The legislation is not only limited to IESO-administered markets.

33. In this context the NQS Generation Group reiterate its submission that the Deemed Dispatch Contracts are clearly probative to the actual economic impacts of the MRP Amendments on

the NQS Generation Group and are consequently directly relevant evidence in the OEB's assessment of the MRP Amendments under Section 33 of the *Electricity Act, 1998.*

IV. Evidentiary Matters

34. In the 3x Rate Ramp case (EB-2007-0040) cited by the IESO, the OEB ordered the IESO to provide a broad range of disclosure, including a requirement to provide "*all materials prepared by the IESO in relation to the Amendment or the subject matter of the Amendment, other than materials already captured by items i to vii above.*"[19] The information requested by the NQS Generation Group in Schedule A of the Application is far less broad than this OEB direction.

35. For the reasons set out in the NQS Generation Group's letter dated November 14, 2024, all of the information requested is relevant to the matters at issue in the Application and should be produced by the IESO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25TH DAY OF NOVEMBER, 2025

BORDEN LADNER GERVAIS LLP

Per:

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Colm Boyle
Counsel to the NQS Generation Group

[19] EB-2007-0040, Procedural Order No. 1, February 16, 2007, pgs. 3-4, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/44935/File/document> [TAB 7]

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TAB #	DOCUMENT
1	EB-2024-0128, IESO – Application to Amend Licence EI-2013-0066, July 23, 2024
2	*Russell v. Toronto (City)*, 2000 CarswellOnt 4876, [2000] O.J. No. 4762, 101 A.C.W.S. (3d) 1188 (ONCA), at paras 14-15, leave to appeal to SCC refused: S.C.C. File No. 28428. S.C.C. Bulletin, 2001, p. 1413
3	EB-2006-0322 / EB-2006-0338 / EB-2006-0340, Decision with Reasons – Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007
4	EB-2019-0242, AMPCO – Decision on Cost Responsibility and Cost Eligibility, November 12, 2019
5	*Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722
6	Reasons of the IESO Board in respect of amendments to the market rules, October 18, 2024
7	EB-2007-0040, Procedural Order No. 1, February 16, 2007

TAB 1

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

DECISION AND ORDER

EB-2024-0128

INDEPENDENT ELECTRICITY SYSTEM OPERATOR

Application to Amend Licence EI-2013-0066

BEFORE: Pankaj Sardana
Presiding Commissioner

July 23, 2024

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

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1 OVERVIEW AND PROCESS

The Independent Electricity System Operator (IESO) filed an application (the Application) with the Ontario Energy Board (OEB) on March 25, 2024, under section 74(1)(b) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B) (OEB Act). The Application requested amendments to the IESO's OEB licence EI-2013-0066 related to the material that the IESO is required to file with the OEB in response to an application to review a Market Rule Amendment (MRA) under section 33 of the *Electricity Act, 1998 (*Electricity Act*)*. The Application requested the following changes to the IESO licence:

i) addition of a new definition for "Market Rule Amendment Proposal"

ii) amendments to paragraph 6.3 i., ii., iii. and v. and deletion of paragraph 6.3 iv. for the purpose of streamlining the documents that the IESO is required to file to the OEB in response to a request to review an MRA

iii) Updating the name of the "Stakeholder Advisory Committee" to the "Strategic Advisory Committee" in paragraph 6.3 iii. of the licence.

A Notice of Hearing was issued on April 26, 2024. The Association of Power Producers of Ontario (APPrO), and the Canadian Renewable Energy Association, Energy Storage Canada and Ontario Waterpower Association, jointly referred to as "REASCWA" (REASCWA), applied for intervenor status and cost eligibility. The OEB granted APPrO and REASCWA intervenor status and cost award eligibility in Procedural Order No. 1 on May 14, 2024.

Procedural Order No. 1 outlined the procedural steps and defined the scope of the submissions as being limited to the proposed wording changes in the draft license amendments that were filed by the IESO in the Application.

On May 27, 2024, the OEB issued Procedural Order No. 2 ordering the IESO to submit an updated Application to clarify a discrepancy in the proposed amendments to paragraph 6.3 iii of the licence and amending the timeline of the procedural steps. On May 29, 2024, the IESO filed an updated Application to clarify the discrepancy.

Submissions were received from APPrO, REASCWA and OEB Staff on June 5, 2024. The IESO's reply submission was received on June 14, 2024.

The Application

The Application, as corrected, seeks to amend the IESO's licence to include the following new definition:

> "Market Rule Amendment Proposal" means a set of Market Rule amendments that were the subject of a formal stakeholder engagement, reviewed by the Licensee's Technical Panel and approved by a vote of the Licensee's Board of Directors.

The Application also requested that paragraph 6.3 of the IESO's licence be amended as follows:

> 6.3 The Licensee shall file with the Board, within seven days of the date of the filing of an application to review a Market Rule amendment under section 33 of the *Electricity Act*, the following in respect of that Market Rule amendment:
>
> i. A copy of the~~ll~~ Market Rule a~~A~~mendment ~~Submissions relating to the amendment~~ that is the subject of the application, including any covering memoranda;
>
> ii. all written submissions received by the Licensee ~~in relation to the~~ with respect to the Market Rule ~~a~~Amendment Proposal;
>
> iii. minutes~~, or~~ meeting notes, ~~of~~ and relevant materials from ~~of~~ all stakeholder meetings (including meetings of the Licensee's Strategic ~~Stakeholder~~ Advisory Committee) and of all meetings of the Licensee's Technical Panel ~~at which the amendment or the subject matter of the amendment was discussed~~ concerning the Market Rule Amendment Proposal;
>
> ~~iv. a list of all materials related to the amendment or the subject matter of the amendment tabled before any stakeholders (including the Licensee's Stakeholder Advisory Committee) or before the Licensee's Technical Panel;~~[NTD: Covered in requirement above]
>
> ~~v.~~iv. a list of all materials tabled before the Board of Directors of the Licensee in ~~relation~~ conjunction with the Market Rule ~~to the a~~Amendment Proposal ~~or the subject matter of the amendment,~~ and a copy of all such materials other than those already captured by item (i) above;

Under section 74(1)(b) of the OEB Act, the OEB may, on the application of any person, amend a licence if it considers the amendment to be in the public interest, having regard to the objectives of the OEB and the purposes of the Electricity Act.

2 CONTEXT

The IESO administers several Ontario electricity markets and has the authority[1] to make rules that govern the IESO-controlled grid and IESO-administered markets and define the roles and obligations of the IESO and participants operating in Ontario's electricity market. [2] Collectively these are known as the "Market Rules".

The IESO Board of Directors has the authority to make and approve Market Rules and MRAs.

To make MRAs, the IESO uses a consultative process, which includes a Technical Panel, comprised of stakeholder representatives.[3] The Technical Panel reviews proposed MRAs and submits its recommendations to the IESO Board of Directors. If an MRA is approved by the IESO Board, the IESO is required to publish the MRA and file it with the OEB at least 22 days before it comes into force.[4]

Sections 33, 34 and 35 of the Electricity Act provide the OEB with oversight in relation to the Market Rules and MRAs. Under section 33 of the Electricity Act, any person may apply to the OEB to review an MRA within 21 days after the MRA is published and the OEB is required to issue an order that embodies its final decision within 120 days after receiving an application.[5]

In its review of an MRA, the OEB must apply the statutory test set out in section 33(9) of the Electricity Act. If the OEB finds that the MRA is "inconsistent with the purposes of the Electricity Act or unjustly discriminates against or in favour of a market participant or class of market participants", the OEB must make an order:

(a) revoking the amendment on a date specified by the OEB; and

(b) referring the amendment back to the IESO for further consideration.

Paragraph 6.3 of the IESO's licence sets out the information that the IESO is required to provide to the OEB, within seven days of the date of the filing of an application to review an MRA. This requirement was added to the IESO's licence in 2013 to assist the OEB

[1] Electricity Act, section 32
[2] IESO, Overview, Amending the Market Rules and Related Documents (https://www.ieso.ca/Sector-Participants/Change-Management/Overview
[3] IESO, Overview of the Market Rule Amendment Process.
[4] Electricity Act, sections 33(1)-(2)
[5] Electricity Act, sections 33(4) and 33(6). The OEB also has the authority to revoke the MRA and refer the amendment back to the IESO for further consideration under section.

and parties to any MRA review proceeding by ensuring that a minimum level of relevant information is filed as early as possible following the filing of an application for review.[6]

The Application is made in the context of the IESO's Market Renewal Program (MRP) although the proposed licence amendments would apply to all MRAs and not just MRAs related to the MRP. The MRP is a long-term IESO initiative over several years that has proceeded through three phases: high level design, detailed design and implementation – and is expected to "go live" in May 2025. Each phase of the MRP has included engagement with stakeholders on key concepts and decisions. Materials for all MRP design phases, including high level design, detailed design and implementation were posted for stakeholder review and comment on the IESO's website.[7]

[6] EB-2013-0066, Decision and Order issued September 26, 2013.
[7] High-level design documents are available at: https://www.ieso.ca/Market-Renewal/Energy-Stream-Designs/High-Level-Designs Detailed design documents are available at: https://www.ieso.ca/Market-Renewal/Energy-Stream-Designs/Detailed-Design Implementation phase documents are available at: https://www.ieso.ca/Market-Renewal/Energy-Stream-Designs/Implementation-phase-documents

3 DECISION

For reasons set out further in this decision, the OEB approves the IESO's application to amend paragraph 6.3 of its licence. The OEB has considered the submissions of the IESO, intervenors and OEB staff, the salient points of which are discussed below.

Submissions

In their submissions, APPrO and REASCWA opposed the IESO's proposed licence amendments. OEB staff's submission supported the proposed licence amendments in principle but requested clarification as to what information the IESO would be required to file as a result of the proposed licence amendments.

REASCWA Submission

REASCWA submitted that the Application did not provide clear rationale or evidence that the changes proposed by the IESO are necessary or improve the efficiency of the review process. REASCWA noted that paragraph 6.3 was added to the IESO's licence during its licence renewal in 2013 and was intended to facilitate reviews of MRAs and to improve the efficiency of the regulatory process. REASCWA also noted that the IESO did not provide any concrete examples of a market rule amendment review by the OEB hindered by the current licence conditions.[8]

In its reply submission, the IESO stated that, when the filing requirement was added to its licence in 2013, the intent was to provide the OEB with some initial context with respect to the nature of an MRA under review, including insight into any concerns that may have been raised previously by stakeholders through the IESO's MRA engagement process.[9] The IESO stated that, in contrast to 2013, when the filing requirement in paragraph 6.3 was first added to the licence, the IESO's stakeholder engagement processes for MRAs has been significantly enhanced and materials are now publicly available on the IESO's website, and would be familiar to relevant stakeholders.[10]

The IESO also submitted that applicants were not required to establish that prior licence amendments failed to achieve their intended purpose and that the sole question before the OEB on a licence amendment application, is whether the requested amendment is in the public interest, having regard to the OEB's objectives and the purposes of the Electricity Act.[11]

[8] REASCWA Submission. p.5.
[9] IESO Reply Submission, p.1.
[10] *Ibid*. p. 2
[11] IESO Reply Submission, p.9.

APPrO Submission

APPrO submitted that the Application should not be granted in its current form and that implementation of the proposed licence amendments, as currently drafted, raises potential procedural fairness and evidentiary issues and is unnecessary in any event.[12]

Definition of "Market Rule Amendment Proposal" (MRAP)

Regarding the IESO's proposed definition of a "Market Rule Amendment Proposal" (MRAP) as a set of market rule amendments that were the "subject of a formal stakeholder engagement", APPrO submitted that it was unclear what "a formal stakeholder engagement" entailed and noted that not all IESO market rule amendment proposals were subject to the same scope or nature of stakeholder engagement.[13]

In its reply submission, the IESO clarified that it considered a formal stakeholder engagement" to be:

> … any stakeholder engagement where the MRAs that are intended to become part of a Market Rule Amendment Proposal have been presented to stakeholders for information or comment. This could include, but is not limited to, engagements with the Strategic Advisory Committee, IESO working groups, and the [Technical Panel].[14]

OEB Staff Submission

OEB Staff's submission supported the proposed licence amendments in principle as a means of scoping the materials that will be of greatest relevance and use to the OEB and participants in any MRA proceeding in terms of an initial information filing. OEB staff submitted that it is important for parties to have a clear, common understanding of what information the IESO would be required to file as a result of the proposed licence amendments.[15] OEB staff requested that, in its reply submission, the IESO provide a more detailed description of the materials that would be included in its initial information filing.[16]

OEB staff also highlighted the statutory requirement for the OEB to render its decision on an application under section 33 of the Electricity Act within 120 days of the filing of an application to review an MRA and that the tight timeline may be exacerbated by

[12] APPrO Submission, para 26
[13] *Ibid.* paras 4 and 8
[14] IESO Reply Submissions dated June 14, 2024, p.7.
[15] Staff Submission, page 4
[16] OEB Staff Submission, pages 5-6

disagreements among parties regarding procedural issues and the material to be filed by the IESO.

There were some common themes raised in some of the intervenor and OEB staff submissions, and IESO responses to those, which are combined below.

Materials filed under Proposed Licence Amendments

APPrO submitted that it was unclear whether the "written submissions" (that would be filed pursuant to proposed amendment to paragraph 6.3 ii) would include those made by stakeholders during the design and development phases of the MRAP.[17] Similarly, it was unclear whether the "relevant materials from all stakeholder meetings" (that would be filed pursuant to proposed amendment to paragraph 6.3 iii) would include materials presented by IESO and/or discussed during stakeholder meetings prior to the introduction of the MRAP.[18] APPrO noted that much of the stakeholder concerns were provided during the design and preliminary stages of the MRA proposals that are subsequently brought to the IESO's Technical Panel and Board of Directors.[19]

OEB staff raised a similar concern. Noting the IESO's statement in the Application that the IESO's filing (under the proposed amendments to paragraph 6.3 of its licence) would not include "preliminary or outdated designs and related documents", OEB staff submitted that detailed design documents are neither preliminary nor outdated because the detailed design is the last and final design that is being implemented. Therefore, the documents related to the detailed design stage should not be excluded from the IESO's initial information filing in an MRA review application if the information is relevant to the review application. Further, OEB staff stated that aspects of the detailed design stages of the MRP-related MRAs (including comments from stakeholders and Technical Panel members) may be relevant to an MRA review application and should not be excluded by the proposed licence amendments. OEB staff noted that this is especially important where market participants may have provided feedback at the detailed design stage but not provided further input at the final implementation stage, i.e., the final "Market Rule Amendment Proposal", and the issues on which feedback was provided at the detailed design stage are related to the issues on an MRA review application. [20]

OEB staff noted the type of information that has been presented to the IESO Board of Directors for *provisional approval* of an MRP-related MRA. OEB staff submitted that, if the proposed licence amendments are approved by the OEB, the initial information that

[17] APPrO Submission, para 10
[18] *Ibid.* para 11
[19] *Ibid.* para 18
[20] OEB Staff Submission, June 5, 2024, p. 6.

would be filed by the IESO within seven days of an MRA review application, for a *final* "Market Rule Amendment Proposal" would include at a minimum the type of information that was (or will be) filed with the IESO Board of Directors for a *provisional* approval of an MRP-related MRA.[21]

OEB staff also submitted that it was not clear how "relevant materials" would be determined and suggested that the IESO could, in its reply submission, clarify how "relevant" materials would be determined and what material would be included in the IESO's initial filing.[22]

In response to APPrO and OEB staff submissions, the IESO stated that "relevant materials" are those directly related to the MRA under review and described these as being materials that are needed for the OEB to address the criteria of section 33(9) of the Electricity Act and determine whether the MRA is: (1) inconsistent with the purposes of the Electricity Act or (2) unjustly discriminates against a market participant or a class of market participants."[23] As such, the scope of the documents filed would "focus on stakeholder engagement materials and materials provided to [the Technical Panel] and the IESO Board of Directors."[24]

In response to OEB staff's request for more detailed description of the material that would be included in the IESO's initial information filing (on an application under section 33 of the Electricity Act), the IESO provided a detailed list of the materials that would be included under the proposed definition of a "Market Rule Amendment Proposal" and the proposed revisions to paragraph 6.3.[25]

The IESO's reply submission also provided two tables that compared the MRP design and implementation materials that the IESO anticipated would be filed based on the current licence provisions with those that would be filed should the Application be approved. The comparison showed that the IESO would file the high-level design and detailed design documents based on the current licence requirements but would exclude them under the proposed licence amendment. The IESO noted that the materials for all MRP design phases were posted for stakeholder review and comment and are publicly available on its website.

In its Application, the IESO stated, if the OEB ultimately determined that certain preliminary documents would be helpful to its review, the proposed licence amendments

[21] *Ibid*. p. 6
[22] *Ibid*. p. 7
[23] IESO Reply Submission, p. 7.
[24] *Ibid.* p.7
[25] Reply Submission, pages 4-6

do not preclude the OEB from requiring the IESO to file them.[26] On this point, APPrO submitted that the OEB may not know what documents exist and should be filed and that the burden then shifts to interveners and stakeholders to try to ascertain relevant materials and seek leave from the OEB to submit them into evidence.[27] In response to APPrO, the IESO argued that a person making an application for review of a MRA is asserting that the MRA is (1) inconsistent with the purposes of the Electricity Act or (2) unjustly discriminatory against a market participant or class of market participants, with rationale for the assertion. That means the applicant must already have relied on public documents to support their argument and has access to and is aware of information relevant to their claim.[28]

Application of Proposed Licence Amendments in MRP and non-MRP Context

OEB staff, APPrO and REASCWA each noted that the IESO's proposed licence amendments would apply to all future MRAs.

APPrO proposed that, for the purpose of MRAs related to the MRP, the better approach is for the IESO to seek an exemption from the relevant licence requirements solely for the purpose of MRAs related to MRP implementation prior to the MRP go-live date, instead of proposing a licence amendment.[29]

In response to APPrO's suggestion, the IESO submitted that the proposed amendments provide an efficient process for any future MRA proposals.[30]

Other Proposed Licence Amendment

As noted above, the Application also proposed amending the name of the "Stakeholder Advisory Committee" to the "Strategic Advisory Committee" ("SAC") in paragraph subsection 6.3 of the licence. None of the intervenors or OEB staff objected to this proposed amendment.

Findings

The OEB approves the IESO's application to amend section 6.3 of the IESO's licence. The IESO's amendments aim to streamline the process for reviewing market rule amendments made under section 33 of the Electricity Act.

[26] Application, page 3
[27] APPrO Submission, para 20
[28] IESO Reply Submission, page 8
[29] APPrO Submission, para 3
[30] IESO Reply Submission, page 8

The OEB is persuaded that the IESO's plan to submit the same documents provided to its Technical Panel and Board of Directors, in connection with their votes to recommend and approve the ultimate MRA will give the OEB and stakeholders sufficient information to review the proposed MRA.

The OEB notes that the IESO's MRA process typically involves a thorough stakeholder engagement process. Therefore, the proposal to focus the filing of information for review under section 33 of the Electricity Act to materials that directly pertain to the ultimate MRA is logical.

As the IESO has highlighted, paragraph 6.3 of its licence does not restrict the entire scope of evidence that can be filed in a section 33 application. Further, information not included in the initial filing can still be introduced if deemed relevant during the OEB's review of an MRA under section 33 of the Electricity Act. Moreover, if the OEB or intervenors require additional information regarding a proposed MRA, they are not precluded from requesting this information.

The OEB considered APPrO's suggestion to limit the IESO's licence amendment request only to MRAs pertaining to the Market Renewal Program. APPrO also pointed out that not all MRAs undergo the same rigorous stakeholder process. While these concerns are valid, the OEB is confident that the IESO's proposal to file documents directly relating to any MRA will ensure a thorough and transparent review process. The OEB is aware that not all MRAs are subject to the extensive stakeholder process that was applied to the MRP-related MRAs. However, the OEB also notes that the IESO's stakeholder engagement processes for all types of MRAs has improved significantly. Accordingly, the OEB is of the view that the IESO's proposed approach will allow for adequate scrutiny by the OEB and other stakeholders, ensuring that all relevant issues are appropriately addressed. The OEB believes that limiting the licence amendment request to the MRP is an unnecessary constraint.

Lastly, the OEB approves the IESO's requested change to paragraph 6.3 (iii) which proposes a change to the name of its advisory committee, which change is intended to better reflect the committee's significance to the IESO and market participants.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The Independent Electricity System Operator's Licence Amendment Application is granted. The amended licence is attached as Appendix A to this Decision and Order.

2. The cost eligible intervenors shall file with the Ontario Energy Board, and forward to the Independent Electricity System Operator, their cost claim by **July 30, 2024**.

3. The Independent Electricity System Operator shall file with the OEB, and forward to the cost eligible intervenors, any objection to the claimed costs by **August 6, 2024**.

4. The cost eligible intervenors shall file with the Ontario Energy Board, and forward to the Independent Electricity System Operator, any response to the objection to claimed costs by **August 13, 2024**.

5. The Independent Electricity System Operator shall pay the Ontario Energy Board's costs of and incidental to this proceeding upon receipt of the Ontario Energy Board's invoice.

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's Rules of Practice and Procedure.

Please quote file number, **EB-2024-0128** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the OEB's online filing portal.

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the Regulatory Electronic Submission System (RESS) Document Guidelines found at the File documents online page on the OEB's website.
- Parties are encouraged to use RESS. Those who have not yet set up an account, or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.
- Cost claims are filed through the OEB's online filing portal. Please visit the File documents online page of the OEB's website for more information. All

participants shall download a copy of their submitted cost claim and serve it on all required parties as per the Practice Direction on Cost Awards.

All communications should be directed to the attention of the Registrar and be received by end of business, 4:45 p.m., on the required date.

Email: registrar@oeb.ca
Tel: 1-877-632-2727 (Toll free)

DATED at Toronto July 23, 2024

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar

APPENDIX A

TAB 2

Russell v. Shanahan et al.; Ontario Municipal Board, intervenor*

[Indexed as: Russell v. Toronto (City)]

52 O.R. (3d) 9
[2000] O.J. No. 4762
Docket Nos. C33545 and C33549

Court of Appeal for Ontario
Finlayson, Labrosse and Weiler JJ.A.
December 19, 2000

* Application for leave to appeal to the Supreme Court of Canada was dismissed with costs August 9, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28428. S.C.C. Bulletin, 2001, p. 1413.

Administrative law--Boards and tribunals--Power to review --Ontario Municipal Board--Jurisdiction--Power to review and reconsider decision--Municipality passing by-law having effect of prohibiting development on ravine lots - Landowner's appeal for exemption dismissed--Landowner applying for review hearing --Review Panel granting exemption to zoning by-law--Review Panel having jurisdiction to substitute its decision for decision of First Panel--Board having wide power to review and reconsider its decisions--Divisional Court erring in setting aside decision of Review Panel--Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 43.

Planning--Zoning--Exemptions--Ontario Municipal Board --Jurisdiction--Power to review and reconsider decision --Municipality passing by-law having effect of prohibiting development on ravine lots--Landowner's appeal for exemption dismissed--Landowner applying for review hearing--Review Panel granting exemption to zoning by-law--Review Panel having

jurisdiction to substitute its decision for decision of First Panel--Board having wide power to review and reconsider its decisions--Divisional Court erring in setting aside decision of Review Panel--Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 43.

In 1995, R purchased a vacant ravine lot in the City of Toronto, and the day after he applied for a building permit to build a home, the City passed an interim control by-law prohibiting all uses on his lot and three others for one year. In 1997, the City enacted a new ravine control by-law that effectively prohibited construction on the four ravine lots. R and D, another ravine lot owner, appealed to the Ontario Municipal Board for exemptions to the new by-law. After a three-week hearing, their appeal was dismissed, the Board concluding that the by-law had been enacted for the valid planning purposes of protecting ravines from development. R and D sought a review of the Board's decision pursuant to s. 43 of the Ontario Municipal Board Act, which provides that "the Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it." After a one-day hearing, the Review Panel granted the application on the basis that the First Panel had ignored the long-standing policy of the Board that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public, then the zoning will not be approved unless the appropriate authority is prepared to acquire the lands within a reasonable time or the municipality can justify the drastic result of the by-law. R's neighbours and the City appealed only the R decision to the Divisional Court. The Divisional Court allowed the appeal, holding that in the absence of manifest error on the part of the First Panel, the Review Panel was not entitled to substitute its own decision. R and the Board both appealed the judgment of the Divisional Court.

Held, the appeals should be allowed.

The Review Panel had the jurisdiction to substitute its opinion for the First Panel. On the whole, courts have been mindful of the uniqueness of the power to review in

administrative proceedings and have been loath to interpret the power narrowly. Section 43 confers a broad jurisdiction on the Board to review its decisions. To say that the Review Panel had the power to review an earlier decision, but without the ability to reconsider it, amounted to no power at all. The Divisional Court erred because it failed to appreciate the distinction between the Review Panel's wide plenary power under s. 43 of the Ontario Municipal Board Act to rehear or review with the Board's self-imposed directive that limited the exercise of that power to two main circumstances, that is, first, to correct typographical or clerical errors and, second, in circumstances of allegations of fraud, new evidence and failure of natural justice or material failure of fact or law. The Divisional Court did not appreciate that the requirement for the applicant for review to show a "manifest error" in the decision of the panel under review was an internal guideline of the Board, not a requirement of s. 43. It was up to the Review Panel to determine on the facts of each case when manifest error has occurred. Further, the Divisional Court erred in interpreting the reasons of the Review Panel. The reasons did not state that the municipality cannot "down-zone" property without providing compensation. The Board was not taking issue with the ability of the municipality to pass such a by-law; rather, it was asserting its own independent jurisdiction to insist upon a justification for such a drastic action. The Review Panel's decision was within its jurisdiction under s. 43. In the exercise of its jurisdiction, it was not necessary for the Review Panel to make an express finding that the by-law as amended complied with the Official Plan, as required by s. 24 of the Planning Act, R.S.O. 1990, c. P.13.

Cases referred to

Canada Mortgage & Housing Corp. (Re) (1994), 31 O.M.B.R. 471 (sub nom. Canada Mortgage and Housing Corp. v. Vaughan (City)); Commercial Union Assurance v. Ontario Human Rights Commission (1988), 63 O.R. (2d) 112, 20 C.C.E.L. 236, 47 D.L.R. (4th) 477, 26 O.A.C. 387 (C.A.); Hall v. Ontario (Ministry of Community and Social Services) (1997), 154 D.L.R. (4th) 696 (Ont. Div. Ct.); Merrens v. Metropolitan Toronto (Municipality), [1973] 2 O.R. 265, 33 D.L.R. (3d) 513 (Div. Ct.); Nepean (Township) Restricted Area By-law 73-76 (Re)

(1979), 10 O.M.B.R. 76 (Lieut. Gov. in Council), varg (1978), 9 O.M.B.R. 36; St. Catharines (City) v. Faith Lutheran Social Services Inc. (1991), 4 M.P.L.R. (2d) 225 (Ont. Gen. Div.)

Statutes referred to

Ontario Municipal Board Act, R.S.O. 1990, c. O.28, ss. 43, 96
Planning Act, R.S.O. 1990, c. P.13, as am., ss. 24, 34(1), 38(4)

Authorities referred to

Reid, Administrative Law and Practice (Toronto: Butterworths, 1971)
Rogers, Law of Canadian Municipal Corporations, 2d ed. (Toronto: Carswell, 1971-), vol. 2, loose-leaf

APPEAL from a judgment of the Divisional Court (MacFarland, Ferrier and Winkler JJ.) (1999), 5 M.P.L.R. (3d) 14 that set aside a decision of a Review Panel of the Ontario Municipal Board.

Stephen Diamond, for appellant.
Leo F. Longo, for respondents Shanahan, Triggs, McFayden and Clarke.
Leslie Mendelson and William Hawryliw, for respondent City of Toronto.
Leslie McIntosh, for the Ontario Municipal Board.

The judgment of the court was delivered by

[1] FINLAYSON J.A.:--Derek Russell ("Russell") and the Ontario Municipal Board (the "Board") appeal separately the judgment of the Divisional Court [reported (1999), 5 M.P.L.R. (3d) 14] setting aside the decision of a panel of the Ontario Municipal Board (the "Review Panel") dated September 3, 1998, and restoring an earlier decision of another panel of the

Ontario Municipal Board (the "First Panel") dated December 16, 1997. The Ontario Municipal Board was represented at the hearing before the Divisional Court pursuant to s. 96(2) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 (the "Act"), and limited its submissions to jurisdictional issues.

Facts

[2] In 1995, Russell purchased a vacant ravine lot on Glen Road in Rosedale for $50,000 with the intention of building a home. To build a home, Russell needed to obtain a building permit from the City of Toronto. He applied for a permit on July 26, 1995. His plans and drawings complied with all the applicable zoning by-laws, but he needed City Council's approval pursuant to the City's ravine control by-law. The day after Russell made his application, the City's Land Use Committee directed the Planning Commissioner to conduct the study of four Rosedale properties located on the ravine. Russell's property was one of the four lots under study. On August 14, 1995, City Council enacted Interim Control By-law 1995-0550, prohibiting all uses on the four lots for one year.

[3] On December 23, 1996, the Planning Commissioner provided a report to City Council recommending that the existing residential zoning be retained for the four properties studied, allowing single-unit homes to be built. City Council rejected the recommendation and retained outside planning consultants. On July 14, 1997, the outside consultants' report was enacted by City Council in the form of a new ravine control by-law (Ravine Impact Boundary By-law 1997-0369) that effectively prohibited any construction on Russell's lands. The purported intention of the by-law was to protect ravines from development. The three other vacant Rosedale properties were likewise affected.

[4] Another Rosedale property owner, Vera Dickinson (who had owned a vacant ravine lot on Beaumont Road for 36 years), and Russell, appealed to the Board under the provisions of the Planning Act, R.S.O. 1990, c. P.13, as amended, for exemptions from the new by-law. There was a three-week hearing during which 12 experts were called. Opposing the appeals were the

City and several Rosedale ratepayers.

[5] The First Panel dismissed the appeals, finding that there was no reason to exempt the appellants from the application of the by-law, which had been enacted "for a valid planning purpose, to protect ravines from development". Russell and Dickinson sought a review of the First Panel's decision by a Review Panel of the Board pursuant to s. 43 of the [Ontario Municipal Board] Act. Section 43 provides: "The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it."

[6] After a one-day hearing, the Review Panel granted the review application on the basis that the First Panel had ignored the long-standing policy of the Board in dealing with this type of zoning by-law, which was first set out in its decision Re Nepean (Township) Restricted Area By-law 73-76 (1978), 9 O.M.B.R. 36 at p. 55:

> This Board has always maintained that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved. We do not wish or intend to depart from that general principle and we hope the solution suggested will allow the township to achieve its goals and at the same time be fair to the land-owner.

The Review Panel accordingly allowed the appeals and amended the by-law to exempt the two applicants' properties.

[7] Russell's neighbours and the City appealed only the Russell decision, with leave, to the Divisional Court. The Divisional Court allowed the appeal, holding that in the absence of "manifest error" on the part of the First Panel, the Review Panel was not entitled to substitute its own opinion. Specifically, MacFarland J. for the court stated [at p. 15 M.P.L.R.]:

We are of the view that all the questions posed for the opinion of the court must be answered in the affirmative. Even if the effect of the by-law was to sterilize the lands owned by the Respondent Russell, the Board erred in overturning the Hearing [Board] decision for that reason. The Planning Act clearly gives the municipality the right to pass the by-law in question and there is clear authority that such right does not carry with it a corresponding obligation to pay compensation absent bad faith on the part of the municipality or specific statutory obligation to this effect. As was stated by Estey J. in British Columbia v. Tener [[1985] 1 S.C.R. 533 at p. 557], a decision of the Supreme Court of Canada,

> Ordinarily in this country . . . compensation does not follow zoning either up or down.

In its hearing decision, the Board applied the existing authority to the facts as it found them and in our view it did so correctly. It is not open to the Board in a Section 43 review to substitute its opinion for that of the Board which heard the matter on the merits over a three-week hearing save in exceptional circumstances.

It is apparent that the Board on review simply preferred an approach other than the approach taken by the Hearing Board. This does not, in our view, constitute "manifest error" on the part of the Hearing Board which did as it is obliged to do in weighing the public and private interests and in result favoured the public interest over the private interest of Mr. Russell.

[8] The Divisional Court also faulted the Review Panel's decision on the basis that it failed to consider s. 24 of the Planning Act, dealing with an amendment to an official plan [at pp. 15-16 M.P.L.R.]:

> There is nothing in the Board's decision to indicate whether it considered the effect of its decision in relation to the mandatory provision of subsection 1 of Section 24 of the Planning Act. The decision in this respect is simply

silent and in the face of the mandatory requirement of subsection 1, that is not sufficient. The Board is obliged to consider this aspect and it did not do so and fell into error.

Relevant Statutory Provisions

Ontario Municipal Board Act

43. The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.

Planning Act

24(1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

(2) If a council or a planning board has adopted an amendment to an official plan, the council of any municipality or the planning board of any planning area to which the plan or any part of the plan applies may, before the amendment to the official plan comes into effect, pass a by-law that does not conform with the official plan but will conform with if the amendment comes into effect, and the by-law shall be conclusively deemed to have conformed with the official plan on and after the day it was passed if the amendment come into effect.

. . . . .

(4) If a by-law is passed under section 34 by the council of a municipality or a planning board in a planning area in which an official plan is in effect and, within the time limited for appeal no appeal is taken or an appeal is taken and the appeal is withdrawn or dismissed or the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity

with the official plan, except, if the by-law is passed in the circumstances mentioned in subsection (2), the by-law shall be conclusively deemed to be in conformity with the official plan on and after the day the by-law was passed, if the amendment to the official plan comes into effect.

. . . . .

34(1) Zoning by-laws may be passed by the councils of local municipalities:

. . . . .

3.2 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,

i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,

ii. that is a significant corridor or shoreline of a lake, river or stream, or

iii. that is a significant natural corridor, feature or area.

Issues

(1) Did the Divisional Court err in holding that it was not open to the Review Panel of the Board to substitute its opinion for that of the First Panel of the Board under s. 43 of the Act?

(2) Was the Review Panel correct in ruling that the First Panel had made a manifest error?

(3) Was it necessary for the second panel of the Board to hold a hearing to determine that the by-law as amended was in conformity with s. 24(1) of the Planning Act?

Analysis

Issue 1: Did the Review Panel have jurisdiction under s. 43 to substitute its opinion?

[9] In my opinion, the Divisional Court failed to appreciate the distinction between the statutory authority of the Review Panel to rehear or review its own decisions under s. 43 of the Act and the self-imposed directive of the Board on the exercise of that power.

[10] The Board has developed a general policy with respect to the exercise of its wide plenary power under s. 43. In Practice Direction 12, dated October 31, 1997, the Board stated that it would exercise its power under s. 43 in two main circumstances. The first, under Part A, is to correct "typographical or clerical errors and minor omissions". The second, in Part B, [is] where the Board sets out three "reasons for review" in addition to minor errors. They are an "allegation of fraud", "new evidence" and "failure of natural justice or material failure of fact or law".

[11] In Canada Mortgage and Housing Corp. v. Vaughan (City) (1994), 31 O.M.B.R. 471, the Board set out its jurisprudence with respect to s. 43 at pp. 474-75:

> The jurisprudence of the board in this regard has been most clear. The past decisions indicate that we are reluctant to grant a s. 43 review unless there is a jurisdictional defect, or where there has been a change of circumstances or new evidence available, or where there is a manifest error of decisions or if there is an apprehension of bias or undue influence. While the list may not be exhaustive and the board's discretion should not be fettered unduly on an a priori basis, there is a common thread running through all the cases dealing with this question of review. We cannot allow any of our decisions to be reviewed or retried for some flimsy or unsubstantial reasons. As an adjudicative tribunal which renders decisions that have profound effects on public and propriety interests, our decisions should be well-considered and must have some measure of finality. If a

> motion is launched on grounds other than those enumerated, it should be to the Divisional Court which has either the competence and the authority to overturn our findings of fact and law. It never has been nor would ever be our wont to constitute ourselves as an appellate body, routinely reviewing or rehearing our own decisions.

(Emphasis added)

[12] The question whether s. 43 empowers a review panel to rescind the decision of an earlier panel based on the misapplication of a planning principle was considered by a single judge of the Divisional Court on an application for leave to appeal from a decision of the Board in St. Catharines (City) v. Faith Lutheran Social Services Inc. (1991), 4 M.P.L.R. (2d) 225 at p. 236 (Ont. Gen. Div.). There, White J. held:

> . . . s. 42 [now s. 43 of the Act] contemplates the Board reviewing its own decision in the event that it is satisfied that in any previous decision it has misinterpreted the facts, or wrongly assessed them; that is, that it has misinterpreted the planning evidence, or wrongly assessed the planning evidence, or failed to apply good planning policy in the entire matter.
>
> . . . [T]he Board had full jurisdiction to grant a rehearing of the decisions of Mr. Cole on the basis that Mr. Cole had misapprehended the planning evidence, and had given a decision that reflected bad planning policy. The wisdom of that policy is entirely a matter for the Board. It is not the type of matter that a court is equipped to deal with. . . .

[13] In the case at bar, the Review Panel considered the First Panel to have committed a "manifest error" by placing "the public interest uppermost in [its] mind" and by failing to apply the planning "principle" concerning "down-zoning" developed in the Board's past policies and jurisprudence, which require a balancing of public and private interests when considering whether to approve zoning by-laws.

[14] The Divisional Court erred in ruling that s. 43 of the Act did not permit the Review Panel to substitute its decision for that of the First Panel. To say that the Review Panel has the power to review an earlier decision without the ability to reconsider it amounts to no power at all. In Merrens v. Metropolitan Toronto (Municipality), [1973] 2 O.R. 265 at p. 278, 33 D.L.R. (3d) 513 at p. 526 (Div. Ct.), Lacourcire J. referred to the following passage in Reid, Administrative Law and Practice (Toronto: Butterworths, 1971), at p. 103:

> The power to reconsider decisions is peculiar to tribunals. It is not found in the law-courts. Its existence is the consequence of a general lack of provisions for appeal, particularly on questions of fact, from tribunals, and of the regulatory nature of most tribunals. In both respects the tribunals differ from the courts. The power to reconsider thus appears to be an appropriate means both for the correction of errors in the absence of an appeal and to permit adjustments to be made as changes in the regulated activity occur. The importance of such a power has been recognized by the courts.

[15] On the whole, courts have been mindful of the uniqueness of the power of review in administrative proceedings and have been loath to interpret the power narrowly. For example, the Divisional Court has repeatedly stressed the wide nature of such powers and has refused to read them down: Merrens, supra, St. Catharines, supra, and Hall v. Ontario (Ministry of Community and Social Services) (1997), 154 D.L.R. (4th) 696.

[16] This court, in Commercial Union Assurance v. Ontario Human Rights Commission (1988), 63 O.R. (2d) 112, 47 D.L.R. (4th) 477, held that the power of reconsideration under the Ontario Human Rights Code is to be interpreted widely in order to prevent injustice. In their endorsement, Lacourcire, Zuber and McKinlay JJ.A. wrote at p. 479 D.L.R. [p. 114 O.R.]:

> We do not agree with counsel for the appellants that the broad power of reconsideration which results in a final decision requires that new facts be established: see Re Merrens and Municipality of Metropolitan Toronto [supra]. The

power is important and may be the only way to correct errors where no right of appeal is provided, or to allow for adjustments even if circumstances remain unchanged. That is the meaning to be given to the maintenance of the integrity of the administrative process.

[17] The above language with reference to analogous sections in the statute governing another administrative tribunal is helpful to our analysis of the Act in the case in appeal.

[18] My own view is that the Divisional Court in the instant case interpreted s. 43 in a manner which is supported neither by the legislation nor by the weight of judicial authority. Section 43 confers a broad jurisdiction on the Board for its review authority which is in contradistinction to the narrow right of appeal to the Divisional Court provided in s. 96 of the Act. Section 96 provides:

> 96(1) Subject to the provisions of Part IV, an appeal lies from the Board to the Divisional Court, with leave of the Divisional Court, on a question of law.

[19] This narrow right of appeal supports an interpretation of the Board's reconsideration powers which is significantly broader than that stated by the Divisional Court. That court did not appear to appreciate that the requirement that an applicant for review show a "manifest error" in the decision of the panel under review is an internal guideline of the Board, not a requirement of s. 43 of the Act. The Board has seen fit to explain in Practice Direction 12 the circumstances under which it would exercise its powers on a review under s. 43 of the Act and expanded on those guidelines in Canada Mortgage and Housing Corp., supra, to say that it will correct errors on review where there is a manifest error. In my view it is up to the Review Panel to determine on the facts of each case when manifest error has occurred. Similarly, there is nothing in s. 43 of the Act that prevents a Review Panel from "substituting its own opinion" for that of the original panel. In holding otherwise, the Divisional Court departed from established case law.

[20] In the end, the Divisional Court committed its own manifest error by substituting its opinion for that of the Review Panel. In doing so, the Divisional Court entered into a policy-making role that is outside its jurisdiction. Moreover, the Divisional Court focused solely on the jurisdiction of the City to enact the by-law in dispute and failed to address the jurisdiction of the Board on a review of an appeal by affected property owners under the Planning Act from the City's exercise of that jurisdiction. One of the functions of the Board, acknowledged countless times by the courts, is to make and apply policies. In that regard, the Board is very different from a court. Here, the Review Panel applied a policy to a set of undisputed facts and on that basis granted the relief requested by Russell. The effect of the decision by the Divisional Court was to strip the Board of its policy-making role.

[21] In a leading text on local government law, Rogers, Law of Canadian Municipal Corporations, 2d ed., vol. 2, loose-leaf (Toronto: Carswell, 1971-), the following statement is made in connection with the power of the Board to approve by-laws at p. 1502:

> Generally speaking, the Ontario Board has absolute discretion in giving or withholding its approval, and its decisions on applications for approval are not reviewable by the Divisional Court. For the most part its decisions involve questions of policy within its discretion with which the court will not interfere. In the exercise of its discretion where no statutory direction is given as to the matters which the Board is to consider when dealing with a question, then it must be taken that the legislature has left it entirely to the Board's discretion.

Issue 2: Manifest error

[22] The Divisional Court erred in its interpretation of the reasons of the Review Panel. The Review Panel did not, as the Divisional Court suggests, refuse to approve the by-law because it thought that the City could not sterilize the lands in question without providing compensation to the owners. The

First Panel's decision was reversed because it did not apply a long-standing Board policy that it will not approve a by-law that has such an effect unless the municipality in question can justify such a drastic result within the guidelines set out in earlier decisions of the Board.

[23] The Review Panel found that the entirety of the Dickinson premises and a good portion of the Russell premises would be rendered unfit for development by the by-law. It said:

> The Board finds that the effect of this by-law on the applicants of the motion is profound and inexorably devastating. The underlying residential rights of both these properties will be effectively removed and these two properties will be, for all intents and purposes, completely sterilized. [The Review Panel cites the proposition from Re Nepean (Township) at p. 55, that "if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved."]
>
> This oft-quoted dicta of Mr. A. J. L. Chapman, Q.C. [in Re Nepean (Township)] is the best enunciation of the Board's long standing tendency to ensure that privately owned lands will not be transformed to public purposes such as open-space or park by zoning instruments unless there is a concomitant commitment on behalf of the municipality to expropriate or to acquire the lands in question. This rule, like many traditional rules of the Board, must be subject to a number of exceptions. We will deal with the exceptions later.

[24] The Review Panel then reiterated its "strongly held belief" that planning decisions must not allow the concerns of the public good nor private interests to become the exclusive and singular goals, but rather the Board should be motivated by its time-honoured experience that planning is often a delicate balancing between these "two noble and sometimes competing objectives". This policy recognizes that planning decisions, no matter how benevolent or farsighted their intent, can easily

become "an unwitting and unquestioning tool to extinguish or debilitate the proprietary interests of an owner".

[25] Far from stating that a municipality cannot sterilize or "down-zone" private property without providing for compensation, the Review Panel asserted that the municipality can re-designate or re-zone for the public benefit to arrest a trend that is harmful or undesirable:

> Where the health and safety of existing or future inhabitants are involved, where there are patent and imminent hazards to the well being of the community, the municipality should have the unfettered discretion to sterilize the use of lands, without the additional burden of compensation. In the present case, we have not heard from the counsel from the City or from Mr. Longo that development of the applicants' lands will attract or invite such considerations.

[26] The Board was not taking issue with the ability of the municipality to pass such a by-law. Rather, it was asserting its own independent jurisdiction to insist upon a justification for such a drastic action. This was completely within its jurisdiction under s. 43 to do so.

Issue 3: Section 24 of the Planning Act

[27] When City Council adopted Ravine Impact Boundary By-law No. 1997-0369, it imposed building restrictions on ravine lands encompassing some 170 Rosedale properties. The by-law was designed to indicate precisely where residential development will be permitted. Russell and Dickinson were denied building permits because of the effect of the building constraints in the by-law. They appealed to the Board under s. 38(4) of the Planning Act and asked for exceptions for the two residential properties. It was these appeals that were heard by the First Panel.

[28] Section 24(1) of the Planning Act provides that no public work shall be undertaken and no by-law shall be passed, and "except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform

therewith". The First Panel heard the appeals and was very much alive to the need that the Ravine Impact Boundary By-law and the exceptions sought by Russell and Dickinson comply with the Official Plan. It expressly said so. However, after considering all the evidence taken over three weeks, particularly the extensive presentation by Russell, the First Panel declined to grant the exceptions and dismissed the appeals. It is common ground that in doing so it found that the by-law was in conformity with the Official Plan.

[29] The Review Panel reviewed the same evidence as the First Panel. It granted the application for a review under s. 43 of the Act, allowed the appeals under the Planning Act and amended By-Law 1997-0369 "so that the applicants lands are exempted". The suggestion that the Review Panel was not similarly aware of the need to find that the by-law as amended was in compliance with the Official Plan is to suggest that it was not aware of the basic provisions of the Planning Act, notably s. 24(4), that "where an appeal is taken and . . . the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan. . . ." As is apparent, it is not necessary for the Board to make an express finding of compliance.

Disposition

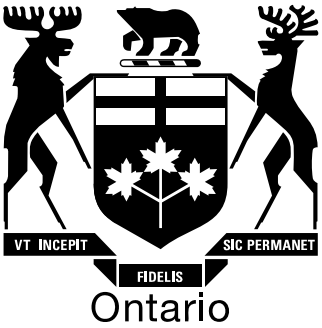
[30] For the above reasons, I would allow the appeal, set aside the judgment of the Divisional Court and order that judgment be entered restoring the decision of the Review Panel. The appellant Russell is entitled to its costs of the appeal, including the motion for leave to appeal, and of the hearing before the Divisional Court.

Order accordingly.

TAB 3

Ontario Energy Board

Commission de l'Énergie de l'Ontario



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

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

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

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

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedur*e.

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

EXECUTIVE SUMMARY

In November of 2006 the Board issued a Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The NGEIR Decision addressed the key issues of natural gas storage rates and services for gas-fired generators, and storage regulation.

In the NGEIR Decision, the Board determined that it would cease regulating the prices charged for certain storage services but that the rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The Board received three Notices of Motion for review of certain parts of the NGEIR Decision. The Board held an oral hearing to consider the threshold questions that the Board should apply in determining whether the Board should review those parts of the NGEIR Decision and whether the moving parties met the test or tests.

The Board finds that the motions do not pass the threshold tests applied by the Board, except in two areas.

First, the Board finds that the decision to cap the storage available to Union Gas Limited's in-franchise customers at regulated rates to 100 PJ is reviewable.

Second, the Board finds that the decisions regarding additional storage requirements for Union Gas Limited's in-franchise gas-fired generator customers and Enbridge's Rate 316 are reviewable.

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Section A: Introduction

The Board received three Notices of Motion for review of its Decision in the Natural Gas Electricity Interface Review proceeding[1] ("NGEIR"). Motions were filed by the City of Kitchener ("Kitchener") and the Association of Power Producers of Ontario ("APPrO"). There was also a joint notice by the Industrial Gas Users' Association ("IGUA"), the Vulnerable Energy Consumers Coalition ("VECC") and the Consumers Council of Canada ("CCC")

On January 25, 2007, the Board issued a Notice of Hearing and Procedural Order which established a schedule for the filing of factums by the moving parties, any responding parties' factums, and an oral hearing date for hearing the threshold question. On February 8, 2007, factums were filed by Kitchener, APPrO, IGUA, and jointly by CCC and VECC.

Responding factums were filed on February 15, 2007 by Board Staff, Union Gas Limited, Enbridge Gas Distribution Inc., Market Hub Partners Canada Ltd., School Energy Coalition, The Independent Electricity System Operator and BP Canada Energy Company.

In its Procedural Order No.2, the Board indicated that, at the upcoming oral hearing, parties should confine their submissions to the material in their factums and to responding to the factums of other parties. The Board also stated that parties should address only the issues set out in the Board's Procedural Order No. 1, namely:

1) What are the threshold questions that the Board should apply in determining whether the Board should review the NGEIR Decision? and

2) Have the Moving Parties met the test or tests?

[1] EB-2008-0551 (November 7, 2006)

On March 5 and 6, 2007, the Board heard the oral submissions of all the parties with the exception of the Independent System Operator and BP Canada who had advised the Board that they would not be appearing at the oral hearing.

The NGEIR Decision

On November 7, 2006 the Board issued its Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The 123-page NGEIR Decision addressed the key issues of:

1) Rates and services for gas-fired generators, and

2) Storage regulation.

The parties reached settlements with Enbridge and Union on most of the issues related to rates and services for gas-fired generators. These settlements were approved by the Board. The oral hearing and the NGEIR Decision addressed the broad issue of storage regulation and any issues that were not settled in the settlement negotiations.

The issue concerning storage regulation was whether the Board should refrain from regulating the prices charged for storage services under section 29 (1) of the Ontario Energy Board Act, 1998. The Board found that the storage market is workably competitive and that neither Union nor Enbridge have market power in the storage market. The Board determined that it would cease regulating the prices charged for certain storage services; however, the Board found that rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The motions requested the following decisions made in the NGEIR Decision be either reviewed and changed; cancelled, or clarified, in a new Board proceeding:

Kitchener

- The aggregate excess methodology for allocating storage space
- The 100 PJ cap on Union's regulated storage

APPrO

- Whether short notice balancing service should be included on the tariffs of Union and Enbridge

IGUA/CCC/VECC

- Parts of the NGEIR Decision pertaining to storage, storage regulation and storage allocation be cancelled
- Review to be heard by a different Board panel

The parties outlined the grounds for the motions which included allegations of errors of fact and in some cases, errors of law.

Organization of the Decision

In this Decision, the Board organized the issues raised by the parties into sections that cover the same or similar topics. In each section following the section on the threshold test, the Board identifies the issue or issues raised, and makes a finding whether the issues are reviewable by applying the threshold test.

The sections of this Decision are:

A. Introduction (this section)
B. Board Jurisdiction to Hear Motions
C. Threshold Test
D. Board Process

E. Board Jurisdiction under Section 29
F. Status Quo
G. Onus
H. Competition in the Secondary Market
I. Harm to Ratepayers
J. Union's 100 PJ Cap
K. Earnings Sharing
L. Additional Deliverability for Generators and Enbridge's Rate 316
M. Aggregate Excess Method of Allocating Storage
N. Orders
O. Cost Awards

The Board has reviewed the factums and arguments of all parties but has chosen to set out or summarize the factums or arguments by parties only to the extent necessary to provide context to its findings.

Section B: Board Jurisdiction to Hear the Motions

Under Rule 45.01, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

In the case of IGUA's motion, which raises questions of law and jurisdiction, counsel for Board Staff argued that the Board should not, and indeed could not, review the NGEIR Decision as these grounds are not specifically enumerated in Rule 44.01 as possible grounds for review. Counsel for Board Staff argued that the Board has no inherent power to review its decisions and the manner in which it exercises such power must fall narrowly within the scope of the *Statutory Powers Procedure Act* (SPPA), which grants the Board this power.

The Board's power to review its decisions arises from Section 21.1(1) of the SPPA which provides that:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

Part VII (sections 42 to 45) of the Board's Rules of Practice and Procedure deal with the review of decisions of the Board. Rule 42.01 provides that "any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision". Rule 42.03 requires that the notice of motion for a motion under 42.01 shall include the information required under Rule 44. Rule 44.01 provides as follows:

> Every notice of motion made under Rule 42.01, in addition to the requirements of 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; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion.

Counsel for Board Staff argued that while the grounds for review do not have to be exactly as those described, they must be of the same nature, and that to the extent the grounds for review include other factors such as error of law, mixed error of fact and law, breach of natural justice, or lack of procedural fairness, they are not within the Board's jurisdiction. He argued that Rule 44 should be interpreted as an exhaustive list, and that as section 21.1(1) of the SPPA requires that the tribunal's rules deal with the matter of motions for review, the Board's jurisdiction is limited to the matters specifically set out in its Rules.

In support of this interpretation of the Rule 44.01, Counsel relied on the fact that an earlier version of the Board's rules specifically allowed grounds which no longer appear in Rule 44.01. Therefore, it must be assumed that the current Rules are not intended to allow motions for review based on those grounds. The relevant section of the earlier version of the Rules read as follows:

63.01 Every notice of motion made under Rule 62.01, in addition to the requirements of 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 of law or jurisdiction, including a breach of natural justice;
>
> (ii) error in fact;
>
> (iii) a change in circumstances;
>
> (iv) new facts that have arisen;
>
> (v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;
>
> (vi) an important matter of principle that has been raised by the order or decision;
>
> (b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, …

Counsel for Board Staff argued that the "presumption of purposeful change" rule of statutory interpretation should be applied to the Board's Rules. This rule applies generally to legislative instruments and is based on the presumption that legislative bodies do not go to the bother and expense of making changes to legislative instruments unless there is a specific reason to do so. Applied to Rule 44, this means that the Board should be presumed to have intended to eliminate the possibility of motions for review based on grounds which are no longer enumerated. He further argued that because the SPPA requires the Board's Rules "to deal with the matter", the

Board can only deal with them in the manner allowed for by its Rules, and any deviation from the Rules will cause the Board to go beyond its power to review granted by Section 21.1(1) of the SPPA.

In general Union and Enbridge supported the argument made by counsel for Board Staff.

Other parties made several arguments to counter those put forward by counsel for Board Staff. These included:

- as the Board's rules are not statutes or regulations but deal with procedural matters the rules of statutory interpretation such as the presumption of purposeful change have little if any application

- to the extent rules of statutory interpretation apply, section 2 of the SPPA specifically requires that the Act and any rules made under it be liberally construed:

  > This Act, and any rule made by a tribunal under subsection 17.1(4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits

- that the *Interpretation Act* requires that the word "may" be construed as permissive, whereas "shall" is imperative, so the list of grounds in Rule 44 should be considered as examples. In support of this argument, counsel for CCC referred to Sullivan and Dreiger on the Construction of Statutes, Fourth Edition, Butterworths, pp 175*ff* which cites the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4th) 197

- that the Ontario Court of Appeal decision in *Russell v. Toronto(City)* (2000), 52 O.R. (3d) 9 provides that a tribunal (in that case the Ontario Municipal Board) cannot use its own policy or practice to restrict the range of matters which it will consider on a motion to review

- that the *Russell* decision gives tribunals a broad jurisdiction to review in contradistinction to the narrow right of appeal to the Divisional Court.

Findings

In the Board's view, in addition to the specific sections of the SPPA and the Board's Rules dealing with motions to review, it is helpful to look at the overall scheme of the SPPA and the Rules to determine the scope of the Board's jurisdiction to review a decision.

Originally, the SPPA was enacted to ensure that decision making bodies such as the Board provided certain procedural rights to parties that were affected by those decisions. These basic requirements apply regardless of whether a tribunal has enacted rules of practice and procedure. They include such requirements as:

- Parties must be given reasonable notice of the hearing (s 6)

- Hearings must be open to the public, except where intimate personal or financial matters may be disclosed (s 9)

- The right to counsel (s 10)

- The right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

- That decisions be given in writing with reasons if requested by a party (s 17 (1))

- That parties receive notice of the decision (s 18)

- That the tribunal compile a record of the proceeding (s 20).

In addition to these requirements there are several practices and procedures that tribunals are allowed to adopt, if provision is made for them in an individual tribunal's rules. These include:

- Alternative dispute resolution. Section 4.8 provides that a tribunal may direct parties to participate in ADR if "it has made rules under section 25.1 respecting the use of ADR mechanisms…"

- Prehearing conferences. Section 5.3 provides that "if the tribunal's rules under section 25.1 deal with prehearing conferences, the tribunal may direct parties to participate in a pre-hearing conference…"

- Disclosure of documents. Section 5.4 provides that "if the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may,…, make orders for (a) the exchange of documents, …"

- Written hearings. Section 5.1 (1) provides that "a tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding."

- Electronic hearings. Section 5.2 provides that "a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding."

- Motions to review. Section 21.1(1) provides that "a tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

Beyond stating that a tribunal's rules have to "deal with" each of these procedures in order for the tribunal to avail itself of them, there are no restrictions on the way in which they do so. In this regard nothing distinguishes motions to review from the other "optional" procedural matters listed above. A tribunal is free to create whatever procedures it thinks appropriate to handle them, provided they are consistent with the SPPA.

The Board notes that there are situations where the SPPA does not give tribunals full discretion in developing their rules to deal with "optional" procedural powers. For example, section 4.5(3) allows tribunals or their staff to make a decision not to process a document relating to the commencement of a proceeding. This section not only requires a tribunal to have "made rules under section 25.1 respecting the making of such decisions" but also requires that "those rules shall set out … any of the grounds referred to in subsection 1 upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding;…" While a tribunal can prescribe the grounds for such a decision in its rules, the grounds must come from a predetermined list found in the SPPA. In that case, it is clear that only certain grounds are permitted, and a tribunal must restrict itself to those grounds enumerated in its rules.

The SPPA could put similar restrictions on the development of a tribunal's rules dealing with motions to review, but it does not.

While the Court of Appeal's decision in *Russell v. Toronto* dealt with motions to review under the *Ontario Municipal Board Act* rather than under the SPPA, the power granted to review decisions is effectively the same, so the principles enunciated in the *Russell* decision are applicable to the Board. The Court of Appeal found that the OMB could not

use its own policies and guidelines to restrict the scope of the power to review which was granted to it by statute. The Board therefore finds that it cannot use its Rules to limit the scope of the authority given to it by the SPPA.

The SPPA allows each tribunal to make its own Rules, so as to allow it to deal more effectively with the specific needs of its proceedings. The SPPA does not give the Board the authority to limit the substantive matters within the Board's purview.

The provisions of the SPPA dealing with the making of rules, give tribunals a very wide latitude to meet their own needs, both in the context of creating rules and in each individual proceeding:

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1

> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
>
> (4) The tribunal shall make the rules available to the public in English and in French.
>
> (5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.
>
> (6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

In the Board's view these sections of the SPPA give the Board very broad latitude to determine the procedure best suited to it from time to time. While consistency with the Act is required, the Rules are not regulations, and can be amended from time to time by the Board to suit its evolving needs.

The Board finds that there is nothing in the SPPA to suggest that rules dealing with motions to review should be interpreted or applied any differently from other provisions of the Board's Rules.

The Board's Rules

In addition to Section 2 of the SPPA which provides for a liberal interpretation of the Act and the Rules, the Board's Rules include the following provisions as a guide to their interpretation.

> 1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or any part of any rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.
>
> 2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious and cost-effective determination of every proceeding before the Board.
>
> 2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

As these provisions are of general application to all of the Board's Rules of Practice and Procedure, the Board finds that each of its individual rules should be read as if the above rules 1.03, 2.01 were part of them, except of course where restricted by the SPPA or another Act. Therefore, the Rules which "deal with the matter" of motions to

review, i.e. Rules 42 to 45, should be read in conjunction with Rules 1.03 and 2.01. Similarly, the rules dealing with alternative dispute resolution, written hearings and so on include Rules 1.03 and 2.01.

The Board finds that it should interpret the words “may include” in Rule 44.01 as giving a list of examples of grounds for review for the following reasons:

- It is the usual interpretation of the phrase;
- It is consistent with section 2 of the SPPA which requires a liberal interpretation of the Rules;
- It is consistent with Rule 1.03 of the Board’s rules which allows the Board to amend, vary or supplement the rules in an appropriate case; and
- If the SPPA had intended to require that the power to review be restricted to specific grounds it would have required the rules to include those grounds and would have required the use of the word “shall”.

With respect to the application of the principle of presumption of purposeful change urged by counsel for Board Staff, the Board notes that at the same time that its rules were amended to remove certain grounds of appeal from Rule 44.01, Rule 1.03 was also amended. The previous version of Rule 1.03 (then 4.04) read as follows:

> The Board may dispense with, amend, vary, or supplement, with or without a hearing, all or any part of any Rule, at any time by making a procedural order, if it is satisfied that the special circumstances of the proceeding so require, or it is in the public interest to do so.

When compared with the current Rule 1.03, it is apparent that the old rule was more restrictive – amendments had to be made by procedural order, and the circumstances of the proceeding had to be “special”. Given the need for a procedural order, it is reasonable to interpret the old rule as applying only to the sorts of matters dealt with in procedural orders, the conduct of the proceeding and not to other provisions of the rules. No such restriction applies in the current Rule 1.03.

The Board finds that to the extent the Rules were amended to remove specific grounds from the list for motions to review, the contemporaneous amendments to Rule 1.03 give the Board the necessary discretion to supplement this list in an appropriate case. The Board presumably was aware of that at the time of the amendments.

The Board therefore finds that it has the jurisdiction to consider the IGUA motion to review even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01.

Even if this interpretation of Rule 44.01 is incorrect, the Board can apply Rule 1.03 to supplement Rule 44.01 to allow the grounds specified by IGUA. Given the number of motions for review, the timing involved, the nature of the hearing and the nature of the alleged errors, the Board concludes that it is in the public interest to avoid splitting this case into Motions reviewed by some parties and appealed by others.

This panel is also aware that Appeals to the Divisional Court can only be based on matters of law including jurisdiction. If the position advanced by counsel for the Board staff was accepted, errors of mixed fact and law could not be effectively reviewed or appealed by any body. This, the Board believes is not consistent with Section 2 of the SPPA.

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

> In respect of a motion 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.

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

Findings

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

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

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

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

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

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

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

Section D: Board Process

IGUA's grounds for review included the following alleged errors in the process used by the panel:

1. The Board has no jurisdiction to conduct what amounts to its own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers,
2. In embarking on its own public inquiry with respect to matters in issue between the parties with respect to storage regulation, the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its decision with respect to forbearance.

In particular, IGUA argued that the process adopted by the Board was flawed as it did not adhere to traditional notions of the adversarial process. IGUA's position was that a "contested rates and pricing proceeding between utilities and their ratepayers" is required to be conducted by the Board as if it were litigation between the parties as it is fundamentally an issue between them as to what the rates should be.

In IGUA's view, the Board departed from appropriate practice at the prehearing stage by

- Setting the agenda based on its priorities
- Defining the issues without input from the parties
- Directing the utilities to file evidence pertaining to some of the issues identified by the Board
- Directing that settlement discussions take place on all issues except storage regulation
- Directing all parties to file their evidence at the same time rather than dividing them by interest and having them file evidence in support of and then opposed to the issues identified by the Board

IGUA's largest area of concern however was that once evidence had been filed, "the Board did not confine its future participation in the process to the performance of the adjudicative functions of hearing and determining the matters of fact and law in dispute". IGUA's overriding complaint is that the Board was engaging in its own fact finding mission and was not confining itself to hearing and determining the disputed matters of fact and law which had been raised by parties opposite in interest to one another.

IGUA argued that once a dispute became clear as between the utilities and the ratepayers the Board had to "stay out of the arena" and allow these parties to determine how to present and argue the case, in effect constraining the Board to choose between the cases put forward by the various parties.

Examples of the alleged behaviour objected to by IGUA include:

- The Board advising the parties that it had retained its own expert, but then not filing a report from this expert nor having him made available for cross examination.
- Board members posing questions which indicated that they were searching for a forbearance solution to the Storage Regulation issues, but not asking questions about the ability of the existing regulatory regime to address the concerns which the Board raised.
- The Board advising BP Canada, a party to the hearing, that it wished to hear evidence from it on certain issues and providing a list of questions in advance – at the time counsel for ratepayer interests objected to the question as "rather leading".
- Counsel for the Board hearing team taking a position in argument adverse in interest to the evidence it had led.

Counsel for Board Staff argued that IGUA's complaints ignore critical differences between the Board and the courts and they confuse the role of the hearing panel with the roles of staff counsel in Board proceedings.

Counsel for Board Staff argued that the Board is not a court of record. It is a highly specialized tribunal that has a strong and important policy-making function. The Board is entitled to commence or initiate proceedings in its own right. It is not required to sit passively as an independent adjudicator and wait for parties to initiate proceedings before it, nor is the Board required to play a purely passive adjudicative role during the course of proceedings once they have been commenced, and particularly once they have been commenced at the instigation of the Board itself.

Counsel for Board Staff also argued that hearing panels of the Board are fully entitled to ask probing questions of witnesses who appear before them, and there is nothing whatsoever untoward about doing so.

The other parties largely supported the position of Board Staff.

Findings

At a minimum, the Board is required to comply with the provisions of the SPPA and the *Ontario Energy Board Act, 1998* ("OEB Act"). The SPPA provides parties with certain procedural rights, none of which IGUA has alleged has been disregarded by the Board in this case:

- Parties must be given reasonable notice of the hearing (s 6)
- Hearings must be open to the public, except where intimate personal or financial; may be disclosed (s 9)
- Parties have the right to counsel (s 10)
- Parties have the right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

- Tribunals must give decisions in writing and must provide reasons if requested by a party (s 17 (1))

- Parties are entitled to notice of the decision (s 18)

- The tribunal must compile a record of the proceeding (s 20)

Beyond these basic requirements, the SPPA specifically allows tribunals to require parties to participate in various other procedures. With respect to prehearing conferences, section 5.3 of the SPPA provides that a tribunal may direct parties to participate in a prehearing conference to consider the settlement of any or all of the issues.

Section 19(4) of the OEB Act specifically allows the Board to determine matters on its own motion:

> The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise, shall determine any matter that under this Act or the regulations it may upon an application determine, and in so doing the Board has and may exercise the same powers as upon an application.

Section 21 of the OEB Act provides that:

> The Board may at any time, on its own motion and without a hearing, give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act.

Therefore as well as the power to initiate proceedings, the Board is also given the statutory right to require the preparation of evidence incidental to the exercise of its powers.

While the Board accepts IGUA's argument that in a hearing under Section 36 of the OEB Act it has the jurisdiction to hear and determine all questions of law and fact, it does not agree with IGUA's characterization of the limits on its exercise of this adjudicative function.

As the Board has an over-riding responsibility to make its decisions in the public interest the parties cannot have the final word in determining the nature of the dispute and the options open to the Board. The Board is not required to accept the position of any of the parties, provided that its process is transparent and open and the parties have a fair opportunity to exercise their rights under the SPPA.

IGUA cited several authorities in support of its argument. The Board found them of little assistance as they arose in quite different contexts, generally that of civil disputes between the parties. That is not the context within which the Board operates. We are not judges in civil disputes and the Board's mandate is much broader than determining rights between the parties.

With respect to the specific allegations made by IGUA, the Board's findings follow.

The Board was fully entitled to issue a notice of proceeding on its own motion in December of 2005 and to delineate the issues it expected the parties and the intervenors to address in the proceeding.

Pursuant to the Board's settlement guidelines and the SPPA, the Board is entitled to exclude from the ambit of a settlement conference particular issues that it believes should be heard in full in the hearing which is what the hearing panel did in this case. This is another example of an area where the Board's practice is fundamentally different from that of the courts.

The Board is fully entitled under its Rules to develop procedural orders to meet the needs of any particular proceeding and there is nothing in the Rules or the SPPA which would restrict it from directing all parties to file their evidence simultaneously. This does

not in any way impede the parties from exercising their statutory rights to have access to the evidence and to cross-examine witnesses.

In a proceeding initiated by the Board, as this one was, where there is no applicant, this procedure is an appropriate one.

With respect to the expert witness retained by Board Staff, Section 14 of the OEB Act expressly permits the Board "to appoint persons having technical or special knowledge to assist the Board." As there is no suggestion that the Board's expert played a role in the deliberations of the hearing panel or that the hearing panel relied in any way on the advice of the expert, there is nothing improper arising out of his retainer. Experts consulted by Board Staff are in the same position as staff and are not required to file evidence, or to submit to questioning by any of the parties.

The Board also finds that IGUA's complaints that the NGEIR panel members asked questions of witnesses, which IGUA complains indicated that they were searching for a forbearance solution to the storage regulation issue, are without merit. Adjudicators are entitled to ask probing questions of witnesses who testify before them, including leading questions. The fact that questions are asked or not asked does not mean that the panel has made up its mind one way or the other on an issue.

The Board also finds that the NGEIR panel was fully entitled as a result of the powers granted in section 21 of the OEB Act to act as it did in putting questions to a witness from BP Canada. It is also not an unusual occurrence for the Board to agree to hear evidence in camera, where there is confidential or sensitive commercial information involved.

The Board also finds no error in the fact that counsel for the Board hearing team made final argument in which she took a position adverse to the expert evidence that the Board hearing team led. The Board hearing team is entitled to take whatever position it chooses based on the evidence that was adduced during the hearing and nothing that Board hearing counsel did could possibly ground a complaint of breaches of the rules of

natural justice against the NGEIR hearing panel itself.

Section E: Board Jurisdiction under Section 29

The joint factum of CCC and VECC and the factum of the IGUA both allege that the original NGEIR panel erred in misinterpreting or overreaching in respect of its jurisdiction under section 29 of the OEB Act.

In particular, the CCC/VECC factum states as follows at paragraph 8:

> 8. The moving parties submit that the NGEIR Decision raises the following issues:
>
> (i) Whether the Board correctly interpreted Section 29 of the Ontario Energy Board Act (the "Act"). It is the position of the moving parties that the Board erred in its interpretation of Section 29 of the Act, thereby depriving itself of jurisdiction;
>
> (ii) Whether the Board gave effect to the legislative intent underlying Section 29 of the Act. It is the position of the moving parties that the Board failed to give effect to the intention of the Legislature in enacting Section 29 of the Act;

In its factum, IGUA alleged that the Board had no jurisdiction to conduct what IGUA characterized as the Board's "own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers". (IGUA factum par. 84(a))

IGUA also alleged that:

> …the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its Decision with respect to forbearance. (IGUA factum par. 84(b))

In addition to these general submissions by CCC/VECC and IGUA about the NGEIR panel's interpretation of its jurisdiction under Section 29, these parties also argued specifically that the NGEIR panel exceeded its jurisdiction under Section 29 by restructuring the storage businesses of Union and Enbridge. They asserted that the power to restructure the storage business comes under section 36 of the legislation. (Tr. Vol. 1, pp. 28 and 56-57)

Findings

The NGEIR panel's interpretation and application of section 29 is central to the NGEIR Decision. The NGEIR Decision therefore deals extensively with the question of the legal test to be applied under section 29, the analytical framework for assessing whether the natural gas market is competitive and finally, the assessment of market power in the natural gas sector in Ontario.

The starting point for the NGEIR Decision is the Board's interpretation of section 29 which is set out in Chapter 3 of the Decision and reads as follows:

> On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest

In Chapter 3 of the NGEIR Decision, the NGEIR panel discussed the statutory test to be used in the assessment of competition in the storage market and applies the analytical framework mandated by that statutory test. In particular, the panel reviews the history of section 29 and of the concept of forbearance and light-handed regulation.

The NGEIR panel's review of Section 29 is described at two levels. The first is the assessment of competition, which is done by applying the market power tests, and the second is the relationship between competition and the public interest.

The NGEIR panel interprets “competition” within section 29 at page 24 of the NGEIR Decision as follows:

> There are degrees of competition in any market. They range from a monopoly, where there is a sole seller, to perfect competition, where there are many sellers and no one seller can influence price and quantity in the market. It is not necessary to find that there is perfect competition in a market to meet the statutory test of “competition sufficient to protect the public interest”; what economists refer to as a “workably competitive” market may well be sufficient.
>
> It is also important to remember that competition is a dynamic concept. Accordingly, in section 29 the test is whether a class of products “is or will be” subject to sufficient competition. In this respect parties often rely on qualitative evidence to estimate the direction in which the market is moving.

The NGEIR panel further interprets its mandate at page 44 as follows:

> …Section 29 says that the Board shall make a determination to refrain “in whole or part” which the Board believes allows considerable flexibility in this regard. In addition, the Board concludes that it is required by the statute to address the public interest trade-offs, for example, between price impacts and the development of storage and the Ontario market generally.

The NGEIR panel then proceeds to assess the “level of competition” using the market power tests and finds the storage market in Ontario is subject to “workable competition”.

Following this, it then addresses the question of whether the level of competition is sufficient to protect the public interest. In so doing, the panel addresses what should be

encompassed in its consideration of the public interest in the context of the assessing competition as follows:

> The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple "yes" or "no". The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly.
>
> Some of the intervenors took the position that the public interest review should be focussed on the financial impacts. For example, Schools argued that the Board should look at the benefits and costs of forbearance, and in its view, the costs include a possible transfer of between $50 million and $174 million from ratepayers to shareholders (arising from the proposed end to the margin-sharing mechanisms and the potential re-pricing of cost-based storage to market prices). The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. [Emphasis added] (pages 42 and 43)

The NGEIR panel then proceeds to balance the Board's public interest mandate against its legislative objectives and describes the trade-offs. It does this by reviewing each of the relevant objectives (i.e., to facilitate competition in the sale of gas to users, to protect the interests of consumers with respect to prices an the reliability and quality of gas service, to facilitate rational development and safe operation of gas storage) and

conducting an assessment of whether the level of storage competition is sufficient to protect the public interest in light of each of those objectives.

At page 56 of Chapter 5, having determined that part of the storage market is workably competitive and having considered some of the key elements of the public interest, the panel addresses whether and it what circumstances the Board should refrain from setting storage prices and approving storage contracts.

> In terms of a section 29 analysis, the goal would be to continue to regulate (and set cost-based rates) for those customers who do not have competitive storage alternatives and to refrain from regulating (allow market-based prices) for those who do have competitive alternatives.

The NGEIR panel then applies its interpretation of the legislative intent of section 29 to the facts before it. That panel's understanding of its mandate under section 29 and its careful application of that mandate are evidenced in its findings at pages 56 and 57 of the decision. The NGEIR panel's application of the requisite elements of section 29 is evident in the balancing between considerations of competition with aspects of public interest.

> The parties recognized that bundled customers, in particular, do not acquire storage services separately from distribution services, do not control their use of storage, and do not have effective access to alternatives in either the primary or secondary markets. Competition has not extended to the retail end of the market, and therefore is not sufficient to protect the public interest. However, the Board finds that customers taking unbundled or semi-unbundled service should have equivalent access to regulated cost-based storage for their reasonable needs. The Board finds that it would not further the development of the competitive market, or facilitate the development of unbundled and semi-unbundled services, if these unbundled and semi-unbundled services were to include current storage services at unregulated rates. The Board also agrees with

the parties that noted that re-pricing existing storage will not provide an incentive for investment in new storage and therefore cannot be said to provide that public interest benefit.

However, customers taking unbundled and semi-unbundled services do have greater control over their acquisition and use of storage than do bundled customers. It is also the Board's expectation that these customers will have access to and use services from the secondary market. Therefore, the Board concludes it is particularly important to ensure that the allocation of cost-based regulated storage to these customers is appropriate. This issue is addressed in Chapter 6.

MHP Canada has suggested that the Board adopt full forbearance in storage pricing as a policy direction. Similarly, Union has characterized its allocation proposal and Enbridge has characterized its "exemption" approach for in-franchise customers as being "transitions" to full competition. The Board has found that the current level of competition is not sufficient to refrain from regulating all storage prices; nor do we see evidence that it would be appropriate to refrain from regulating all storage prices in the future. The current structure (for example, the full integration of Union's storage and transportation businesses and the full integration of Union as a provider of storage services and as a user of storage services) is not conducive to full forbearance from storage rate setting. In addition, there would be significant direct and indirect rate impacts associated with full forbearance from rate setting, and there is little evidence of significant attendant public interest benefits. The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there a reasonable prospect that they will be at some future time.

The submissions of both CCC/VECC and of IGUA are that the Board misinterpreted and misapplied section 29 of the OEB Act. This panel finds that there is no reviewable error

associated with the NGEIR panel's interpretation of section 29. The NGEIR Decision clearly evidences that the NGEIR panel knew and understood that section 29 was not a section that the Board had invoked in any previous decisions or analyses. For that reason, the Decision provides extensive background regarding the section and goes into significant detail regarding the appropriate framework and analysis required to be undertaken. The Decision shows that the NGEIR panel reviewed the elements of section 29 and considered each of those elements in considerable detail. Where moving parties raised specific questions regarding the application of Section 29, for example, with respect to whether the NGEIR panel had sufficient evidence upon which to make a finding that there was competition sufficient to protect the public interest and whether the NGEIR panel erred in setting a cap on the amount of natural gas storage available to in-franchise customers, the Board makes specific findings elsewhere in this Decision.

With respect to the allegation by CCC/VECC and IGUA that the NGEIR panel exceeded its jurisdiction by restructuring the storage businesses of Union and Enbridge, something which they assert should come under section 36 of the legislation, the Board also finds there is no reviewable error.

The NGEIR panel confined its considerations related to the application of the test under Section 29 in determining whether and to what extent there was competition in the natural gas storage market sufficient to protect the public interest. The portions of the decision that go on to discuss the impacts of the Section 29 decision on the structure of the natural gas storage market flow from the determination under Section 29, but the NGEIR panel does not, in its Decision, describe these as arising out of their Section 29 jurisdiction. The NGEIR proceeding was commenced pursuant to sections 19, 29 and 36 of the *Ontario Energy Board Act, 1998*. As such, the NGEIR panel acted under the authority of Section 29 and 36 in making the determinations in the NGEIR Decision. The decisions made by the NGEIR panel with respect to the allocation of storage available at cost-based rates and the treatment of the premium on market-based storage transactions were made based on evidence filed by the parties to the proceeding and the NGEIR panel considers this evidence as part of the NGEIR Decision.

The Board finds that the allegations of CCC/VECC and IGUA on this point do not raise a question as to the correctness of the decision. The NGEIR panel clearly confined itself to its legislative mandate as provided in Section 29 in determining whether the natural gas market was subject to competition sufficient to protect the public interest. The NGEIR's findings that flow from the Section 29 determination align with the evidence that was before it, did not fail to address any material issue and did not make any inconsistent findings with respect to the evidence before it, except as otherwise noted in this decision.

Section F: Status Quo

The factums and submission of both CCC/VECC and of IGUA allege that the NGEIR panel erred by failing to consider the option of retaining the current regulatory regime in respect of natural gas storage regulation. CCC/VECC and IGUA articulate this alleged error in a number of different ways in different parts of their factums and submissions.

For example, at paragraph 3 of their joint factum, CCC and VECC take the position that:

> "… the Board was obligated to consider whether a change in the status quo with respect to the regulation of storage was required and that it erred in failing to do so." IGUA's factum states that "…reasonable people, objectively examining the process which led to the Decision, will likely conclude that retaining the status quo was not a decision-making option which the Board considered, either fairly or at all, and that the Board itself was a proponent for forbearance relief."

Findings

The NGEIR Decision provides evidence in various places, of the NGEIR panel's recognition of both the current regulatory status with respect on natural gas storage in Ontario and the dynamic nature of competition generally.

In particular, Chapter 2 is described at page 5 of the decision as "…an overview of gas storage in Ontario today – the existing storage facilities, the use of storage by Union's and Enbridge's "in-franchise" customers, the "ex-franchise" market for storage, and the prices charged for storage services."

Later in the NGEIR Decision, as part of its findings on the assessment of assessment of storage competition, the Board expressly disagrees with Mr. Stauft's testimony that the regulated cost-base price for storage is a reasonable proxy for the competitive price of

storage. Implicit in this finding is the NGEIR panel's consideration of the current regulatory regime.

At page 46 of the Decision, the NGEIR Panel also considered the current regulatory regime in the context of question of the sharing of the premium which exists between the price of market-based storage and the underlying costs. The Board acknowledged the current state as follows:

> Currently, that premium is shared between utility ratepayers and utility shareholders. Under the utilities'' proposals for forbearance, the premium would be retained by the shareholders. This would result in significant transfer of funds in the case of Union (2007 estimate is $44.5 million); less so in the case of Enbridge (2007 estimate is $5 million to $6 million). The intervenors in general rejects these proposals and, as a result, opposed forbearance.

At page 47, the NGEIR panel specifically considered and expressly acknowledged the importance of the change from the status quo, but ultimately rejected these submissions as follows:

> The Board agrees that the distribution of the premium is a significant consideration. In many ways, it has been the underlying focus of the NGEIR Proceeding. However, the impact of removing the premium from rates is the result of removing a sharing of economic rents; it is not the result of competition bringing about a price increase. So while it is an important consideration which the Board must address (see Chapter 7), it is not a sufficient reason, in and of itself, to continue regulating storage prices.

There are a number of other examples throughout the NGEIR Decision that satisfy the Board that the NGEIR panel was conscious of the status quo regulatory regime and bore this in mind throughout its analysis on the narrow issue of competition and the s.

29 analysis as well as in considering the impacts upon both shareholders and ratepayers, of a completely or partial forbearance decision.

The Board also feels that the decision by the NGEIR panel to continue to regulate and set cost-based rates for existing storage services provided to in-franchise customers up to their allocated amounts evidences a clear understanding of the current regulatory framework and under what circumstances, based upon the evidentiary record before the NGEIR panel, it was appropriate to deviate from that current framework.

The Board is not convinced, however, that the analysis mandated by the legislative language of s. 29 requires the Board to consider the status quo in the way that has been suggested by some parties. Although it was important for the NGEIR panel to review the current regulatory framework to set the stage for the analysis, the Board is not convinced by the arguments of CCC/VECC, nor those of IGUA that consideration of the status quo is an integral, or even a necessary part of the s. 29 analysis. The purpose of s. 29 was clearly stated by the NGEIR panel and that is to determine whether there is or will be competition sufficient to protect the public interest. If there is a finding that competition does exist, nothing in the section requires the panel to then consider whether the current regulatory framework is sufficient to accommodate the competitive market. In fact, the section mandates that upon finding competition sufficient to protect the public interest, that "…the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act…" In this case, the Board determined that it would refrain, in part, from regulating the setting of rates and the review of contracts for natural gas storage.

The Board therefore concludes that CCC/VECC and IGUA have not demonstrated that their grounds for review based on the alleged failure of the NGEIR panel to consider retaining the status quo as a viable decision-making option raise an issue that is material and directly relevant to the findings made in the decision. This panel concludes that there is no reviewable error with respect to the NGEIR panel's alleged failure to fairly consider the status quo.

Section G: Onus

At paragraph 84(d) of its factum, IGUA alleges that the Board erred in concluding that there is no onus of proof to be assigned in the rates and pricing proceedings it initiated. IGUA alleges that the NGEIR panel erred in law in not assigning the onus of proof to the utilities.

Findings

Pages 26 to 27 of the NGEIR Decision deal explicitly with this issue. In that part of the Decision, the panel acknowledges that generally, the onus is on the applicant. The panel also, however, pointed out the unique nature of the NGEIR proceeding and the fact that the proceeding was brought on the Board's own motion.

The Board is satisfied that all parties to the NGEIR Proceeding were given a full and fair opportunity to provide submissions on the question of onus and that, based on the Decision, the NGEIR panel heard and understood those submissions. This panel is not satisfied that the question of onus is an issue that is material and directly relevant to the findings made in the Decision, nor that if a reviewing panel did decide the issue differently, that it would change the outcome of the Decision. For these reasons, the Board finds that there is no reviewable error relating to assignment of or the failure to assign onus in the NGEIR proceeding.

Section H: Competition in the Secondary Market

In the NGEIR Decision, the Board concluded that Ontario storage operators compete in a geographic market that includes Michigan and parts of Illinois, Indiana, New York and Pennsylvania, that the market is competitive and neither Union nor Enbridge have market power. This determination was made by employing the following four step process, based on the Competition Bureau's Merger Enforcement Guidelines (MEGs):

- Identification of the product market.
- Identification of the geographic market.
- Calculation of market share and market concentration measures.
- An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment).

IGUA alleged that the NGEIR panel made numerous errors in assessing sufficiency of competition in the secondary market. IGUA's allegations of errors can be summarized as follows:

- The NGEIR panel erred in misapprehending and misapplying the analytical tests used for determining market power.
- The NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services, excluding commodity, were available at Dawn, nor their prices, nor whether consumers regarded such services as substitutes for delivery services offered by Union.

- The NGEIR panel failed to recognize that the evidence of Gaz Métropolitain Inc. (GMi) did not establish that Union lacked market power in storage services transacted at Dawn, and indeed this evidence established the opposite.

Findings

IGUA alleges that the Board misapprehended and misapplied the market power analytical frameworks presented in documents from the Competition Bureau, the Federal Energy Regulatory Commission (FERC), and the Canadian Radio-Television and Telecommunications Commission (CRTC). According to IGUA, a 10 step procedure must be followed in order to correctly carry out a market power analysis instead of the four step process used by the NGEIR panel.

The Board notes that, in settling on the four step procedure that should apply to determine whether Union and Enbridge have market power and whether the storage market is competitive, the NGEIR Decision provided substantial review and analysis pertaining to Competition Bureau's Enforcement Guidelines (MEGs) and the FERC's 1996 Policy Statement on Market Power Analysis. It is evidenced in the Decision that this was the result of the review of substantial pre-filed evidence, cross examination and argument on this topic.

In the Board's view, the test to be applied is not whether a review panel of the Board would have adopted a different analytical framework. Rather, it is matter of whether in settling upon a certain analytical process, there was an error of fact or law. In view of the extensive record and the analysis and reasons provided in the NGEIR Decision, the Board finds that IGUA not raised an identifiable error in the NGEIR Decision. Rather the submissions of the moving parties are more in the nature of re-arguing the same points that were made in the original hearing. This evidence was presented and evaluated by the NGEIR panel. As the Board stated in enunciating the threshold test at Section C of this Decision, a motion for review cannot succeed if a party simply argues that the Board should have interpreted conflicting evidence differently. The Board has therefore

determined that there is not enough substance to the issues raised by IGUA such that a review of those issues could result in the Board determining that the NGEIR Decision or Order should be varied, cancelled or suspended. As such, the NGEIR panel's determination on the nature and application of market power analysis to the natural gas storage market in and around Ontario is not reviewable.

IGUA alleges that the NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services were available at Dawn, nor their prices or whether consumers regarded such services as substitutes for delivery services offered by Union.

In the Board's view, this alleged error is essentially an application of the alleged market power analysis framework error discussed above. The NGEIR panel listed several forms of evidence in support of its conclusion that the secondary market in transportation services is unconstrained and therefore serves to enlarge the geographic market from what it would otherwise have been found to be.

The NGEIR panel treated evidence on the operation of primary and secondary markets in transportation as relevant to the determination of the geographic market in a manner consistent with the market power analysis methodology that the NGEIR panel had settled upon. For the reasons stated above, the Board finds that the original NGEIR panel's use of evidence relating to the secondary market in transportation services is not reviewable.

IGUA cites the NGEIR hearing transcript (volume 10, pages 56-120) in support of its allegation that the Board failed to recognize that GMi's evidence actually supported IGUA's view that Union has market power.

The Decision (at page 35, paragraphs 4-5) clearly reflects the statements of GMi witnesses that they regularly contact alternative suppliers for comparisons to Union's services. IGUA has not shown that the NGEIR panel's findings are contrary to the evidence that was before the panel, or that the panel failed to address GMi's evidence

or made inconsistent findings with respect to that evidence. The Board therefore finds that there is no reviewable error with respect to the NGEIR panel's use of the evidence provided by GMi.

Section I: Harm to Ratepayers

IGUA and CCC/VECC alleged that the Board erred when it bifurcated the natural gas storage market between those customers that continue to benefit from storage regulation and those customers who do not. They allege that as a result of this bifurcated market, the Board conferred a windfall benefit on the shareholders of the utilities with no corresponding benefit to ratepayers and that this is unfair.

The parties also alleged that the transitional measures the Board employed to implement the new regime merely serve to underscore the error in the finding that the market should be split. The parties alleged that the market, taken as a whole, was determined not to be workably competitive, and the transitional measures are evidence that a decision to forbear from the regulation of prices was not appropriate.

Finally, CCC and VECC alleged that the Board erred in its interpretation of section 29, and acted in excess of its jurisdiction, by moving assets out of rate base, with no credit to the ratepayer. They argued that the effect of the NGEIR Decision is to allocate the rate base storage assets of the utilities between in-franchise and ex-franchise customers, and to allow for a new shareholder business within each utility. They submitted that doing those things does not naturally follow from a finding that the rates charged by the utilities to ex-franchise customers do not need to be regulated.

Findings

The Board finds that the issues raised in this area have not met the threshold test for the matter to be forwarded to a reviewing panel of this Board. The NGEIR panel did not err in failing to consider the facts, the evidence, or in exercising its mandate. There were no facts omitted or misapprehended in the NGEIR panel's analysis nor are the moving parties raising any new facts.

It was entirely within the NGEIR panel's mandate and discretion how to assess the competitive position of segments of the market and how to address the regulatory treatment of customers within those segments. The NGEIR panel clearly decided that ex-franchise customers of both Union and Enbridge had access to a competitive natural gas storage market. Further, the decision goes on to make clear on page 61, that Enbridge as a utility is ex-franchise to Union and therefore should be subject to market prices. The NGEIR Decision differentiates between the competitive position of a utility (e.g. Enbridge) and the competitive position of that utility's in-franchise customers. For example, the Decision is clear that the in-franchise customers of Enbridge will pay cost-based rates which will continue to be regulated by the Board and are based on EGD's costs of storage service owned by the utility and the costs that EGD pays for procuring these services in the competitive market.

A key issue the parties raise is that the bifurcated market brings about unfair and inconsistent treatment, and therefore constitutes a misapplication of the Board's mandate to protect the public interest. However, on this point, the grounds that the moving parties raised to support a review are in fact the very points used by the NGEIR panel to protect consumers as a natural consequence of the decision to refrain from storage regulation of the ex-franchise market. It is clear that the NGEIR panel took into account the protection of the public interest in its decision to provide transition mechanisms to protect consumers.

With respect to the allegation of a windfall benefit for shareholders of the utilities with no corresponding benefit to ratepayers, the Board is of the view that this is related to the question of earnings sharing. This issue is more fully addressed in Section K of this Decision. It is important to note here, however, that the NGEIR panel's decisions with respect to the profit or earnings sharing mechanism were based on the evidence presented by all parties and flowed from the broader decisions with respect to the competitiveness of the gas storage market. Chapter 7 of the NGEIR Decision clearly described the NGEIR panel's considerations with respect to and its reasoning for changing the earnings sharing mechanism. In the Board's view, the changes related to the earnings sharing mechanism necessarily arise from a recognition by the Board of

the implications of its findings under Section 29 that there is a workably competitive market for storage in the ex-franchise market.

Section J: Union's 100 PJ Cap

In their factum, CCC and VECC allege that, on the one hand the Board in its NGEIR Decision said that a substantial portion of the storage market requires regulatory protection because there is insufficient competition to protect the public interest while on the other hand the Board exposed this same group to the effects of competition from the unregulated market.

Kitchener has also specifically sought the Board's review of an aspect of the NGEIR Decision related to the Board's placement of a "cap" on the amount of Union's storage space that is reserved for in-franchise customers at cost-based rates.

The Board determined at page 83 of the NGEIR Decision that Union should reserve 100 PJ of storage space at cost-based rates for its in-franchise customers. The Decision reads as follows (page 83):

> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs. The Board has determined that Union should be required to reserve 100 PJ (approximately 95 Bcf) of space at cost-based rates for in-franchise customers. This compares with Union's estimate of 2007 in-franchise needs of 92 PJ (87 Bcf). At an annual growth rate of 0.5% each year, which Union claims is the growth rate since 2000, in-franchise needs would not reach 100 PJ until 2024. The limit would be reached in 2016 if the annual growth is 1%; at a very annual high growth rate of 2% per annum, the 100 PJ limit would be reached in 2012.
>
> The 100 PJ (95 Bcf) amount is the capacity that Union must ensure is available to in-franchise customers if they need it. Union should continue to charge in-franchise customers based on the amount of space required in any year. If Union's in-franchise customers require less than 95 Bcf in any year, as measured by Union's standard allocation methodology, the

> cost-based rates should be based on that amount, not on the full 95 Bcf reserved for their future use. Union will have the flexibility to market the difference between the total amount needed and the 95 Bcf reserve amount.

The Board acknowledged that the cap might be reached at any time between 2012 and 2024, depending on what growth rate assumptions are used. At the current rate of growth (0.5% each year), the cap would not be met until 2024.

In Kitchener's oral submissions (page 187, Volume 1), Mr. Ryder on behalf of Kitchener makes the following comments:

> And while the cap of 100 pJs allows for some growth so it won't immediately affect the Ontario consumer, the cap will be reached between 2012 and 2024. That's between 5 and 17 years from now.
>
> Now, that's not far off, and if the public interest requires a margin for growth today in 2007, then the public interest will surely require it in five to 17 years from now when the cap is reached.
>
> And when it is reached, it is my submission that the Board will have wished it had reviewed the decision in 2007, because, when the cap is reached, this decision will be responsible for adding significantly to the costs of energy in Ontario, to the detriment of the Ontario consumer.

Page 7 of the CCC/VECC factum states:

> The Board made no finding, however, that at the end of the operation of those transitional measures, the public interest, as represented by in-franchise customers of Union and EGD, would be protected. The moving parties submit that Section 29 required the Board, before making an order to forbear from regulation under Section 29, to find on the evidence that,

> at the end of the transitional measures, there would be sufficient competition to protect the public interest. The moving parties submit that, in failing to make that finding, the Board erred.

Findings

On page 57 of the NGEIR decision, in reference to the in-franchise customers of Union the NGEIR panel makes the following statement:

> The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there reasonable prospect that they will be at some future time.

Later in the decision at page 82, the decision states:

> The Board panel concludes that its determination that the storage market is competitive requires it to clearly delineate the portion of Union's storage business that will be exempt from rate regulation. Retaining a perpetual call on all of Union's current capacity for future in-franchise needs is not consistent with forbearance. As evidenced by the arguments from GMi and Nexen, two major participants in the ex-franchise market, retaining such a call is likely to create uncertainty in the ex-franchise market that is not conducive to the continued growth and development of Dawn as a major market centre.
>
> The Board concludes that it would be inappropriate, however, to freeze the in-franchise allocation at the level proposed by Union. Union's proposal implies that a distributor with an obligation to serve would be prepared to own, or to have under contract, only the amount of storage needed to serve in-franchise customers for just the next year. In the Board's view, it is appropriate to allow for some additional growth in in-

> franchise needs when determining the "utility asset" portion of Union's current capacity.
>
> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs."

The NGEIR panel then goes on to provide its decision on the methodology which was used to determine the cap and says at page 83 of the decision:

> The 100 PJ (95 BCF) amount is the capacity that Union must ensure is available to in-franchise customers if they need it.

The NGEIR panel then makes a finding with respect to how the excess capacity should be treated if the in-franchise customers require less than 100 PJ in a given year. The NGEIR panel is silent on the outcome if in-franchise customers require more than 100 PJ of storage per year. Although the NGEIR panel is clear that it does not expect this circumstance to occur for many years, the decision nevertheless appears to raise the possibility that in-franchise customers may, at some point, be subject to unregulated prices.

The Board finds that on this issue the moving parties have raised a question as to the correctness of the order or decision and that a review based on the issue could result in the Board deciding that the decision or order should be varied, cancelled or suspended.

In particular, in this instance, there are unanswered questions that are raised by the NGEIR Decision on the 100 PJ cap issue. Since the NGEIR Decision clearly stated that the in-franchise customers did not have and were not likely to have access to competition in the foreseeable future, a decision that forbears from the regulation of pricing for these customers at some time in the future does not appear to this panel to be consistent. The Board finds that the following questions should have been addressed by the NGEIR panel:

(a) If the cap of 100 PJ of storage for in-franchise Union customers remain in place in perpetuity, what is the basis for forbearance (under Section 29) of required storage above 100 PJ for in-franchise customers?

(b) If the cap of 100 PJ of storage for in-franchise Union customers does not remain in place in perpetuity, what mechanism should the Board use to monitor the likelihood of the cap being exceeded?

(c) If the cap of 100 PJ of storage for in-franchise Union customers is likely to be exceeded, what, if any, remedy is available to in-franchise customers?

The Board therefore finds that the NGEIR panel either failed to address a material issue or made inconsistent findings, that the alleged error is material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected, the reviewing panel could change the outcome of the decision.

The Board therefore finds that this is a reviewable matter.

Section K: Earnings Sharing

Certain parties, led by VECC, allege that the NGEIR panel erred because one of the effects of the NGEIR Decision on the in-franchise customers of Union is that these customers will lose the benefit of their share of the premium obtained by Union through the sale of storage to ex-franchise customers. The parties stated that the NGEIR Decision will result in a material increase in revenue to the shareholder of Union and, to a lesser extent, an increase in the revenue to EGD's shareholder. They also indicated that at the same time, there will be no corresponding benefit to the ratepayers of either Union or EGD. In fact the moving parties argued that the ratepayers of Union and EGD will suffer adverse impacts, in both the short and the long term. The moving parties maintained that the NGEIR Decision upsets the balance between the interests of ratepayers and shareholders which the regulatory system is supposed to maintain and that the NGEIR Decision is, therefore, contrary to public and regulatory policy.

It was also stated by the moving parties that section 29 of the OEB Act does not permit the Board to re-allocate rate-based storage assets. The effect of the NGEIR Decision was to allocate rate-based storage assets between in-franchise and ex-franchise customers and to allow for a new shareholder business within each utility. The moving parties stated that the Board exceeded its jurisdiction by moving assets out of rate base with no credit to the ratepayer.

It was further asserted that rather than requiring utility shareholders to share the premiums derived from the sale of storage to ex-franchise customers, there will now be a separation of utility and non-utility assets and revenues and costs associated therewith. The moving parties stated that this will raise cross-subsidization and other issues pertaining to the performance of utility and non-utility services; a result which they say contravenes the spirit and intent of the pure utility policy adopted by the Ontario government years ago.

Further, the parties allege that the Board erred in concluding that it has the power to forbear under Section 29 of the *OEB Act* when an exercise of the power results in a

windfall benefit to utility shareholders and consequential harm to ratepayers. The parties asserted that changes to the allocation between ratepayers and utility shareholders of financial benefits and burdens produced by a particular regulatory regime must take place under the auspices of regulation.

Findings

The Board notes that the NGEIR Decision deals extensively with the issue of the allocation/sharing of margins (also called premiums, revenues or earnings) associated with the sale of natural gas storage on both a short-term (transactional services) and long-term contractual basis. The Decision canvasses both the status quo (prior to the implementation of the changes required by the NGEIR Decision) and provides an explanation of the rationale for changing the earnings sharing structure, the new mechanisms for earnings sharing and the transitional implementation (where applicable) of those mechanisms.

In particular, chapter 2 of the NGEIR Decision provides, among other things, a description of the current types and volumes of sales of natural gas storage by Union to ex-franchise customers and canvasses the current regulatory treatment of ex-franchise sales, including the rate treatment of margins on storage sales. In Chapter 7, the NGEIR panel goes into greater detail regarding the extent of margin sharing and the regulatory history that underlines premium sharing for both short-term (for both Union and Enbridge) and long-term (for Union only) sales of storage.

Chapter 7 goes on to provide the Board's findings on for the sharing of margins for both short-term and long-term transactions and to describe a transition mechanism related to long-term margins.

The record that the NGEIR panel relied upon included extensive evidence and argument of many parties, including the moving parties to this proceeding and the utilities. The NGEIR Decision refers to various parties' submissions on the issue of premium sharing and the Board reiterated some of the historical evidence with respect

to the margin sharing in its Decision. The NGEIR Decision indicates that the NGEIR panel heard and considered the evidence and submissions before it in making its determinations with respect to this issue.

Importantly, the NGEIR panel's findings relate back to and to a certain extent flow from its broader decision to refrain, in part, from regulating rates for storage services. The Board does not accept the suggestion that the Board exceeded its jurisdiction by moving assets (in the case of Union) out of rate-base and by altering the status quo margin sharing mechanism. On the contrary, the NGEIR Decision clearly articulates that the changes to margin sharing flow necessarily and logically from the decision to refrain, in part, from regulated rates for storage services.

The determinations of the NGEIR panel are also consistent with its determination to distinguish between "utility assets" and "non-utility assets". The Decision clearly indicates that the NGEIR panel canvassed past decisions of the Board on this issue and considered the implications of its findings on both the utilities and ratepayers. Part of this consideration is evidenced in the development by the panel of a transition mechanism related to the implementation of the Board's finding that profits from new long-term transactions should accrue entirely to the utility (Union) as opposed to ratepayers. The threshold panel does not accept the argument that this transitional implementation is a form of implicit acknowledgement that the finding is inappropriate. The NGEIR panel exemplified Board precedent for the use of a phase-out mechanism and, in its finding, indicated that it had considered other options for a transitional mechanism.

The Board finds that the NGEIR panel's determinations on the treatment of the premium on market-based storage transactions are not reviewable. The record of the NGEIR proceeding clearly demonstrates that the NGEIR panel considered the evidence, the regulatory history with respect to the issue of premium sharing and parties' submissions and made its determination on the basis of that evidence and those submissions. There is nothing in the moving parties' evidence or arguments that demonstrate to the Board that the NGEIR panel made a reviewable error. For this

reason, the Board has determined that the threshold test has not been met and it will not order a review of the NGEIR Decision as it pertains to the issue of the division of the utilities assets or the sharing of the margin realized from the sale of natural gas storage to ex-franchise customers.

Section L: Additional Storage for Generators and Enbridge's Rate 316

Many of the issues which existed between Union and Enbridge and their generator customers were resolved in the Settlement Proposals which were filed and accepted by the Board in the NGEIR proceeding. These settlements deal with storage space parameters, increased deliverability for that space, and access to that enhanced space to balance on an intra-day basis. What remained unresolved was the pricing for the new high deliverability storage services for in-franchise generators.

The utilities had proposed in the NGEIR proceeding to offer these services at market-based rates and proposed that the Board refrain from regulating the rates for these services. The power generators took the position that storage services provided to them should be regulated at cost-based rates.

In the NGEIR Decision, APPrO's position was described as follows:

> The Association of Power Producers of Ontario (APPrO) argued that the product it is more interested in – high deliverability storage – is not currently available in Ontario. APPrO argued that competition cannot exist for a product that is not yet introduced and pointed out that when it is introduced it will be available only from Ontario utilities as ex-Ontario suppliers will be constrained by the nomination windows specified by the North American Energy Standards Board (NAESB).

The NGEIR Decision stated:

> With respect to APPrO's position, the Board is not convinced that high deliverability storage service is a different product. High deliverability storage may be a new service, but it is a particular way of using physical storage, which still depends upon the physical parameters of working capacity and deliverability.

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

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

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

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

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

Findings

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

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

With respect to the Rate 316 issue, on page 70 of the NGEIR Decision, the Board stated:

> The Board notes that Enbridge committed to offer Rate 316, whether or not the Tecumseh enhancement project goes ahead, and to price it on cost pass-through basis. The Board expects Enbridge to fulfill this commitment.

The Board further noted:

> The Board will refrain from regulating the rates for new storage services, including Enbridge's high deliverability service from the Tecumseh storage enhancement and Rate 316, and Union's high deliverability storage, F24-S, UPBS and DPBS services.

At the motion hearing, APPrO indicated that it wanted the Board to issue an order requiring Enbridge to do what the Board has asked them to do, that is, to offer Rate 316 on a cost pass-through basis. Enbridge has already committed to offering this service in the Settlement Proposal and the Board has already noted this commitment in this decision. This panel does not see any further value to issuing an order stating the same.

However, there is some ambiguity with respect to Rate 316. The NGEIR decision seems to indicate that the Board will refrain from regulating Rate 316. Even so, the Enbridge NGEIR Rate Order has a tariff sheet for Rate 316 with storage rates for maximum deliverability of 1.2% of contracted storage space. This seems to indicate that Rate 316 is regulated for 1.2% deliverability storage and the Board has refrained from regulating rates for deliverability higher than 1.2%. It is difficult to recognize this distinction from the NGEIR Decision.

For these reasons, the Board finds that APPrO has raised a question as to the correctness of the order or decision in respect of the Rate 316 issue and that a review

panel of the Board could decide that the decision or order should be varied (by way of clarification or otherwise), cancelled or suspended.

Section M: Aggregate Excess Method of Allocating Storage

In the NGEIR proceeding, Union had proposed the "aggregate excess" method in allocating storage to its customers. The aggregate excess method is the difference between the amount of gas a customer is expected to use in the 151-day winter period and the amount that would be consumed in that period based on the customer's average daily consumption over the entire year. Kitchener had proposed two alternative methodologies. The NGEIR Decision approved Union's proposal.

Kitchener argued that the NGEIR Decision failed to take into account that the aggregate excess methodology, because it uses normal weather to estimate a customer's storage allocation, unnecessarily increases utility rates and therefore offends the requirement of just and reasonable rates under sections 2 and 36 of the Act. Kitchener also argued that there is no evidence to support the Board's conclusion that aggregate excess meets the reasonable load balancing requirements of the Kitchener utility.

Union argued that these issues were fully considered by the Board in its NGEIR Decision and that Kitchener has not brought forward any new evidence or any new circumstances; it is simply attempting to reargue its case.

Findings

With respect to Kitchener's allegation that the NGEIR panel did not consider the impact on rates, the Board notes that the record in the NGEIR proceeding indicates that the impact on utility rates was examined extensively. The issue was raised in Kitchener's pre-filed evidence at page 5 and again at page 14. The transcript from the proceeding also indicates that there was extensive discussion on costs (Volume 12, pages 39-133) during cross examination and additional undertakings were filed on the topic. The record also indicates that the previous Panel questioned the witnesses specifically with respect to the costs and a utility's exposure to winter spot purchases (Volume 12, pages 183-184). The issue was again raised by Kitchener in argument (Volume 17, page 153)

and once again questions were posed to Kitchener's counsel by the NGEIR panel (Volume 17, pages 159-164).

The NGEIR Decision (pages 93 to 95) refers to Kitchener's alternatives and arguments and deals with that issue squarely when it finds that:

> The Board does not agree that the allocation of cost based storage should be determined assuming colder than normal weather or that it should be designed to provide protection against a cold snap in April. To do so would result in in-franchise customers as a group being allocated more cost-based storage than they are expected to use in most winters. As noted in 6.2.2, the Board concludes that the objective of the allocation of cost-based storage space is to assign an amount that is reasonably in line with what a customer is likely to require. In the Board's view, that supports continuing the assumption of normal weather.

In the Board's view, the record clearly indicates that this issue was thoroughly examined in the NGEIR proceeding. The Board believes that Kitchener's claim that the NGEIR panel failed to account for the fact the aggregate excess methodology increases utility rates is without merit. Kitchener presented no new evidence or new circumstances which would convince the Board that this issue is reviewable.

To support its second claim (i.e. the Board erred because there is no evidence to support the Board's conclusion that the aggregate excess method meets the reasonable load balancing requirements of the Kitchener utility), Kitchener argues that the Board ignored the evidence which suggests that the actual allocation to Kitchener over the past 6 years has been at a contractual level which is 10.6% higher than aggregate excess.

The Board disagrees. Contrary to Kitchener's assertions, the NGEIR Decision clearly considers the fact that Kitchener's aggregate excess amount is 10.6% lower than its current contracted amount. Specifically, the NGEIR Decision states:

> The current contract expires March 31, 2007 and Kitchener is seeking a long-term storage contract with Union effective April 1, 2007. It is concerned that its allocation of cost-based storage in a new contract will be restricted to the amount calculated under the aggregate excess method. Kitchener's current aggregate excess amount is 3.01 million GJ, 10.6% lower than the amount of cost-based storage in its current contract.

The NGEIR Decision also states:

> The issue is whether Kitchener has made a compelling case that its use of storage is so different from the assumed use underlying the aggregate excess method that Union should be required to develop an allocation method just for Kitchener. The Board finds Kitchener has not successfully made that argument.

In view of the above, the Board is convinced that the NGEIR panel considered the evidence before it. The claim by Kitchener that the Board ignored the evidence in question and based its decision only on the evidence provided by Union is demonstrably incorrect.

Kitchener also claims that the Board committed an error in fact by stating (at page 85 of the NGEIR Decision), that Enbridge uses a methodology similar to that of Union's. In the Boards' view, this reference is simply to provide context and is clearly referring to the mathematical formula used to calculate the storage allocation. It is certainly not a matter capable of altering the decision on this point.

In conclusion, the Board finds that the matters raised by Kitchener are not reviewable.

Section N: Orders

Having made its determinations on the Motions, the Board considers it appropriate to make the following Orders.

The Board Orders That:

The Motions for Review are hereby dismissed without further hearing, with the following exceptions. The Board's findings on Union's 100 PJ cap on cost-based storage for in-franchise customers and the additional storage requirements for in-franchise gas-fired generators are reviewable for the purposes set out in this Decision.

Section O: Cost Awards

The eligible parties shall submit their cost claims by June 5, 2007. A copy of the cost claim must be filed with the Board and one copy is to be served on both Union and Enbridge. The cost claims must be done in accordance with section 10 of the Board's Practice Direction on Cost Awards.

Union and Enbridge will have until June 19, 2007 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

The party whose cost claim was objected to will have until June 26, 2007 to make a reply submission as to why their cost claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on both Union and Enbridge.

DATED at Toronto, May 22, 2007

Original signed by

_____

Pamela Nowina
Presiding Member and Vice Chair

Original signed by

_____

Paul Vlahos
Member

Original signed by

_____

Cathy Spoel
Member

TAB 4

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

EB-2019-0242

Association of Major Power Consumers in Ontario

Application to Review Amendments to the Market Rules made by the Independent Electricity System Operator

DECISION ON COST RESPONSIBILITY & COST ELIGIBILITY

November 12, 2019

On September 26, 2019, the Association of Major Power Consumers in Ontario (AMPCO) filed a Notice of Appeal (Application) asking the Ontario Energy Board (OEB) to review and issue an order revoking amendments to the market rules made by the Independent Electricity System Operator (IESO) (MR-00439-R00 to -R05) (Amendments), and referring the Amendments back to the IESO for further consideration. The Amendments enable the evolution of the IESO's Demand Response Auction into a Transitional Capacity Auction (TCA), including allowing participation by certain generators. The Application was filed under section 33 of the *Electricity Act*, *1998*, S.O. 1998, c. 15, (Schedule B) (Act).

AMPCO also filed a Notice of Motion requesting an order of the OEB staying the operation of the Amendments pending the completion of the OEB's review (Motion).

On October 18, 2019, the OEB issued Procedural Order No. 2 (PO 2) which indicated, among other things, that the OEB will make cost awards available in this proceeding to eligible parties and granted intervenor status to all parties that requested it, as follows:

- Advanced Energy Management Alliance (AEMA)
- Association of Power Producers of Ontario (APPrO)
- Capital Power Corporation (Capital Power)
- Kingston CoGen Limited Partnership (KCLP)
- Rodan Energy Solutions Inc. (Rodan)
- School Energy Coalition (SEC)
- TransAlta Corporation (TransAlta)
- IESO (filed on October 17, 2019)

In its Application, AMPCO requested eligibility to seek recovery of its reasonably incurred costs of the Application and the Motion. APPrO and SEC also applied for cost award eligibility in their Notices of Intervention. KCLP, in its Notice of Intervention, submitted that, if AMPCO is granted cost award eligibility, it should also be eligible for an award of costs.

In PO 2, the OEB stated that it intends for the IESO to bear the costs of this proceeding, as this is consistent with the overall legislative scheme, which contemplates a review by the OEB as a potential last step in relation to market rule amendments. The OEB also noted that this was the outcome in the two preceding applications before the OEB to review market rule amendments: EB-2013-0029 / EB-2013-0010 (RES Proceeding) and EB-2007-0040 (Ramp Rate Proceeding).

The OEB did, however, allow the IESO an opportunity to make a submission if it wished to object to bearing the costs of this proceeding, and if it wished to object to any of the requests for cost award eligibility made by AMPCO, APPrO, SEC and KCLP. Provision was also made for a reply submission by any party whose request for cost award eligibility was the subject of an objection by the IESO.

Cost Responsibility

Submissions of the Parties

IESO Submission

On October 23, 2019, the IESO filed its submission (IESO Submission) stating, among other things, that the OEB should defer its determination of who should be responsible for costs until the end of this proceeding, when the OEB will be better positioned to decide whether ‘special circumstances’ have been demonstrated that warrant a departure from the presumptive rule that (i) applicants bear their own costs, and (ii) parties pursuing their own commercial interests are not eligible for cost awards.

The IESO submitted that the two earlier market rule review proceedings are not dispositive with respect to cost responsibility in an application under section 33 of the Act, and further submitted that it disagreed with the OEB’s view, as expressed in PO 2, that making the IESO responsible for costs is consistent with the legislative scheme. The IESO Submission also noted that the decision on cost responsibility in the RES Proceedings was deferred until later in the proceeding after submissions by the parties.

AMPCO Submission

AMPCO filed its reply to the IESO Submission on October 29, 2019 (AMPCO Submission) in which it submitted, among other things, that in the two previous proceedings considering market rule amendments - the RES Proceeding and the Ramp Rate Proceeding - the OEB determined that the IESO should bear the costs of the proceeding. AMPCO noted that, in the Ramp Rate Proceeding, the OEB determined that it would not be appropriate to defer its decision on cost responsibility and made the same determination in the later RES Proceeding. The AMPCO Submission stated that, if the OEB defers determination of who should bear the costs of this proceeding, AMPCO would be forced to abandon the Application as it is not set up or funded to absorb the costs of a regulatory proceeding.

APPrO Submission

On October 29, 2019, APPrO filed its submission (APPrO Submission) in response to the IESO Submission. APPrO stated that deferring a decision on cost responsibility until after the determination of the Application would be unreasonable as APPrO (and other entities that have no ability to recover costs from ratepayers or market participants) would be exposed to uncertain cost risk, which will hamper its participation in this proceeding. APPrO also stated that deferring a decision on cost responsibility could discourage intervenors from seeking intervenor status to bring legitimate concerns and important perspectives to the OEB in other proceedings.

OEB Findings

The OEB has determined that the IESO shall bear the costs of this proceeding. The OEB remains of the view that this is consistent with the overall legislative scheme, which contemplates a review by the OEB as a potential last step in relation to market rule amendments.

The OEB acknowledges that the IESO is responsible for making and amending the market rules, but the fact remains that market rule amendments are subject to oversight by the OEB under section 33 of the Act (among others) and that this oversight is part of the legislative scheme even if as a proceeding separate from the IESO's market rule amendment process.

Based on the above, the OEB also does not see any compelling reasons to defer its decision on cost responsibility, as requested by the IESO.

Cost Award Eligibility

Submissions of the Parties

IESO Submission

The IESO objected to the cost award eligibility requests made by AMPCO, APPrO and KCLP on the basis that these parties are pursuing their own commercial interests and are *prima facie* not eligible for cost awards under the OEB's *Practice Direction on Cost Awards* (Practice Direction). Alternatively, the IESO requested that the OEB defer its decision on cost award eligibility until the end of the proceeding, as it had done in the RES Proceeding.

AMPCO Submission

In its submission, AMPCO referred to the Ramp Rate Proceeding where it was found eligible for recovery of its reasonably incurred costs on the basis that:

(a) Its application raised legitimate issues for the OEB's consideration.
(b) As market participants, members of AMPCO are in fact participating in the funding of cost awards in the matter through their payment of the IESO's administrative costs in accordance with the market rules.

The AMPCO Submission argued that the same is true of the Application.

The AMPCO Submission conceded that, in this Application, AMPCO is primarily acting in the interests of its members who offer, or who might offer, Demand Response resources, but noted that AMPCO is also advocating the interests of its members – including those who do not offer Demand Response resources – as electricity consumers. AMPCO submitted that the observations in the Ramp Rate Proceeding regarding AMPCO are instructive and analogous in respect of AMPCO's cost eligibility in this proceeding.

APPrO Submission

APPrO noted that it is a representative of generators who are directly impacted by this proceeding. APPrO submitted that it is uniquely positioned to provide the OEB with useful context as to how its members view the TCA, their ability to participate in it and other issues of asset utilization tied to the TCA. APPrO further stated that there are therefore special circumstances that warrant a finding that it should be afforded cost eligibility in accordance with section 3.07 of the Practice Direction.

SEC and KCLP

Two other intervenors also requested cost award eligibility in their Notices of Intervention – SEC and KCLP – although these two parties did not make submissions in response to PO 2 or the IESO Submission.

The IESO did not object to SEC's request for cost award eligibility.

In its Notice of Intervention, KCLP stated that if AMPCO is granted cost award eligibility, the OEB should do the same for KCLP in light of special circumstances under section 3.07 of the Practice Direction; namely, to ensure that one category of capacity resources (Demand Response resources) do not receive preferential treatment in this process over another competing category of capacity resources (electricity generators), given that both resources are direct competitors in the upcoming TCA.

OEB Findings

The OEB has determined that SEC, as a representative of ratepayers, is eligible for an award of costs under section 3.03 of the Practice Direction.

By contrast, all other parties requesting cost award eligibility are *prima facie* not eligible for an award of costs under section 3.05 of the Practice Direction, AMPCO by reason of being the applicant, and KCLP and APPrO by reason of being or representing, respectively, generators. However, section 3.07 of the Practice Direction contemplates that a party that falls into one of the categories listed in section 3.05 can be eligible in special circumstances.

The OEB has determined that AMPCO is eligible for an award of costs despite being the applicant. This is consistent with the OEB's view that the review process under section 33 of the Act is part of the overall market rule amendment process. The OEB also notes that, as market participants, members of AMPCO are participating in the funding of cost awards in this case through their payment of the IESO's fees in accordance with the market rules.

The OEB believes that, in this case, the views of generators with respect to the Amendments will be important to the OEB's determination of how the Amendments may fare relative to the criteria set out in section 33(9) of the Act. The OEB has therefore determined that APPrO is also eligible for an award of costs.

Although KCLP is also a generator, the OEB has determined that it is not eligible for an award of costs. The OEB is of the view that, given its broad membership, APPrO should be in a position to provide the OEB with generator perspectives on the Amendments, including the perspective of KCLP's owner Northland Power, which according to APPrO's website is a member of APPrO. Even if and to the extent that KCLP's current situation is different from the situation of other generators, it does not appear to the OEB based on KCLP's intervention letter that such difference translates to a unique perspective on the Amendments that speaks directly to the determinations to be made by the OEB on an application under section 33 of the Act.

Being eligible to apply for an award of costs is not a guarantee of recovery of any costs claimed. Cost awards are made by way of OEB order at the end of a hearing. Cost eligible parties should be aware that the OEB will not generally allow the recovery of costs for the attendance of more than one representative of any party, unless a compelling reason is provided when cost claims are filed.

The OEB also takes this opportunity to remind all of the parties that, as in all cases, parties are expected to act responsibly and that the OEB retains discretion to address irresponsible or inappropriate participation through the cost award process.

Parties should not engage in detailed exploration of items that do not appear to be relevant or material. In making its decision on costs, the OEB will consider whether parties made reasonable efforts to ensure that their participation in the hearing was focused on relevant and material issues.

DATED at Toronto, **November 12, 2019**

ONTARIO ENERGY BOARD

Original signed by

Christine E. Long
Registrar and Board Secretary

TAB 5

The Canadian Radio-Television and Telecommunications Commission *Appellant*

v.

Bell Canada *Respondent*

and

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

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

File No.: 20525.

1989: February 21; 1989: June 22.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

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

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

c.

Bell Canada *Intimée*

et

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

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

N° du greffe: 20525.

1989: 21 février; 1989: 22 juin.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

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

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

1986. In 1985, given Bell Canada's improved financial situation, the CRTC ordered Bell Canada to file revised tariffs effective as of September 1, 1985. As a result of this decision, Bell Canada was forced to charge the rates effective before its application for a rate increase filed in March 1984. These new rates too were interim in nature. In October 1986, notwithstanding Bell Canada's request to withdraw its initial application for a general rate increase, the CRTC reviewed Bell Canada's financial situation and the appropriateness of its rates. The CRTC established appropriate levels of profitability for Bell Canada on the basis of its return on equity and found that, in 1985 and 1986, it had earned excess revenues for a total of $206 million. Although Bell Canada always charged rates approved by the CRTC, the latter decided that Bell Canada could not retain these excess revenues and ordered it to distribute the excess revenues through a one-time credit to be granted to certain classes of customers. On appeal, the Federal Court of Appeal quashed the CRTC's order. This appeal is to determine (1) whether the CRTC had the legislative authority to review the revenues made by Bell Canada during the period when interim rates were in force; and (2) whether the CRTC had jurisdiction to make an order compelling Bell Canada to grant a one-time credit to its customers.

Held: The appeal should be allowed.

The CRTC's decisions are subject to appeal to the Federal Court of Appeal on questions of law or jurisdiction by virtue of s. 68(1) of the *National Transportation Act*. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise. Here, Bell Canada is challenging the CRTC's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the CRTC when it makes interim decisions. This question cannot be solved without an analysis of the procedural scheme created by the *Railway Act* and the *National Transportation Act*. The decision impugned by Bell Canada is therefore not a decision which falls within the CRTC's area of special expertise and is pursuant to s. 68(1) subject to review in accordance with the principles governing appeals. Indeed, the CRTC was not created for the purpose of interpreting the *Railway Act* or the *National Transportation Act* but

faire générale de Bell Canada sur la base des données financières complètes pour les années 1985 et 1986. En 1985, devant l'amélioration de la situation financière de Bell Canada, le CRTC a ordonné à Bell Canada de déposer des révisions tarifaires devant entrer en vigueur le 1er septembre 1985. Suite à cette décision, Bell Canada a dû imposer les taux en vigueur avant que sa demande de majoration tarifaire ne soit déposée en mars 1984. Ces nouveaux taux étaient eux aussi provisoires. En octobre 1986, sans égard à la demande de Bell Canada de retirer sa requête initiale en majoration tarifaire générale, le CRTC a examiné la situation financière de Bell Canada et le caractère raisonnable de ses taux. Le CRTC a établi les niveaux de rentabilité appropriés pour Bell Canada en se fondant sur le taux de rendement de l'avoir moyen des détenteurs d'actions ordinaires et a conclu qu'en 1985 et 1986 elle avait accumulé des revenus excédentaires de 206 millions de dollars. Même si Bell Canada a toujours imposé des taux approuvés par le CRTC, ce dernier a jugé que Bell Canada ne pouvait conserver ces revenus excédentaires et lui a ordonné de les rembourser à certaines catégories d'abonnés au moyen d'un crédit forfaitaire. En appel, la Cour d'appel fédérale a annulé l'ordonnance du CRTC. Le présent pourvoi vise à déterminer (1) si la loi permettait au CRTC d'examiner les revenus réalisés par Bell Canada pendant la période où les taux provisoires étaient en vigueur et (2) si le CRTC avait compétence pour rendre une ordonnance enjoignant à Bell Canada d'accorder un crédit forfaitaire à ses abonnés.

Arrêt: Le pourvoi est accueilli.

Les décisions du CRTC sont susceptibles d'appel à la Cour d'appel fédérale sur une question de droit ou de compétence en vertu du par. 68(1) de la *Loi sur les transports nationaux*. Bien qu'un tribunal d'appel puisse être en désaccord avec le tribunal d'instance inférieure sur des questions qui relèvent du pouvoir d'appel prévu par la loi, les tribunaux devraient faire preuve de retenue envers l'opinion du tribunal d'instance inférieure sur des questions qui relèvent parfaitement de son champ d'expertise. En l'espèce, Bell Canada conteste la décision du CRTC sur une question de droit et de compétence relative à la nature des décisions provisoires et à l'étendue des pouvoirs conférés au CRTC lorsqu'il rend des décisions provisoires. On ne peut résoudre cette question sans analyser le régime de procédure créé par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux*. La décision contestée par Bell Canada ne relève donc pas du champ d'expertise particulier du CRTC et est, conformément au par. 68(1), susceptible de contrôle selon les principes qui régissent les appels. En effet, le CRTC a été créé non pas dans le but d'interpréter la *Loi*

rather to ensure, amongst other duties, that telephone rates are always "just and reasonable".

The fixing of tolls and tariffs that are "just and reasonable" necessarily involves, albeit in a seemingly indirect manner, the regulation of the revenues of the regulated entity as the administrative tribunal must balance the interests of the customers with the necessity of ensuring that the regulated entity is allowed to make sufficient revenues to finance the costs of the services it sells to the public. In fixing fair and reasonable tolls in this case, the CRTC had to take into consideration the level of revenues needed by Bell Canada.

The CRTC had the power to revisit the period during which interim rates were in force. Such power is implied in the power to make interim orders within the statutory scheme established by the *Railway Act* and the *National Transportation Act*. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. It is the interim nature of the order which makes it subject to further retrospective directions. The circumstances under which they are granted also explains and justifies their being, unlike final orders, subject to retrospective review and remedial orders. Interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are traditionally granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. To hold in this case that the interim rates could not be reviewed would not only be contrary to the nature of interim orders, it would also frustrate and subvert the CRTC's order approving interim rates which clearly indicates its intention to review the rates charged for 1985 up to the date of the final decision.

There should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. The added flexibility provided by the power to make interim orders is meant to

sur les chemins de fer ou la *Loi sur les transports nationaux*, mais plutôt pour assurer, notamment, que les tarifs de téléphone soient toujours «justes et raisonnables».

L'établissement de taxes et de tarifs «justes et raisonnables» comporte forcément, quoique d'une façon apparemment indirecte, la réglementation des revenus de l'organisme réglementé puisque le tribunal administratif doit soupeser les intérêts des consommateurs en fonction de la nécessité que l'organisme réglementé puisse gagner des revenus suffisants pour financer les coûts des services qu'il vend au public. Pour fixer des taxes qui soient justes et raisonnables en l'espèce, le CRTC devait tenir compte des besoins en revenus de Bell Canada.

Le CRTC avait le pouvoir de réexaminer la période pendant laquelle les taux provisoires étaient en vigueur. Le pouvoir de rendre des ordonnances provisoires comporte implicitement ce pouvoir dans le régime juridique établi par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux*. Il relève de la nature même des ordonnances provisoires que leur effet ainsi que toute divergence entre une ordonnance provisoire et une ordonnance définitive peuvent être révisés et corrigés dans l'ordonnance définitive. C'est le caractère provisoire de l'ordonnance qui la rend sujette à de plus amples instructions rétroactives. Les circonstances dans lesquelles elles sont accordées expliquent et justifient davantage pourquoi elles peuvent, contrairement aux ordonnances définitives, être révisées rétroactivement et faire l'objet d'une ordonnance de redressement. Les ordonnances tarifaires provisoires qui traitent de manière interlocutoire de questions devant faire l'objet d'une décision finale sont traditionnellement accordées pour éviter que le requérant ne subisse les effets néfastes de la longueur des procédures. Ces décisions sont prises rapidement à partir d'éléments de preuve qui seraient souvent insuffisants pour rendre une décision finale. Conclure en l'espèce que les taux provisoires ne pouvaient pas être révisés serait non seulement contraire à la nature des ordonnances provisoires, mais encore aurait pour effet de contrecarrer l'ordonnance dans laquelle le CRTC a approuvé les taux provisoires et a indiqué clairement son intention de réviser les taux imposés à compter de 1985 jusqu'à la date de la décision finale.

La stabilité financière des services publics réglementés ne devrait soulever aucune difficulté lorsqu'il s'agit de traiter du pouvoir de réexaminer des tarifs provisoires. L'objet même des tarifs provisoires est de dissiper les risques d'instabilité financière liés à la longueur des procédures devant un tribunal administratif. La souplesse supplémentaire que procure le pouvoir de rendre

foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable.

Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the CRTC is empowered to make orders as of the date at which the initial application was made or as of the date the CRTC initiated the proceedings of its own motion. The power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, the rate review process does not begin at the date of the final hearing; instead, the rate review begins when the CRTC sets interim rates pending a final decision on the merits.

Finally, once it is decided that the CRTC has the power to revisit the period during which interim rates were in force for the purpose of ascertaining whether they were just and reasonable, it follows that it has the power to make a remedial order where, in fact, these rates were not just and reasonable. In any event, s. 340(5) of the *Railway Act* provides a sufficient statutory basis for the power to make remedial orders including an order to give a one-time credit to certain classes of customers. While the one-time credit order will not necessarily benefit the customers who were actually billed excessive rates, once it is found that the CRTC has the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue.

Cases Cited

Approved: *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705; **referred to**: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245; *Alberta Union of Provincial Employees v. Board of Governors of Olds College*, [1982] 1 S.C.R. 923; *Re Ontario Public Service Employees Union and Forer* (1985), 52 O.R. (2d) 705; *Re City of Ottawa and Ottawa Professional Firefight-*

des ordonnances provisoires vise à favoriser la stabilité financière tout au long du processus de réglementation. Le pouvoir de réexaminer la période pendant laquelle les taux provisoires étaient en vigueur est forcément accessoire à ce pouvoir sans lequel les ordonnances provisoires rendues dans des situations d'urgence peuvent causer un préjudice irréparable et contrecarrer l'objectif fondamental d'assurer le maintien de taux justes et raisonnables.

Même si le Parlement a décidé d'adopter un système de réglementation des tarifs de téléphone par voie d'approbation, la souplesse additionnelle que procure le pouvoir de rendre des ordonnances provisoires indique que le CRTC peut rendre des ordonnances effectives à compter de la date du dépôt de la demande initiale ou de la date à laquelle le CRTC a entrepris les procédures de son propre chef. Le pouvoir de rendre des ordonnances provisoires comporte forcément le pouvoir de modifier en entier la structure des taux établie antérieurement dans l'ordonnance définitive. Par conséquent, le processus de révision des taux ne commence pas à la date de la dernière audience; la révision des taux commence plutôt lorsque le CRTC établit des taux provisoires en attendant qu'une décision finale sur le fond soit rendue.

Enfin, une fois qu'il a été décidé que le CRTC a le pouvoir de réexaminer la période pendant laquelle les taux provisoires étaient en vigueur pour déterminer s'ils sont justes et raisonnables, il s'ensuit qu'il a le pouvoir d'ordonner un redressement lorsqu'en fait ces taux n'étaient pas justes et raisonnables. En tout état de cause, le par. 340(5) de la *Loi sur les chemins de fer* fournit un fondement légal suffisant au pouvoir d'ordonner un redressement, y compris celui d'ordonner l'attribution d'un crédit forfaitaire à certaines catégories d'abonnés. Bien que ce ne soit pas les abonnés à qui des taux excessifs ont été facturés qui vont nécessairement profiter du crédit forfaitaire ordonné, une fois qu'on a conclu que le CRTC a le pouvoir d'ordonner un redressement, la nature et l'étendue de cette ordonnance relèvent de sa compétence en l'absence d'une disposition législative expresse sur cette question.

Jurisprudence

Arrêt approuvé: *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705; **arrêts mentionnés**: *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *Douglas Aircraft Co. of Canada Ltd. c. McConnell*, [1980] 1 R.C.S. 245; *Alberta Union of Provincial Employees c. Conseil d'administration de Olds College*, [1982] 1 R.C.S. 923; *Re Ontario Public Service Employees Union and Forer* (1985), 52 O.R. (2d) 705; *Re City of Ottawa and*

ers' Association, Local 162 (1987), 58 O.R. (2d) 685; *Greyhound Lines of Canada Ltd. v. Canadian Human Rights Commission* (1987), 78 N.R. 192; *Canadian Pacific Ltd. v. Canadian Transport Commission* (1987), 79 N.R. 13; *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] S.C.R. 837; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *City of Calgary v. Madison Natural Gas Co.* (1959), 19 D.L.R. (2d) 655; *United States v. Fulton*, 475 U.S. 657 (1986); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978); *Regina v. Board of Commissioners of Public Utilities* (1966), 60 D.L.R. (2d) 703; *Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission* (1978), 87 D.L.R. (3d) 727; *Nova v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437.

Statutes and Regulations Cited

CRTC Telecommunications Rules of Procedure, SOR/79-554, Parts III, VII.
National Energy Board Act, R.S.C., 1985, c. N-7, s. 64.
National Transportation Act, R.S.C., 1985, c. N-20, ss. 49, 52, 60(2), 61, 66, 68(1).
Railway Act, R.S.C., 1985, c. R-3, ss. 334 to 340.

APPEAL from a judgment of the Federal Court of Appeal, [1988] 1 F.C. 296, 43 D.L.R. (4th) 30, 78 N.R. 58, quashing an order of the CRTC. Appeal allowed.

Raynold Langlois, *Q.C.*, *Greg Van Koughnett* and *Luc Huppé*, for the appellant.

Gérald R. Tremblay, *Q.C.*, and *Michel Racicot*, for the respondent.

Graham Garton, for the intervener the Attorney General of Canada.

Janet Yale, for the intervener the Consumer's Association of Canada.

Kenneth G. Engelhart, for the intervener the Canadian Business Telecommunications Alliance.

Michael Ryan, for the intervener CNCP Telecommunications.

Andrew Roman and *Robert Horwood*, for the intervener the National Anti-Poverty Organization.

Ottawa Professional Firefighters' Association, Local 162 (1987), 58 O.R. (2d) 685; *Greyhound Lines of Canada Ltd. c. Commission canadienne des droits de la personne* (1987), 78 N.R. 192; *Canadien Pacifique Ltée c. Commission canadienne des transports* (1987), 79 N.R. 13; *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] R.C.S. 837; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] R.C.S. 186; *City of Calgary v. Madison Natural Gas Co.* (1959), 19 D.L.R. (2d) 655; *United States v. Fulton*, 475 U.S. 657 (1986); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978); *Regina v. Board of Commissioners of Public Utilities* (1966), 60 D.L.R. (2d) 703; *Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission* (1978), 87 D.L.R. (3d) 727; *Nova c. Amoco Canada Petroleum Co.*, [1981] 2 R.C.S. 437.

Lois et règlements cités

Loi sur l'Office national de l'énergie, L.R.C. (1985), chap. N-7, art. 64.
Loi sur les chemins de fer, L.R.C. (1985), chap. R-3, art. 334 à 340.
Loi sur les transports nationaux, L.R.C. (1985), chap. N-20, art. 49, 52, 60(2), 61, 66, 68(1).
Règles de procédure du CRTC en matière de télécommunications, DORS/79-554, parties III, VII.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1988] 1 C.F. 296, 43 D.L.R. (4th) 30, 78 N.R. 58, qui a annulé une ordonnance du CRTC. Pourvoi accueilli.

Raynold Langlois, *c.r.*, *Greg Van Koughnett* et *Luc Huppé*, pour l'appelant.

Gérald R. Tremblay, *c.r.*, et *Michel Racicot*, pour l'intimée.

Graham Garton, pour l'intervenant le procureur général du Canada.

Janet Yale, pour l'intervenante l'Association des consommateurs du Canada.

Kenneth G. Engelhart, pour l'intervenante l'Alliance canadienne des télécommunications de l'entreprise.

Michael Ryan, pour l'intervenante Télécommunications CNCP.

Andrew Roman et *Robert Horwood*, pour l'intervenante l'Organisation nationale anti-pauvreté.

The judgment of the Court was delivered by

GONTHIER J.—The present case is an appeal against a decision of the Federal Court of Appeal which quashed one of the orders made by the appellant in Telecom Decision CRTC 86-17 ("Decision 86-17"). The impugned order compelled the respondent to distribute $206 million in excess revenues earned in the years 1985 and 1986 through a one-time credit to be granted to certain classes of customers. The respondent does not contest the factual findings on which Decision 86-17 is based nor does it claim that this order would unduly prejudice its financial position. None of the other orders made in Decision 86-17 are challenged.

The appellant claims that the purpose of the challenged order was to provide telephone users with a remedy against interim rates which turned out to be excessive on the basis of the findings of fact made by the appellant following a final hearing held in the summer of 1986 for the purpose of setting rates to be charged by the respondent in the years 1985 and following. These findings of fact are reported in Decision 86-17. Since this case turns on the proper characterization of the one-time credit order made in Decision 86-17, it is important to describe the procedural history of the administrative proceedings which led to the order now contested by the respondent.

I—The facts

On March 28, 1984, the respondent applied for a general rate increase under Part VII of the *CRTC Telecommunications Rules of Procedure*, SOR/79-554, which provides for a summary public process to deal with special applications. The respondent claimed that the Canadian Government's restraint program restricting rate increases of federally regulated utilities to 5 per cent and 6 per cent was sufficient justification to dispense with the normal procedure for general rate increase applications set out in Part III of the *CRTC Telecommunications Rules of Procedure*. In Telecom Decision CRTC 84-15, the appellant rejected this application on the ground that the

Version française du jugement de la Cour rendu par

LE JUGE GONTHIER—Il s'agit d'un pourvoi contre un arrêt de la Cour d'appel fédérale qui a annulé une des ordonnances rendues par l'appelant dans la décision Télécom CRTC 86-17 («décision 86-17»). Aux termes de l'ordonnance contestée, l'intimée devait rembourser à certaines catégories d'abonnés les revenus excédentaires de 206 millions de dollars réalisés au cours des années 1985 et 1986 au moyen d'un crédit forfaitaire. L'intimée ne conteste pas les conclusions de fait sur lesquelles se fonde la décision 86-17 et ne prétend pas que cette ordonnance porterait un préjudice indu à sa situation financière. Les autres ordonnances que comporte la décision 86-17 ne sont pas contestées.

L'appelant prétend que le but de l'ordonnance contestée était d'accorder aux usagers du téléphone un redressement contre des tarifs provisoires qui se sont révélés excessifs compte tenu des conclusions de fait auxquelles l'appelant est parvenu à la suite d'une dernière audience tenue au cours de l'été 1986 pour établir les taux à être imposés par l'intimée à compter de 1985. Ces conclusions de fait sont énoncées dans la décision 86-17. Puisque cette affaire porte sur la façon dont il faut qualifier l'ordonnance de crédit forfaitaire contenue dans la décision 86-17, il est important de faire l'historique des procédures administratives à l'origine de l'ordonnance que conteste maintenant l'intimée.

I—Les faits

Le 28 mars 1984, l'intimée a présenté une demande de majoration tarifaire générale en vertu de la partie VII des *Règles de procédure du CRTC en matière de télécommunications*, DORS/79-554, qui prescrit une procédure sommaire publique pour les requêtes particulières. L'intimée a prétendu que le programme de restriction du gouvernement canadien qui limite les majorations tarifaires des services publics régis par le gouvernement fédéral à 5 pour 100 et 6 pour 100 constituait un motif suffisant de se soustraire à la procédure normalement applicable aux demandes de majoration tarifaire générale, procédure qui est énoncée à la partie III des *Règles de procédure du CRTC en*

respondent had failed to use the appropriate procedure set out in Part III of these rules. However, the appellant indicated that if the respondent was to suffer financial prejudice as a result of the delays involved in preparing for the more complex procedure set out in Part III, it could always apply for interim relief pending a hearing and a decision on the merits (at pp. 8-9):

> The Commission recognizes that, in 1985 and beyond, in the absence of rate relief, a deterioration in the Company's financial position could occur. In this regard, if the Company should find it necessary to file an application for a general rate increase under Part III of the Rules, the Commission would be prepared to schedule a public hearing on such an application in the fall of 1985. Should Bell consider it necessary to seek rate increases to come into effect earlier in 1985 than this schedule would allow, it may of course apply for interim relief. In the event Bell were to seek such interim relief, it would be open to the Company to suggest that the Commission's traditional test for determining interim rate applications is overly restrictive in light of the Commission hearing schedule and to put forward proposals for an alternative test for consideration. [Emphasis added.]

On September 4, 1984, the respondent filed an application for a general rate increase based on 1985 financial data which would come into effect on January 1, 1986. At the same time, the respondent applied for an interim rate increase of 3.6 per cent.

In Telecom Decision CRTC 84-28 ("Decision 84-28") rendered on December 19, 1984, the appellant set out the following policy previously adopted in Telecom Decision CRTC 80-7 with respect to the granting of interim rate increases (at pp. 8-9):

> The Commission's policy concerning interim rate increases, enunciated in Decision 80-7, is as follows:
>
> > The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim

matière de télécommunications. Dans la décision Télécom CRTC 84-15, l'appelant a rejeté cette demande pour le motif que l'intimée n'avait pas suivi la procédure appropriée de la partie III des Règles. L'appelant a toutefois indiqué que si l'intimée devait subir un préjudice financier par suite des délais que comporte la mise en œuvre de la procédure plus complexe établie à la partie III, elle pourrait toujours demander un redressement provisoire en attendant l'audience et une décision sur le fond (aux pp. 8 et 9):

> Le Conseil reconnaît que, en 1985 et au-delà, en l'absence de redressement tarifaire, la position financière de la compagnie pourrait se détériorer. À cet égard, le Conseil serait disposé à tenir une audience publique portant sur une telle requête à l'automne de 1985 si la compagnie juge nécessaire de déposer une requête en majoration tarifaire générale en vertu de la partie III des Règles. Si Bell estimait nécessaire d'obtenir une majoration tarifaire devant entrer en vigueur plus tôt en 1985 que ne le permettrait cet échéancier, elle pourrait, il va sans dire, demander un redressement provisoire de ses tarifs. Le cas échéant, et Bell jugeant trop restrictive, compte tenu du calendrier des audiences du Conseil, la méthode que celui-ci utilise pour déterminer s'il y a lieu d'agréer une requête en majoration tarifaire provisoire, il lui serait loisible de proposer des solutions de rechange aux fins d'étude par le Conseil. [Je souligne.]

Le 4 septembre 1984, l'intimée a présenté une demande de majoration tarifaire générale fondée sur ses données financières de 1985, cette majoration devant entrer en vigueur le 1er janvier 1986. Au même moment, elle a demandé une majoration tarifaire provisoire de 3,6 pour 100.

Dans la décision Télécom CRTC 84-28 («décision 84-28») du 19 décembre 1984, l'appelant a énoncé la politique suivante qui avait été adoptée antérieurement dans la décision Télécom CRTC 80-7 relativement aux demandes de majoration tarifaire provisoire (aux pp. 8 et 9):

> La politique du Conseil en matière de majorations tarifaires provisoires, énoncée dans la décision 80-7, est la suivante:
>
> > Le Conseil estime que, en principe, les majorations tarifaires générales ne devraient être accordées qu'à la suite du processus public complet envisagé à la partie III de ses Règles de procédure en matière de télécommunications. En l'absence d'un tel processus, les majorations tarifaires générales ne devraient pas,

basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an applicant absent a general interim increase. [Emphasis added.]

The respondent argued that its financial situation warranted an interim rate increase and did not question the reasonableness of this policy. The appellant agreed with the respondent's submission that, in the absence of interim rate increases, it might suffer from serious financial deterioration and awarded an interim rate increase of 2 per cent. In this decision, the appellant required the respondent to prepare for a hearing to be held in the fall of 1985 for the purpose of assessing the respondent's application for a final order increasing its rates on the basis of two test years, 1985 and 1986. Decision 84-28 also states at p. 10 the reasons why the interim rate increase was set at 2 per cent:

In determining the amount of interim rate increases required under the circumstances, the Commission has taken into account the following factors:

1) While the company stated that an interest coverage ratio of 4.0 times is required, the Commission regards the maintenance of the coverage ratio of 3.8 times, projected by the Company for 1984, as sufficient for the purposes of this interim decision.

2) With regard to the level of ROE ["return on equity"], the Commission is of the view that, for 1985, and subject to review in the course of its consideration of the Company's general rate increase application in the fall of 1985, 13.7% is appropriate for determining the amount of rate increases to be permitted pursuant to this interim increase application.

3) With regard to the Company's 1985 expense forecasts, the Commission notes that the inflation factor used by the Company is higher than the current consensus forecast of the inflation rate for 1985 and considers that Bell's forecast of its 1985 Operating Expenses could be overestimated by approximately $25 million.

selon le Conseil, être accordées même de façon intérimaire sauf si le requérant peut démontrer qu'il s'agit de circonstances spéciales. Ce pourrait être le cas, par exemple, si de longs délais dans le traitement d'une requête entraînaient une dégradation sérieuse de la situation financière d'un requérant à moins d'une majoration tarifaire intérimaire. [Je souligne.]

L'intimée a soutenu que sa situation financière justifiait une majoration tarifaire provisoire, sans remettre en question le caractère raisonnable de cette politique. L'appelant s'est dit d'accord avec l'argument de l'intimée selon lequel, en l'absence de majorations tarifaires provisoires, la situation financière de celle-ci pourrait se détériorer gravement et il lui a accordé une majoration tarifaire provisoire de 2 pour 100. Dans cette décision, l'appelant a exigé que l'intimée se prépare à une audience qui serait tenue à l'automne 1985 en vue d'examiner sa demande d'ordonnance définitive en majoration de ses tarifs sur la base de deux années témoins, soit 1985 et 1986. Les motifs pour lesquels la majoration tarifaire provisoire a été fixée à 2 pour 100 sont exposés à la p. 10 de la décision 84-28:

Lorsqu'il a étudié le pourcentage de majorations tarifaires provisoires requis dans les circonstances, le Conseil a tenu compte des facteurs suivants:

1) Même si la compagnie a déclaré qu'un coefficient de couverture de l'intérêt de 4,0 est nécessaire, le Conseil considère le maintien d'un coefficient de couverture de 3,8, prévu par la compagnie pour 1984, comme suffisant aux fins de la présente décision provisoire.

2) Pour ce qui est du niveau du RAO [«taux de rendement de l'avoir moyen des détenteurs d'actions ordinaires»], le Conseil estime que, pour 1985, et sous réserve d'un examen au cours de l'étude qu'il fera de la requête en majoration tarifaire générale de la compagnie à l'automne 1985, 13,7 % sont suffisants pour déterminer le pourcentage des majorations tarifaires à autoriser en vertu de la présente requête en majoration tarifaire provisoire.

3) Quant aux prévisions des dépenses de la compagnie pour 1985, le Conseil note que le facteur d'inflation utilisé par la compagnie est supérieur aux prévisions actuelles du taux d'inflation pour 1985 et considère que les prévisions de dépenses d'exploitation de Bell pour cette année-là pourraient être surestimées d'environ 25 millions de dollars.

Taking the above factors into account, the Commission has decided that an interim rate increase of 2% for all services in respect of which rate increases were requested by the Company in the interim application is appropriate at this time. This increase is expected to generate additional revenues of $65 million from 1 January 1985 to 31 December 1985. To permit the review of the Company's 1985 revenue requirement by the Commission at the fall 1985 public hearing, Bell is directed to file its 4 June 1985 general rate increase application on the basis of two test years, 1985 and 1986. [Emphasis added.]

Compte tenu des facteurs susmentionnés, le Conseil a jugé qu'une majoration tarifaire provisoire de 2 % pour tous les services pour lesquels des hausses tarifaires sont demandées par la compagnie dans la requête provisoire convient pour l'instant. Cette augmentation devrait générer des recettes additionnelles de 65 millions de dollars entre le 1er janvier 1985 et le 31 décembre 1985. Pour lui permettre d'examiner les besoins en matière de revenus de la compagnie pour 1985 à l'audience publique qui aura lieu à l'automne de 1985, le Conseil ordonne à Bell de déposer sa requête en majoration tarifaire générale du 4 juin 1985 sur la base de deux années témoin, soit 1985 et 1986. [Je souligne.]

The reasons set out in the appellant's decision indicate that the interim rate increase was calculated on the basis of financial information provided by the respondent without placing this information under the scrutiny normally associated with hearings made under Part III of the *CRTC Telecommunications Rules of Procedure*. Furthermore, the appellant clearly expressed the intention to review this interim rate increase in its final decision on the respondent's application for a general rate increase on the basis of financial information for the years 1985 and 1986. Given the content of the appellant's final decision, it is also important to note that the 2 per cent interim rate increase was calculated on the assumption that the respondent's return on equity for 1985 should be 13.7 per cent, subject to review in the final decision.

Dans les motifs de sa décision, l'appelant indique que le calcul de la majoration tarifaire provisoire s'est fait à partir des données financières fournies par l'intimée sans que celles-ci aient fait l'objet de l'examen minutieux qui est normalement associé aux audiences tenues en application de la partie III des *Règles de procédure du CRTC en matière de télécommunications*. En outre, l'appelant a clairement manifesté l'intention de réviser cette majoration tarifaire provisoire dans sa décision finale portant sur la demande de majoration tarifaire générale présentée par l'intimée sur la base des données financières relatives aux années 1985 et 1986. Compte tenu des motifs de la décision finale de l'appelant, il est également important de souligner que le calcul de la majoration tarifaire provisoire de 2 pour 100 a été fait à partir de l'hypothèse que le taux de rendement de l'avoir moyen des détenteurs d'actions ordinaires en 1985 devrait être de 13,7 pour 100, sous réserve d'une révision lors de la décision finale.

The respondent's financial situation later improved thereby reducing the necessity to proceed with an early hearing for the purpose of obtaining a general and final rate increase. By letter dated March 20, 1985, the respondent asked for this hearing to be postponed to February 10, 1986, suggesting however that the 2 per cent interim increase be given immediate final approval. In CRTC Telecom Public Notice 1985-30 dated April 16, 1985, the appellant granted the postponement but refused to grant the final approval requested by the respondent without further investigation into this matter. The Commission added that it would monitor the respondent's

La situation financière de l'intimée s'étant ultérieurement améliorée, il n'était plus aussi nécessaire de procéder sans tarder à l'audience pour obtenir une majoration tarifaire générale et définitive. Dans une lettre en date du 20 mars 1985, l'intimée a demandé que cette audience soit reportée au 10 février 1986 tout en suggérant que la majoration provisoire de 2 pour 100 soit approuvée immédiatement de façon définitive. Dans l'avis public Télécom CRTC 1985-30 en date du 16 avril 1985, l'appelant a accordé le report, mais a refusé d'accorder l'approbation définitive demandée par l'intimée sans procéder à un examen plus poussé de la question. Le Conseil a ajouté qu'il surveillerait

financial situation on a monthly basis and ordered the filing of monthly statements (at p. 4):

In view of the improving trend in the Company's financial performance, the Commission further directs as follows:

Bell Canada is to provide to the Commission for the balance of 1985, within 30 days after the end of each month, commencing with April 1985, a full year forecast of revenues and expenses on a regulated basis for the year 1985, together with the estimated financial ratios including the projected regulated return on common equity.

The Commission will monitor the Company's financial performance during 1985, in order to determine whether any further rate action may be necessary. [Emphasis added.]

Again, the appellant clearly expressed its intention to prevent abuse of interim rate increases.

After a review of the July financial information filing ordered in CRTC Telecom Public Notice 1985-30, the appellant asked the respondent to provide reasons why the interim rate increase of 2 per cent should remain in force given its improved financial situation. The respondent was unable to convince the appellant that this interim increase remained necessary to avoid financial deterioration and was accordingly ordered to file revised tariffs effective as of September 1, 1985, at pp. 4-5 of Telecom Decision CRTC 85-18:

In view of the improving trend in Bell's financial performance, the Commission is satisfied that the company no longer needs the 2% interim increases which were awarded in Decision 84-28 in order to avoid serious financial deterioration in 1985. Accordingly, Bell is directed to file revised tariffs forthwith, with an effective date of 1 September 1985, to suspend these increases.

In arriving at its decision the Commission has estimated that, with interim rates in effect for the complete year, the company would earn an ROE ["return on equity"] of approximately 14.5% in 1985, a return well in excess of the 13.7% considered appropriate for determining the 2% interim rate increases. The Commission also projected that interest coverage would be approximately 3.9 times. This would improve on the actual 1984 coverage

la situation financière de l'intimée sur une base mensuelle et a ordonné la production d'états financiers mensuels (à la p. 4):

Compte tenu de la tendance à l'amélioration du rendement financier de la compagnie, le Conseil lui ordonne de plus ce qui suit:

Bell Canada présentera au Conseil, pour le reste de 1985, et ce 30 jours après la fin de chaque mois à compter d'avril 1985, des prévisions des revenus et dépenses pour une année complète, sur une base réglementée pour l'année 1985, ainsi que des ratios financiers estimatifs, y compris le taux de rendement réglementé de l'avoir des détenteurs d'actions ordinaires.

Le Conseil surveillera le rendement financier de la compagnie pour 1985, afin d'établir s'il y a lieu ou non de prendre d'autres mesures de tarification. [Je souligne.]

L'appelant a encore une fois manifesté clairement son intention d'empêcher qu'on abuse des demandes de majoration tarifaire provisoire.

Après avoir examiné les états financiers du mois de juillet, déposés conformément à l'avis public Télécom CRTC 1985-30, l'appelant a demandé à l'intimée d'expliquer pourquoi la majoration tarifaire provisoire de 2 pour 100 devrait être maintenue compte tenu de l'amélioration de sa situation financière. L'intimée n'a pas su convaincre l'appelant que cette majoration provisoire était toujours nécessaire pour éviter une détérioration de sa situation financière et l'appelant lui a donc ordonné de déposer des révisions tarifaires devant entrer en vigueur le 1er septembre 1985, aux pp. 4 et 5 de la décision Télécom CRTC 85-18:

Compte tenu de la tendance à l'amélioration du rendement financier de Bell, le Conseil est convaincu que la compagnie n'a plus besoin des majorations provisoires de 2 % consenties dans la décision 84-28, afin d'éviter une grave détérioration de sa situation financière en 1985. En conséquence, il est ordonné à Bell de déposer sans délai des révisions tarifaires devant entrer en vigueur le 1er septembre 1985, qui suspendent ces majorations.

Pour en arriver à sa décision, le Conseil a estimé que, si les tarifs provisoires avaient été en vigueur toute l'année, la compagnie obtiendrait un RAO [«taux de rendement de l'avoir moyen des détenteurs d'actions ordinaires»] d'environ 14,5 % en 1985, soit un rendement bien au-dessus du taux de 13,7 % qui avait été considéré comme étant convenable pour l'établissement des majorations tarifaires provisoires de 2 %. Le Conseil a égale-

of 3.8 times. These estimates are not significantly different from Bell's current expectation of its 1985 results.

The Commission will make its final determination of Bell's revenue requirement for the year 1985 in the general rate proceeding currently scheduled to commence with an application to be filed on 10 February 1986. [Emphasis added.]

As a result of this decision, the respondent was forced to charge the rates effective before its application for a rate increase filed on March 28, 1984. However, even though the rates effective as of September 1, 1985, were numerically identical to the rates in force under the previous final decision prior to the interim increase, these new rates remained interim in nature. In fact, the appellant reiterated its intention to review the rates actually charged during 1985 and 1986.

On October 31, 1985, the respondent decided not to proceed with its application for a general rate increase and requested that its procedures be withdrawn. In CRTC Telecom Public Notice 1985-85, the appellant decided to review the respondent's financial situation and therefore the appropriateness of its rates notwithstanding its request to withdraw its initial application for a general rate increase (at pp. 3-4):

In light of these forecasts and the degree to which the company's rate structure is expected to be considered in separate proceedings, Bell stated that it wished to refrain from proceeding with the application scheduled to be filed on 10 February 1986. Accordingly, the company requested the withdrawal of the amended Directions on Procedure issued by the Commission in Public Notice 1985-30.

The Commission notes that the appropriate rate of return for Bell has not been reviewed in an oral hearing since the proceeding which culminated in *Bell Canada—General Increase in Rates*, Telecom Decision CRTC 81-15, 20 September 1981 (Decision 81-15). The Commission considers that, given Bell's current forecasts, it would be appropriate to review the company's cost of equity for the years 1985, 1986 and 1987 in the proceeding scheduled for 1986. Such a review would allow consideration of the changing financial and economic circumstances which will prevail at that time.

ment prévu que le coefficient de couverture de l'intérêt serait d'environ 3,9, ce qui serait supérieur au coefficient réel de 1984 qui s'établissait à 3,8. Ces estimations ne sont pas sensiblement différentes des prévisions courantes des résultats de Bell pour 1985.

Le Conseil rendra sa décision définitive pour ce qui est des besoins en matière de revenus de Bell pour l'année 1985 dans le cadre de l'instance portant sur des majorations tarifaires générales qui devrait débuter par le dépôt d'une requête, le 10 février 1986. [Je souligne.]

Suite à cette décision, l'intimée a dû imposer les taux en vigueur avant le dépôt, le 28 mars 1984, de sa demande de majoration tarifaire. Cependant, même si les taux devant entrer en vigueur le 1er septembre 1985 étaient numériquement identiques aux taux en vigueur qui avaient été fixés dans la dernière décision finale rendue avant la majoration provisoire, ces nouveaux taux étaient toujours provisoires. D'ailleurs, l'appelant a exprimé de nouveau son intention de réviser les taux effectivement imposés au cours des années 1985 et 1986.

Le 31 octobre 1985, l'intimée a décidé de ne pas déposer sa demande de majoration tarifaire générale et a demandé que sa procédure soit retirée. Dans l'avis public Télécom CRTC 1985-85, l'appelant a décidé d'examiner la situation financière de l'intimée et, par conséquent, le caractère raisonnable de ses taux sans égard à sa demande de retrait de sa requête initiale en majoration tarifaire générale (aux pp. 3 et 4):

En raison de ces prévisions et de la mesure dans laquelle la structure tarifaire de la compagnie devrait être étudiée dans des instances distinctes, Bell a déclaré qu'elle désirait s'abstenir de l'instance, sa requête devant être déposée le 10 février 1986. La compagnie a donc demandé le retrait des Directives sur la procédure modifiées telles que publiées par le Conseil dans l'avis public 1985-30.

Le Conseil constate que le taux de rendement approprié de Bell n'a pas été examiné dans le cadre d'une audience avec comparution depuis l'instance qui a abouti à la décision Télécom CRTC 81-15 du 20 septembre 1981 intitulée *Bell Canada—Majoration tarifaire générale* (la décision 81-15). Le Conseil estime qu'étant donné les prévisions actuelles de Bell, il conviendrait d'examiner le coût des capitaux propres de la compagnie pour les années 1985, 1986 et 1987 à l'occasion de l'audience devant avoir lieu en 1986. Cet examen permettrait

nomic conditions since Decision 81-15 and the impact of Bell's corporate reorganization on its rate of return. The Commission notes that other issues arising from the reorganization would also be addressed in the 1986 proceeding. [Emphasis added.]

d'étudier les conditions financières et économiques qui ont changé depuis la décision 81-15 ainsi que les répercussions de la réorganisation de Bell sur son taux de rendement. Le Conseil note que d'autres questions résultant de la réorganisation pourraient également faire l'objet d'un examen lors de l'audience de 1986. [Je souligne.]

This interim decision indicates that the appellant wished to continue the original rate review procedure initiated by the respondent in March of 1984. Thus, the rates in force as of January 1, 1985 until the final decision now challenged by the respondent were interim rates subject to review.

Il ressort de cette décision provisoire que l'appelant voulait que la procédure initiale de révision tarifaire demandée par l'intimée au mois de mars 1984 se poursuive. Les taux qui étaient en vigueur le 1er janvier 1985 jusqu'à la décision finale que conteste maintenant l'intimée étaient donc provisoires et susceptibles de révision.

The hearing which led to the final decision lasted from June 2 to July 16, 1986 and this final decision, Decision 86-17, was rendered on October 14, 1986. In this decision, the appellant first established appropriate levels of profitability for the respondent on the basis of its return on equity. The appellant then calculated the amount of excess revenues earned by the respondent in 1985 and 1986 along with the necessary reduction in forecasted revenues for 1987. It was found that the respondent had earned excess revenues of $63 million in 1985 and $143 million in 1986 for a total of $206 million (at p. 93):

L'audience qui est à l'origine de la décision finale s'est déroulée du 2 juin au 16 juillet 1986 et cette décision finale, soit la décision 86-17, a été rendue le 14 octobre 1986. Dans cette décision, l'appelant a d'abord établi les niveaux de rentabilité appropriés pour l'intimée en se fondant sur le taux de rendement de l'avoir moyen des détenteurs d'actions ordinaires. L'appelant a ensuite procédé au calcul des revenus excédentaires réalisés par l'intimée en 1985 et 1986, ainsi que de la réduction nécessaire des revenus prévus pour 1987. On a constaté, à la p. 93, que l'intimée avait accumulé des revenus excédentaires de 63 millions de dollars en 1985 et de 143 millions de dollars en 1986 pour un total de 206 millions de dollars:

After making further adjustments for the compensation for temporarily transferred employees and including the regulatory treatment for non-integral subsidiary and associated companies, the Commission has determined that a revenue requirement reduction of $234 million would provide the company with a 12.75% ROE ["return on equity"] on a regulated basis in 1987. Similarly, the Commission has determined that $143 million is the required revenue reduction to achieve the upper end of the permissible ROE on a regulated basis in 1986, 13.25%. With respect to 1985, after making the adjustments set out in this decision, the Commission has determined that Bell earned excess revenues in the amount of $63 million, the deduction of which would provide 13.75%, the upper end of the permissible ROE on a regulated basis.

Après avoir apporté d'autres rajustements de manière à tenir compte du dédommagement pour les employés provisoirement mutés et avoir inclus le traitement réglementaire des filiales non partie intégrante et des compagnies associées, le Conseil a établi qu'une réduction des besoins en revenus de l'ordre de 234 millions de dollars donnerait à la compagnie un taux de RAO [«taux de rendement de l'avoir moyen des détenteurs d'actions ordinaires»] de 12,75 % sur une base réglementée pour 1987. De même, le Conseil a établi qu'une réduction de 143 millions de dollars des besoins en revenus s'impose pour atteindre l'échelon supérieur du taux de RAO autorisé sur une base réglementée pour 1986, soit 13,25 %. Pour ce qui est de 1985, après avoir apporté les rajustements exposés dans la présente décision, le Conseil a établi que Bell a obtenu des revenus excédentaires de 63 millions de dollars, dont la défalcation donnerait un taux de 13,75 %, soit l'échelon supérieur du taux de RAO autorisé sur une base réglementée.

It is important to note that the evidence and the arguments presented by the interested parties as well as interveners were carefully scrutinized by the appellant at pp. 77 to 92 of Decision 86-17. It is for all practical purposes impossible to engage in such a meticulous and painstaking analysis of all relevant facts when faced with an application for interim relief. Finally, it is also useful to note that the permissible return on equity of 13.7 per cent allowed by the appellant in its interim decision, Decision 84-28, was increased to 13.75 per cent in Decision 86-17. Thus, the appellant realized that the interim rates approved for 1985 yielded greater rates of return than initially anticipated and that the rate of return actually recorded for that year even exceeded the greater allowable rate of return fixed in the final decision, Decision 86-17. Such differences between projected and actual rates of return are common and certainly call for a high level of flexibility in the exercise of the appellant's regulatory duties.

Il importe de souligner que l'appelant a examiné minutieusement la preuve et les arguments présentés par les parties intéressées et les intervenants aux pp. 77 à 92 de la décision 86-17. Il est à toutes fins pratiques impossible d'entreprendre un examen aussi minutieux et soigné de tous les faits pertinents en présence d'une demande de redressement provisoire. Enfin, il convient également de souligner que le taux de rendement de l'avoir moyen des détenteurs d'actions ordinaires de 13,7 pour 100 que l'appelant avait autorisé dans sa décision provisoire, la décision 84-28, a été majoré à 13,75 pour 100 dans la décision 86-17. L'appelant a donc constaté que les taux provisoires approuvés pour l'année 1985 avaient généré des taux de rendement supérieurs à ce qui avait été prévu à l'origine et que le taux de rendement effectivement obtenu pour cette année était même supérieur à celui qui avait été autorisé dans la décision finale, soit la décision 86-17. De telles différences entre les taux de rendement projetés et réels sont courantes et exigent certainement de l'appelant un niveau de souplesse très élevé dans l'exercice de ses fonctions de réglementation.

The Commission decided that the respondent could not retain excess revenues earned on the basis of interim rates and issued the order now challenged by the respondent in order to provide a remedy for this situation. This order reads as follows, at pp. 95-96:

> Concerning the excess revenues for the years 1985 and 1986, the Commission directs that the required adjustments be made by means of a one-time credit to subscribers of record, as of the date of this decision, of the following local services: residence and business individual, two-party and four-party line services; PBX trunk services; centrex lines; enhanced exchange-wide dial lines; exchange radio-telephone service; service-system service and information system access line service. The Commission directs that the credit to each subscriber be determined by pro-rating the sum of the excess revenues for 1985 and 1986 of $206 million in relation to the subscriber's monthly recurring billing for the specified local services provided as of the date of this decision. The Commission further directs that the work necessary to implement the above directives be commenced immediately and that the billing adjustments be completed by no later than 31 January 1987. Finally, the Commission directs the company to file a report detail-

Le Conseil a décidé que l'intimée ne pouvait conserver les revenus excédentaires réalisés à partir des taux provisoires et il a rendu l'ordonnance maintenant contestée par l'intimée, en vue de remédier à la situation. L'ordonnance est rédigée ainsi, aux pp. 95 et 96:

> Dans le cas des revenus excédentaires pour les années 1985 et 1986, le Conseil ordonne que les rajustements qui s'imposent soient apportés au moyen d'un crédit forfaitaire aux abonnés inscrits, à la date de la présente décision, aux services locaux suivants: résidentiel et d'affaires de ligne individuelle, de ligne à deux et à quatre abonnés; de ligne principale de PBX; de ligne centrex; de ligne perfectionnée de circonscription; du service radiotéléphonique de circonscription; du service de réseau dépendant; et du service de ligne d'accès aux services informatiques. Le Conseil ordonne que le crédit à chaque abonné soit calculé au prorata de la somme des revenus excédentaires pour 1985 et 1986, soit 206 millions de dollars, en fonction des états de compte périodiques mensuels de l'abonné pour les services locaux spécifiés fournis à la date de la présente décision. Le Conseil ordonne de plus que le travail nécessaire pour mettre en œuvre les directives ci-dessus soit amorcé immédiatement et que les rajustements aux états de compte soient

ing the implementation of the credit by no later than 16 February 1987.

The Commission considers that 1987 excess revenues are best dealt with through rate reductions to be effective 1 January 1987. [Emphasis added.]

Although the respondent always charged rates approved by the appellant, the appellant found it necessary to make sure that its assessment of allowable revenues for 1985 and 1986 would be complied with. The appellant argues that the order now challenged by the respondent was the most efficient way of redistributing these excess revenues to the respondent's customers even though they would not necessarily be refunded to those who actually had to pay the rates in force during that period.

It is therefore obvious that the appellant only allowed interim rates to be charged after January 1, 1985 on the assumption that it would review these rates in a hearing to be held in order to deal with an application for a general rate increase. Every interim decision which led to Decision 86-17 confirmed the appellant's intention to review the interim rates at the final hearing. Finally, the interim rates were ordered for the purpose of preventing any serious deterioration in the respondent's financial situation while awaiting for a final decision on the merits. Of necessity, these interim rates were determined on the basis of incomplete evidence presented by the respondent. It cannot be said that the purpose of the interim rate increase ordered by the appellant was to serve as a temporary final decision.

II—The Issue and the Arguments Raised by the Parties

In this Court as well as in the Federal Court of Appeal, the parties have agreed that the only issue arising out of the facts of this case is whether the appellant had jurisdiction to order the respondent to grant a one-time credit to its customers. The appellant's findings of fact, its determination with respect to the respondent's revenue requirements for 1985 and 1986 and its computation of the

faits le 31 janvier 1987 au plus tard. Enfin, le Conseil ordonne en outre à la compagnie de lui présenter, au plus tard le 16 février 1987, un rapport donnant le détail de la mise en œuvre du crédit.

a Le Conseil estime que le meilleur moyen de traiter les revenus excédentaires de 1987 est par la voie de réductions tarifaires devant entrer en vigueur le 1er janvier 1987. [Je souligne.]

b Même si l'intimée a toujours imposé les taux approuvés par l'appelant, ce dernier a jugé nécessaire de s'assurer que son évaluation des revenus autorisés pour 1985 et 1986 soit respectée. L'appelant soutient que l'ordonnance que conteste maintenant l'intimée constituait le moyen le plus efficace de redistribuer ces revenus excédentaires aux abonnés de l'intimée même si ceux qui ont réellement eu à payer les taux en vigueur au cours de cette période n'obtiendraient pas nécessairement de remboursement.

Il ressort donc clairement que l'appelant n'a autorisé les taux provisoires à être imposés après le 1er janvier 1985 qu'en supposant qu'il réviserait ces taux au cours d'une audience qui devait porter sur une demande de majoration tarifaire générale. Toutes les décisions provisoires à l'origine de la décision 86-17 ont confirmé l'intention de l'appelant de réviser les taux provisoires à l'audience finale. Enfin, les taux provisoires ont été fixés par ordonnance afin d'empêcher que la situation financière de l'intimée ne se détériore gravement avant qu'une décision finale sur le fond soit rendue. Il va de soi que ces taux provisoires avaient été fixés à partir d'éléments de preuve incomplets présentés par l'intimée. On ne peut affirmer que la majoration tarifaire provisoire ordonnée par l'appelant avait pour objet de servir temporairement de décision finale.

II—La question en litige et les arguments des parties

Devant cette Cour et la Cour d'appel fédérale, les parties ont convenu que la seule question en litige qui découle des faits de l'espèce est de savoir si l'appelant avait compétence pour ordonner à l'intimée d'accorder à ses abonnés un crédit forfaitaire. L'intimée ne conteste pas les conclusions de fait de l'appelant, ni sa décision quant aux besoins en revenus de l'intimée pour les années 1985 et

amount of excess revenues earned during this period are not contested by the respondent. In my opinion, this issue can be divided in two subquestions:

1– whether the appellant had the legislative authority to review the revenues made by the respondent during the period when interim rates were in force;

2– whether the appellant had jurisdiction to make an order compelling the respondent to grant a one-time credit to its customers.

The main arguments raised by the appellant can be summarized as follows:

1– the *Railway Act* and the *National Transportation Act* grant the appellant the power to review the period during which a regulated entity was allowed to charge interim rates for the purpose of comparing the revenues earned during this period to the appropriate level of revenues set in the final decision;

2– the power to make a one-time credit order is necessarily ancillary to the power to review the period during which interim rates were charged and the appellant has jurisdiction to determine the most efficient method of providing a remedy in cases where excess revenues were made.

The main arguments raised by the respondent can be summarized as follows:

1– the power to set tolls and tariffs does not include the power to review and make orders with respect to the respondent's level of revenues;

2– the appellant has no power to make a one-time credit order with respect to revenues earned as a result of having charged rates which the respondent, by virtue of the *Railway Act*, was obliged to charge, whether these rates were set by interim order or by a final order.

Counsel for the National Anti-Poverty Organization ("NAPO") has also argued that the appel-

1986, ni son calcul du montant des revenus excédentaires gagnés au cours de cette période. À mon avis, il est possible de diviser cette question en deux:

1– La loi permettait-elle à l'appelant d'examiner les revenus réalisés par l'intimée pendant la période où les taux provisoires étaient en vigueur?

2– L'appelant avait-il compétence pour rendre une ordonnance obligeant l'intimée à accorder à ses abonnés un crédit forfaitaire?

Les principaux arguments soulevés par l'appelant peuvent être résumés de la façon suivante:

1– la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux* confèrent à l'appelant le pouvoir d'examiner les revenus gagnés par un organisme réglementé pendant la période où ce dernier était autorisé à imposer des taux provisoires pour comparer ces revenus avec le niveau approprié de revenus établi dans la décision finale;

2– le pouvoir d'ordonner un crédit forfaitaire est nécessairement accessoire au pouvoir d'examiner la période au cours de laquelle les tarifs provisoires ont été imposés et l'appelant a compétence pour décider quel est le meilleur moyen d'accorder un redressement lorsque des revenus excédentaires ont été gagnés.

Les principaux arguments soulevés par l'intimée peuvent être résumés de la façon suivante:

1– le pouvoir d'établir des taxes et des tarifs ne comprend pas le pouvoir d'examiner et de rendre des ordonnances quant au niveau de revenus de l'intimée;

2– l'appelant n'a aucun pouvoir d'ordonner un crédit forfaitaire quant aux revenus gagnés par suite de l'imposition de taux que l'intimée était obligée d'imposer en vertu de la *Loi sur les chemins de fer*, que ces taux soient fixés dans une ordonnance provisoire ou définitive.

L'avocat de l'Organisation nationale anti-pauvreté («ONAP») a également soutenu que les déci-

lant's decisions concerning the interpretation of statutes which grant them jurisdiction to deal with certain matters are entitled to curial deference and cannot be reviewed unless they are patently unreasonable. This argument raises the issue of the scope of review allowed by s. 68(1) of the *National Transportation Act*, R.S.C., 1985, c. N-20 (now the *National Telecommunications Powers and Procedures Act*), and must be dealt with prior to any analysis of the relevant statutory provisions claimed to be the source of the appellant's jurisdiction to make the one-time credit order found in Decision 86-17.

The present case raises difficult questions of statutory interpretation and it will therefore be necessary to examine the relevant provisions of the *Railway Act*, R.S.C., 1985, c. R-3, and the *National Transportation Act* before moving to a detailed analysis of the decision of the Federal Court of Appeal and the arguments raised by the parties.

III—Relevant Legislative Provisions

The appellant derives its power to regulate the telephone industry from ss. 334 to 340 of the *Railway Act* ("Provisions Governing Telegraphs and Telephones") and from ss. 47 *et seq.* of the *National Transportation Act* ("General Jurisdiction and Powers in Respect of Railways"). The *Railway Act* sets out the general criteria concerning the setting of rates and tariffs to be charged by telephone utility companies whereas the *National Transportation Act* sets out the appellant's procedural powers in the context of decisions concerning, amongst other matters, telephone rates and tariffs.

Sections 335(1), 335(2) and 335(3) of the *Railway Act* (formerly ss. 320(2) and 320(3)) state the principle upon which the appellant's regulatory authority rests, namely that telephone rates and tariffs are subject to approval by the appellant, cannot be changed without its prior authorization and may be revised at any time by the appellant:

sions de l'appelant concernant l'interprétation des lois qui lui confèrent compétence en certaines matières sont sujettes à retenue judiciaire et ne peuvent être révisées à moins d'être manifestement déraisonnables. Cet argument soulève la question de l'étendue de la révision que permet le par. 68(1) de la *Loi sur les transports nationaux*, L.R.C. (1985), chap. N-20 (maintenant la *Loi nationale sur les attributions en matière de télécommunications*), et doit être traité préalablement à toute analyse des dispositions législatives pertinentes que l'on prétend être à l'origine du pouvoir de l'appelant d'ordonner dans la décision 86-17 un crédit forfaitaire.

La présente affaire soulève d'épineuses questions d'interprétation législative et il sera donc nécessaire d'examiner les dispositions pertinentes de la *Loi sur les chemins de fer*, L.R.C. (1985), chap. R-3, et de la *Loi sur les transports nationaux* avant d'entreprendre une analyse détaillée de la décision de la Cour d'appel fédérale et des arguments des parties.

III—Les dispositions législatives pertinentes

Le pouvoir de l'appelant de réglementer le secteur du téléphone provient des art. 334 à 340 de la *Loi sur les chemins de fer* («Dispositions relatives aux télégraphes et aux téléphones») et des art. 47 et suiv. de la *Loi sur les transports nationaux* («Compétence générale en matière de chemins de fer»). La *Loi sur les chemins de fer* définit les critères généraux concernant l'établissement des taux et des tarifs que peuvent imposer les compagnies de téléphone, tandis que la *Loi sur les transports nationaux* énonce les pouvoirs de l'appelant en matière de procédure visant les décisions qui portent notamment sur les taux et les tarifs du service téléphonique.

Le pouvoir de réglementation de l'appelant trouve son fondement aux par. 335(1), (2) et (3) de la *Loi sur les chemins de fer* (les anciens par. 320(2) et (3)) lesquels prévoient que les taux et tarifs de téléphone sont subordonnés à l'agrément de l'appelant, ne peuvent être modifiés sans son consentement préalable et peuvent être révisés en tout temps par l'appelant:

335. (1) Notwithstanding anything in any other Act, all telegraph and telephone tolls to be charged by a company, other than a toll for the transmission of a message intended for reception by the general public and charged by a company licensed under the *Broadcasting Act*, are subject to the approval of the Commission, and may be revised by the Commission from time to time.

(2) The company shall file with the Commission tariffs of any telegraph or telephone tolls to be charged, and the tariffs shall be in such form, size and style, and give such information, particulars and details, as the Commission by regulation or in any particular case prescribes.

(3) Except with the approval of the Commission, the company shall not charge and is not entitled to charge any telegraph or telephone toll in respect of which there is default in filing under subsection (2), or which is disallowed by the Commission . . . . [Emphasis added.]

The most important requirement governing the appellant's power to set telephone rates is found in s. 340(1) of the *Railway Act* which provides that all such rates must be "just and reasonable":

340. (1) All tolls shall be just and reasonable and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate. [Emphasis added.]

Section 340 also prohibits discriminatory telephone rates and gives the appellant the power to suspend, postpone, or disallow a tariff of tolls which is contrary to ss. 335 to 340 and substitute a satisfactory tariff of tolls in lieu thereof.

Finally, s. 340(5) of the *Railway Act* gives the appellant the power to make orders with respect to traffic, tolls and tariffs in all matters not expressly covered by s. 340:

340. . . .

(5) In all other matters not expressly provided for in this section, the Commission may make orders with respect to all matters relating to traffic, tolls and tariffs or any of them.

Although the power granted by s. 340(5) could be construed restrictively by the application of the

335. (1) Nonobstant les dispositions de toute autre loi, toutes les taxes de télégraphe et de téléphone que peut exiger une compagnie, à l'exception des taxes exigées pour la transmission de messages destinés à être captés par le public en général, par une compagnie titulaire d'une licence en vertu de la *Loi sur la radiodiffusion*, sont subordonnées à l'agrément de la Commission, qui peut les réviser.

(2) La compagnie dépose au bureau de la Commission les tarifs des taxes de télégraphe ou de téléphone à exiger, et ces tarifs ont la forme, le modèle et le format et contiennent les renseignements et les détails que la Commission prescrit par voie de règlement ou dans un cas particulier.

(3) À moins d'avoir obtenu le consentement de la Commission, la compagnie ne peut exiger de taxe de télégraphe ou de téléphone lorsque le tarif n'a pas été ainsi déposé ou que la Commission l'a rejeté . . . [Je souligne.]

La condition la plus importante qui régit le pouvoir de l'appelant d'établir les taux de téléphone se trouve au par. 340(1) de la *Loi sur les chemins de fer* qui prévoit que tous ces taux doivent être «justes et raisonnables»:

340. (1) Toutes les taxes doivent être justes et raisonnables et doivent toujours, dans des circonstances et conditions sensiblement analogues, en ce qui concerne tout le trafic du même type suivant le même parcours, être imposées également à tous au même taux. [Je souligne.]

L'article 340 interdit également l'établissement de taux de téléphone discriminatoires et confère à l'appelant le pouvoir de suspendre, de différer ou de rejeter un tarif de taxes contraire aux art. 335 à 340 et d'y substituer un tarif satisfaisant.

Enfin, le par. 340(5) de la *Loi sur les chemins de fer* confère à l'appelant le pouvoir de rendre des ordonnances en ce qui concerne le trafic, les taxes et les tarifs, dans toute autre matière non visée expressément par l'art. 340:

340. . . .

(5) En toute autre matière non expressément prévue par le présent article, la Commission peut prendre des ordonnances au sujet de tout ce qui a trait au trafic, aux taxes et aux tarifs, ou à l'un deux.

Bien qu'il soit possible d'interpréter restrictivement le pouvoir conféré par le par. 340(5) en

ejusdem generis rule, I do not think that such an interpretation is warranted. Section 340(5) is but one indication of the legislator's intention to give the appellant all the powers necessary to ensure that the principle set out in s. 340(1), namely that all rates should be just and reasonable, be observed at all times.

Sections 47 *et seq.* of the *National Transportation Act* set out, from a procedural point of view, the appellant's jurisdiction with respect to the powers granted by the *Railway Act*. Section 49(1) gives the appellant jurisdiction over all complaints concerning compliance with the Act while s. 49(3) gives the appellant jurisdiction over all matters of fact or law for the purposes of the *Railway Act* and of ss. 47 *et seq.* of the *National Transportation Act*. However, s. 68(1) provides an appeal to the Federal Court of Appeal, with leave, on any question of law or jurisdiction and it is under this provision that the respondent has challenged Decision 86-17.

In many respects, ss. 47 *et seq.* of the *National Transportation Act* have been designed to further the policy objectives and the regulatory scheme set out in the *Railway Act* governing the approval of telephone rates and tariffs. Thus, s. 52 of the *National Transportation Act* gives the appellant the power to inquire into, hear or determine, of its own motion or upon request from the Minister, any matter which it has the right to inquire into, hear or determine under the *Railway Act*:

52. The Commission may, of its own motion, or shall, on the request of the Minister, inquire into, hear and determine any matter or thing that, under this part or the *Railway Act*, it may inquire into, hear and determine upon application or complaint, and with respect thereto has the same powers as, on any application or complaint, are vested in it by this Act.

Section 52 is therefore the corollary of the appellant's power to "revise [tolls] .... from time to time" found in s. 335(1) of the *Railway Act*. Thus, the appellant has the power to review, from time to

application de la règle *ejusdem generis*, je ne crois pas que cette interprétation soit justifiée. Le paragraphe 340(5) ne fait qu'indiquer l'intention du législateur de conférer à l'appelant tous les pouvoirs nécessaires pour garantir que le principe établi au par. 340(1), savoir que tous les taux soient justes et raisonnables, soit respecté en tout temps.

Sur le plan de la procédure, la compétence de l'appelant en ce qui a trait aux pouvoirs conférés par la *Loi sur les chemins de fer* est énoncée aux art. 47 et suiv. de la *Loi sur les transports nationaux*. Le paragraphe 49(1) prévoit que l'appelant a compétence pour entendre toutes plaintes relatives au respect de la Loi alors que le par. 49(3) prévoit que l'appelant a compétence sur toutes les questions de droit ou de fait aux fins de la *Loi sur les chemins de fer* et des art. 47 et suiv. de la *Loi sur les transports nationaux*. Le paragraphe 68(1) prévoit cependant que toute question de droit ou de compétence peut, suite à une autorisation en ce sens, être portée en appel devant la Cour d'appel fédérale et c'est en vertu de cette disposition que l'intimée a contesté la décision 86-17.

À maints égards, les art. 47 et suiv. de la *Loi sur les transports nationaux* ont été conçus pour servir les objectifs de principe et le système de réglementation qui sont énoncés dans la *Loi sur les chemins de fer* et qui régissent l'approbation des taux et des tarifs de téléphone. Ainsi, l'art. 52 de la *Loi sur les transports nationaux* prévoit que l'appelant peut, de son propre chef ou à la demande du ministre, instruire, entendre et juger toute affaire qu'il peut, en vertu de la *Loi sur les chemins de fer*, instruire, entendre et juger:

52. La Commission peut, de son propre chef, ou doit, à la demande du ministre, instruire, entendre et juger toute affaire qu'elle peut, en vertu de la présente partie ou de la *Loi sur les chemins de fer*, instruire, entendre et juger sur une demande ou sur une plainte, et, à cet égard, elle a les mêmes pouvoirs que la présente loi lui confère pour statuer sur une demande ou sur une plainte.

L'article 52 est donc le corollaire du par. 335(1) de la *Loi sur les chemins de fer* qui confère à l'appelant le pouvoir de «réviser» les taxes. L'appelant a donc le pouvoir de réviser ses propres décisions

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

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

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

60. . . .

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

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

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

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

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

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

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

60. . . .

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

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

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

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

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

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

IV—The Decision of the Court Below

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

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

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

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

IV—La décision du tribunal d'instance inférieure

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

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

respect to retroactivity and that the presumption against retroactivity should therefore operate. Marceau J. added that the power to make interim orders does not carry with it the power to remedy any discrepancy between interim and final orders because the respondent could not be forced to reimburse revenues earned by charging rates approved by the appellant. Thus, according to Marceau J., the regulatory scheme set out in the *Railway Act* and the *National Transportation Act* is prospective in nature and, in the context of such a scheme, the power to make interim orders only involves the power to make orders "for the time being".

Pratte J., who concurred in the result with Marceau J., rejected all arguments based on the retroactive nature of the powers granted by ss. 60(2) and 66 of the *National Transportation Act*. Pratte J. was of the opinion that the impugned order was not retroactive in nature since its effect was to force the respondent to grant a credit in the future rather than change the rates charged in the past in a retroactive manner. Pratte J. then stated that if legislative authority existed for Decision 86-17, it must be found in s. 60(2) of the *National Transportation Act* which provides for "further directions" to be made at a later date following an interim decision. However, Pratte J. was of the opinion that any "further direction" must be in the nature of an order which can be made under s. 60(2) in the first place. It follows from that reasoning that if no one-time credit order can be made by interim order, no "further direction" to that effect can be made under s. 60(2). Pratte J. then agreed with Marceau J. that the respondent could not be forced to reimburse revenues made by charging rates approved by the appellant whether by interim order or by a "further direction" made in a final order.

Hugessen J. dissented on the basis that, within the statutory framework set out in the *Railway Act* and the *National Transportation Act*, all

d'agir rétroactivement et la présomption contre le pouvoir d'agir rétroactivement devrait donc s'appliquer. Le juge Marceau a ajouté que le pouvoir de rendre des ordonnances provisoires ne comprend pas le pouvoir de remédier à tout écart entre les ordonnances provisoires et définitives puisque l'intimée ne saurait être obligée de rembourser des revenus gagnés lorsque les taux imposés ont été approuvés par l'appelant. Ainsi, selon le juge Marceau, le système de réglementation établi dans la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux* est de nature prospective et, dans ce contexte, le pouvoir de rendre des ordonnances provisoires comprend seulement le pouvoir de rendre des ordonnances «pour le moment».

Le juge Pratte, qui a souscrit à la conclusion du juge Marceau, a rejeté tous les arguments fondés sur le caractère rétroactif des pouvoirs conférés par le par. 60(2) et l'art. 66 de la *Loi sur les transports nationaux*. Le juge Pratte était d'avis que l'ordonnance contestée n'avait pas de caractère rétroactif puisqu'elle avait pour effet d'obliger l'intimée à accorder un crédit forfaitaire à l'avenir, plutôt que de modifier rétroactivement les taux imposés dans le passé. Le juge Pratte a ensuite affirmé que s'il existait un fondement législatif à la décision 86-17, il devait se trouver au par. 60(2) de la *Loi sur les transports nationaux* qui prévoit que «de plus amples instructions» peuvent être données à une date ultérieure à la suite d'une décision provisoire. Le juge Pratte était cependant d'avis que ces instructions devaient tenir d'une ordonnance qui, à l'origine, pouvait être rendue en vertu du par. 60(2). Selon ce raisonnement, il s'ensuit que si un crédit forfaitaire ne peut être imposé dans une ordonnance provisoire, «de plus amples instructions» en ce sens ne peuvent être données en vertu du par. 60(2). Le juge Pratte a ensuite convenu avec le juge Marceau qu'on ne pouvait obliger l'intimée à rembourser des revenus qu'elle avait gagnés en imposant des taux que l'appelant avait approuvés que ce soit par voie d'ordonnance provisoire ou «de plus amples instructions» données dans une ordonnance définitive.

Le juge Hugessen était dissident parce que selon le régime juridique établi dans la *Loi sur les chemins de fer* et la *Loi sur les transports natio-*

orders whether final or interim can, by virtue of ss. 60(2) and 66 of the *National Transportation Act*, be modified by a further prospective order; thus, the proposed rule that interim orders can only be modified by a further prospective order would, in Hugessen J.'s opinion, effectively eliminate any distinction between final and interim orders and defeat the legislator's intention to provide the appellant with a distinct and independent power to make interim orders. In order to differentiate interim orders from final orders, Hugessen J. was of the opinion that the appellant in this Court must have the power to fix just and reasonable rates as of the date at which interim rates came into effect. Thus, only interim rates can be modified in a retrospective manner by a final order. Hugessen J. then stated that the interim rates in force in 1985 and 1986 must not be divided into the previous rate and the interim rate increase of 2 per cent: the resulting rate must be viewed as interim in its entirety because all the rates charged after January 1, 1985 were authorized by interim orders. Finally, Hugessen J. stated that the one-time credit order was a valid exercise of the power to set just and reasonable rates as of January 1, 1985 and that the choice of the appropriate remedy was an " 'administrative matter' properly left for the Commission's determination". Hugessen J. also noted that the appellant's order was in substance though not in form a "matter relating to tolls and tariffs" within the meaning of s. 340(5) of the *Railway Act*.

V—Analysis

(A) *Curial Deference Towards the Decisions of the CRTC*

NAPO argues that the appellant's decisions are entitled to "curial deference" because of their national importance and that these decisions should not be overturned unless they are patently unreasonable. NAPO cites the following cases as

naux, les ordonnances, qu'elles soient définitives ou provisoires, peuvent toutes, en application du par. 60(2) et de l'art. 66 de la *Loi sur les transports nationaux*, être modifiées par une autre ordonnance de nature prospective; ainsi, de l'avis du juge Hugessen, la règle proposée selon laquelle les ordonnances provisoires ne peuvent être modifiées que par une autre ordonnance prospective aurait effectivement pour effet d'éliminer toute distinction entre les ordonnances définitives et provisoires et de contrecarrer l'intention du législateur d'accorder à l'appelant un pouvoir distinct et indépendant de rendre des ordonnances provisoires. Le juge Hugessen a estimé que, pour distinguer les ordonnances provisoires des ordonnances définitives, le CRTC doit avoir le pouvoir de fixer des taux justes et raisonnables applicables à compter de la date d'entrée en vigueur des tarifs provisoires. Par conséquent, seuls les tarifs provisoires peuvent être modifiés rétroactivement par une ordonnance définitive. Le juge Hugessen a ensuite affirmé que les tarifs provisoires en vigueur en 1985 et 1986 ne doivent pas être divisés en tarif antérieur et en majoration tarifaire provisoire de 2 pour 100: le nouveau tarif doit être considéré comme entièrement provisoire parce que tous les taux chargés après le 1er janvier 1985 étaient autorisés par des ordonnances provisoires. Enfin, le juge Hugessen a affirmé que le crédit forfaitaire ordonné représentait un exercice valide du pouvoir de fixer des taux justes et raisonnables à compter du 1er janvier 1985 et que le choix du redressement approprié était une « «question administrative» qu'il convient de laisser trancher par le Conseil.» Le juge Hugessen a également souligné que l'ordonnance de l'appelant était en substance mais non quant à la forme «une question ayant trait aux taxes et aux tarifs» au sens du par. 340(5) de la *Loi sur les chemins de fer.*

V—Analyse

(A) *La retenue judiciaire à l'égard des décisions du CRTC*

L'ONAP soutient que les décisions de l'appelant doivent faire l'objet de «retenue judiciaire» en raison de leur importance nationale et qu'elles ne devraient pas être écartées à moins d'être manifestement déraisonnables. L'ONAP cite les arrêts

authority for this proposition: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*"); *Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245; *Alberta Union of Provincial Employees v. Board of Governors of Olds College*, [1982] 1 S.C.R. 923; *Re Ontario Public Service Employees Union and Forer* (1985), 52 O.R. (2d) 705 (C.A.); *Re City of Ottawa and Ottawa Professional Firefighters' Association, Local 162* (1987), 58 O.R. (2d) 685 (C.A.); *Greyhound Lines of Canada Ltd. v. Canadian Human Rights Commission* (1987), 78 N.R. 192 (F.C.A.); and *Canadian Pacific Ltd. v. Canadian Transport Commission* (1987), 79 N.R. 13 (F.C.A.) ("*Canadian Pacific*").

With the exception of the *Canadian Pacific* case, all these cases involved judicial review of decisions which were either protected by a privative clause or by a provision stating that no appeal lies therefrom. Where the legislator has clearly stated that the decision of an administrative tribunal is final and binding, courts of original jurisdiction cannot interfere with such decisions unless the tribunal has committed an error which goes to its jurisdiction. Thus, this Court has decided in the *CUPE* case that judicial review cannot be completely excluded by statute and that courts of original jurisdiction can always quash a decision if it is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Decisions which are so protected are, in that sense, entitled to a non-discretionary form of deference because the legislator intended them to be final and conclusive and, in turn, this intention arises out of the desire to leave the resolution of some issues in the hands of a specialized tribunal. In the *CUPE* case, Dickson J., as he then was, described the legislator's intention as follows, at pp. 235-36:

> Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour rela-

suivants à l'appui de cette affirmation: *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227 («SCFP»), *Douglas Aircraft Co. of Canada Ltd. c. McConnell*, [1980] 1 R.C.S. 245, *Alberta Union of Provincial Employees c. Conseil d'administration de Olds College*, [1982] 1 R.C.S. 923, *Re Ontario Public Service Employees Union and Forer* (1985), 52 O.R. (2d) 705 (C.A.), *Re City of Ottawa and Ottawa Professional Firefighters' Association, Local 162* (1987), 58 O.R. (2d) 685 (C.A.), *Greyhound Lines of Canada Ltd. c. Commission canadienne des droits de la personne* (1987), 78 N.R. 192 (C.A.F.), et *Canadien Pacifique Ltée c. Commission canadienne des transports* (1987), 79 N.R. 13 (C.A.F.) («*Canadien Pacifique*»).

Sous réserve de l'affaire *Canadien Pacifique*, tous ces arrêts portent sur le contrôle judiciaire de décisions visées par une clause privative ou par une disposition qui interdit d'interjeter appel de ces décisions. Si le législateur affirme clairement que la décision d'un tribunal administratif est finale et exécutoire, les tribunaux judiciaires de première instance ne peuvent toucher à ces décisions à moins que le tribunal administratif n'ait commis une erreur qui porte atteinte à sa compétence. Cette Cour a donc décidé dans l'arrêt *SCFP* qu'une loi ne peut complètement écarter le contrôle judiciaire et que les tribunaux judiciaires de première instance peuvent toujours annuler une décision si elle est «déraisonnable au point de ne pouvoir rationnellement s'appuyer sur la législation pertinente et d'exiger une intervention judiciaire» (p. 237). Les décisions qui sont ainsi protégées doivent, en ce sens, faire l'objet d'une forme de retenue non discrétionnaire parce que le législateur a voulu qu'elles soient définitives et sans appel et cette intervention du législateur découle, à son tour, de la volonté de laisser à des tribunaux spécialisés le soin de trancher certains litiges. Dans l'arrêt *SCFP*, le juge Dickson, alors juge puîné, décrit ainsi l'intention du législateur, aux pp. 235 et 236:

> L'article 101 révèle clairement la volonté du législateur que les différends du travail dans le secteur public soient réglés promptement et en dernier ressort par la Commission. Des clauses privatives de ce genre sont typiques

tions legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

However, it is important to stress the fact that the decision of an administrative tribunal can only be entitled to such deference if the legislator has clearly expressed his intention to protect such decisions through the use of privative clauses or clauses which state that the decision is final and without appeal. As formulated, NAPO's argument on curial deference must therefore be rejected because it fails to recognize the basic difference between appellate review and judicial review of decisions which do not fall within the jurisdiction of the lower tribunal.

Although s. 49(3) of the *National Transportation Act* provides that the appellant has full jurisdiction to hear and determine all matters whether of law or fact for the purposes of the *Railway Act* and of Part IV of the *National Transportation Act*, the appellant's decisions are subject to appeal, with leave, to the Federal Court of Appeal on questions of law or jurisdiction by virtue of s. 68(1) which reads as follows:

68. (1) An appeal lies from the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave therefor being obtained from that Court on application made within one month after the making of the order, decision, rule or regulation sought to be appealed from or within such further time as a judge of that Court under special circumstances allows, and on notice to the parties and the Commission, and on hearing such of them as appear and desire to be heard.

It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is

dans les lois sur les relations de travail. On veut protéger les décisions d'une commission des relations de travail, lorsqu'elles relèvent de sa compétence, pour des raisons simples et impérieuses. La commission est un tribunal spécialisé chargé d'appliquer une loi régissant l'ensemble des relations de travail. Aux fins de l'administration de ce régime, une commission n'est pas seulement appelée à constater des faits et à trancher de questions de droit, mais également à recourir à sa compréhension du corps jurisprudentiel qui s'est développé à partir du système de négociation collective, tel qu'il est envisagé au Canada, et à sa perception des relations de travail acquise par une longue expérience dans ce domaine.

Il convient toutefois d'insister sur le fait que les décisions d'un tribunal administratif ne doivent faire l'objet d'une telle retenue que si le législateur a clairement exprimé son intention de les protéger par des clauses privatives ou des dispositions qui prévoient qu'elles sont définitives et sans appel. En raison de sa formulation, l'argument de l'ONAP sur la retenue judiciaire doit donc être rejeté parce qu'il ne reconnaît pas la différence fondamentale entre le contrôle par un tribunal d'appel et le contrôle judiciaire de décisions qui ne relèvent pas de la compétence du tribunal d'instance inférieure.

Même si le par. 49(3) de la *Loi sur les transports nationaux* prévoit que l'appelant a pleine compétence pour entendre et juger toute question de droit ou de fait aux fins de la *Loi sur les chemins de fer* et de la partie IV de la *Loi sur les transports nationaux*, les décisions de l'appelant sont susceptibles d'appel, sous réserve d'une autorisation, à la Cour d'appel fédérale sur une question de droit ou de compétence en vertu du par. 68(1) qui se lit ainsi:

68. (1) Les décisions de la Commission sont susceptibles d'appel à la Cour d'appel fédérale sur une question de droit ou une question de compétence, quand une autorisation à cet effet a été obtenue de cette Cour sur demande faite dans le délai d'un mois après que l'ordonnance, la décision, la règle ou le règlement dont appel est projeté a été pris, ou dans telle autre limite de temps que le juge permet dans des circonstances spéciales, après avis aux parties et à la Commission, et après audition de ceux des intéressés qui comparaissent et désirent être entendus.

Il va de soi que la compétence d'un tribunal saisi d'un appel est beaucoup plus large que celle d'un tribunal qui exerce un contrôle judiciaire. En prin-

entitled, on appeal, to disagree with the reasoning of the lower tribunal.

However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise. The *Canadian Pacific* case is an example of a situation where curial deference towards a decision of the Canadian Transport Commission involving the interpretation of a tariff was appropriate. The decision of the Canadian Transport Commission was appealed to a review committee and then to the Federal Court of Appeal. Urie J. held that the decision of the review committee must not be reversed unless it is unreasonable or clearly wrong, at pp. 16-17:

> On the appeal from that decision to this court, the appellant advanced essentially the same grounds and arguments which it had submitted to the RTC. As to the first ground, I am of the opinion that the RTC correctly interpreted the two items from the tariff and since its view was confirmed by the Review Committee, that committee did not commit an error in construction. No useful purpose would be served by my restating the reasons of the R.T.C. for interpreting the items as they did and I respectfully adopt them as my own. This Court should not interfere with an interpretation made by bodies having the expertise of the R.T.C. and the Review Committee in an area within their jurisdiction, unless their interpretation is not reasonable or is clearly wrong. Neither situation prevails in this case. [Emphasis added.]

Although the very purpose of the review committee is to interpret the tariff and although such questions of interpretation fall within the Review Committee's area of special expertise, it does not follow that its decisions can only be reviewed if they are unreasonable. However the principle of specialization of duties justifies curial deference in such circumstances.

cipe, le tribunal saisi d'un appel a le droit d'exprimer son désaccord avec le raisonnement du tribunal d'instance inférieure.

Toutefois, dans le contexte d'un appel prévu par la loi d'une décision d'un tribunal administratif, il faut de plus tenir compte du principe de la spécialisation des fonctions. Bien qu'un tribunal d'appel puisse être en désaccord avec le tribunal d'instance inférieure sur des questions qui relèvent du pouvoir d'appel prévu par la loi, les tribunaux devraient faire preuve de retenue envers l'opinion du tribunal d'instance inférieure sur des questions qui relèvent parfaitement de son champ d'expertise. L'affaire *Canadien Pacifique* est un exemple d'une situation où la décision de la Commission canadienne des transports sur une question d'interprétation d'un tarif a fait à bon droit l'objet de retenue judiciaire. La décision de la Commission canadienne des transports a été portée en appel devant un comité de révision et ensuite devant la Cour d'appel fédérale. Le juge Urie a conclu que la décision du comité de révision ne devrait pas être infirmée à moins d'être déraisonnable ou clairement erronée, aux pp. 16 et 17:

> Dans le cadre de l'appel qu'elle a interjeté contre cette décision auprès de cette Cour, l'appelante a essentiellement présenté les mêmes motifs et les mêmes arguments qu'elle avait soumis à l'appréciation du C.T.C.F. Pour ce qui est du premier motif d'appel, je suis d'avis que le C.T.C.F. a correctement interprété les deux articles du tarif, et puisque son opinion a été confirmée par le comité de révision, ce comité n'a pas commis une erreur d'interprétation. Cela ne servirait à aucune fin utile que je répète les motifs pour lesquels le C.T.C.F. a interprété les articles comme il l'a fait, et en toute déférence, je les fais miens. Cette Cour ne devrait pas modifier l'interprétation donnée par des organismes ayant l'expertise du C.T.C.F. et du comité de révision dans un domaine ressortissant à leur compétence, à moins que cette interprétation soit déraisonnable ou clairement erronée, ce qui n'est pas le cas en l'espèce. [Je souligne.]

Bien que le but même du comité de révision soit d'interpréter le tarif et bien que ces questions d'interprétation relèvent du champ d'expertise particulier du comité de révision, il ne s'ensuit pas que ses décisions peuvent être révisées uniquement si elles sont déraisonnables. Le principe de la spécialisation des fonctions justifie cependant la retenue judiciaire dans ces circonstances.

In this case, the respondent is challenging the appellant's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the appellant when it makes interim decisions. This question cannot be solved without an analysis of the procedural scheme created by the *Railway Act* and the *National Transportation Act*. It is a question of law which is clearly subject to appeal under s. 68(1) of the *National Transportation Act*. It is also a question of jurisdiction because it involves an inquiry into whether the appellant had the power to make a one-time credit order.

Except as regards the choice, amongst remedies available to the appellant, of the most appropriate remedy to achieve the goal of just and reasonable rates throughout the interim period, the decision impugned by the respondent is not a decision which falls within the appellant's area of special expertise and is therefore pursuant to s. 68(1) subject to review in accordance with the principles governing appeals. Indeed, the appellant was not created for the purpose of interpreting the *Railway Act* or the *National Transportation Act* but rather to ensure, amongst other duties, that telephone rates are always just and reasonable.

(B) *The Power to Regulate Bell Canada's Revenues*

The respondent argues that the appellant only has jurisdiction to regulate tolls and tariffs and that this power does not include the power to regulate its level of revenues or its return on equity.

The fixing of tolls and tariffs that are just and reasonable necessarily involves the regulation of the revenues of the regulated entity. This has been recognized by this Court interpreting provisions similar to s. 340(1) of the *Railway Act* which prescribe that "[a]ll tolls shall be just and reasonable". In *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia,* [1960] S.C.R. 837, Locke J. said the following about s. 16(1)(*b*) of the *Public Utilities Act*, R.S.B.C. 1948, c. 277, which provided that in

En l'espèce, l'intimée conteste la décision de l'appelant sur une question de droit et de compétence relative à la nature des décisions provisoires et à l'étendue des pouvoirs conférés à l'appelant lorsqu'il rend des décisions provisoires. On ne peut résoudre cette question sans analyser le régime de procédure créé par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux*. Il s'agit d'une question de droit qui est certainement susceptible d'appel en vertu du par. 68(1) de la *Loi sur les transports nationaux*. Il s'agit également d'une question de compétence parce qu'il faut déterminer si l'appelant avait le pouvoir d'ordonner l'attribution d'un crédit forfaitaire.

Hormis le choix du redressement le plus approprié parmi ceux dont disposait l'appelant pour fixer des tarifs justes et raisonnables au cours de la période provisoire, la décision contestée par l'intimée ne relève pas du champ d'expertise particulier de l'appelant et est donc, conformément au par. 68(1), susceptible de contrôle selon les principes qui régissent les appels. En effet, l'appelant a été créé non pas dans le but d'interpréter la *Loi sur les chemins de fer* ou la *Loi sur les transports nationaux*, mais plutôt pour assurer, notamment, que les tarifs de téléphone soient toujours justes et raisonnables.

(B) *Le pouvoir de réglementer les revenus de Bell Canada*

L'intimée soutient que l'appelant n'a compétence que pour réglementer les taxes et les tarifs et que ce pouvoir ne comprend pas celui de réglementer son niveau de revenu ou son taux de rendement de l'avoir moyen des détenteurs d'actions ordinaires.

L'établissement de taxes et de tarifs justes et raisonnables comporte forcément la réglementation des revenus de l'organisme réglementé. Cette Cour a reconnu cette nécessité dans le cadre de décisions où elle interprétait des dispositions semblables au par. 340(1) de la *Loi sur les chemins de fer*, qui prévoit que «[t]outes les taxes doivent être justes et raisonnables». Dans l'arrêt *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] R.C.S. 837, voici ce que le juge Locke a dit au sujet de

fixing a rate the Public Utility Commission of British Columbia should take into consideration the "fair and reasonable return upon the appraised value of the property of the public utility used . . . to enable the public utility to furnish the service" (at p. 848):

> I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases or that it is expedient to attempt to do so. It is a continuing obligation that rests upon such a utility to provide what the Commission regards as adequate service in supplying not only electricity but transportation and gas, to maintain its properties in a satisfactory state to render adequate service and to provide extensions to these services when, in the opinion of the Commission, such are necessary. In coming to its conclusion as to what constituted a fair return to be allowed to the appellant these matters as well as the undoubted fact that the earnings must be sufficient, if the company was to discharge these statutory duties, to enable it to pay reasonable dividends and attract capital, either by the sale of shares or securities, were of necessity considered. Once that decision was made it was, in my opinion, the duty of the Commission imposed by the statute to approve rates which would enable the company to earn such a return or such lesser return as it might decide to ask. [Emphasis added.]

In *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, Lamont J. described the relevant factors in the determination of what are just and reasonable rates as follows (at p. 190):

> In order to fix just and reasonable rates, which it was the duty of the Board to fix, the Board had to consider certain elements which must always be taken into account in fixing a rate which is fair and reasonable to the consumer and to the company. One of these is the rate base, by which is meant the amount which the Board considers the owner of the utility has invested in the enterprise and on which he is entitled to a fair return. Another is the percentage to be allowed as a fair return.

Such provisions require the administrative tribunal to balance the interests of the customers with the necessity of ensuring that the regulated entity is allowed to make sufficient revenues to finance the costs of the services it sells to the public.

l'al. 16(1)*b*) de la *Public Utilities Act*, R.S.B.C. 1948, chap. 277, qui prévoyait que pour établir un taux la Public Utility Commission de la Colombie-Britannique devrait tenir compte du [TRADUCTION] «rendement juste et raisonnable de la valeur estimative des biens du service public utilisés [. . .] pour lui permettre de fournir le service» (à la p. 848):

> [TRADUCTION] Je ne crois pas qu'il soit possible de définir ce qui constitue un rendement juste des biens de services publics d'une façon qui soit applicable dans tous les cas ni qu'il soit opportun de tenter de le faire. Il appartient au service public de fournir sans cesse ce que la Commission estime être un service approprié en ce qui concerne non seulement l'électricité, mais encore le transport et le gaz, et de maintenir ses biens suffisamment en bon état pour fournir des services appropriés et des services supplémentaires lorsque la Commission l'estime nécessaire. Pour finalement décider quel rendement juste l'appelante se verrait accorder, ces questions ont forcément été examinées ainsi que le fait indubitable que les revenus doivent être suffisants si la compagnie doit satisfaire à ces obligations prévues par la loi, verser des dividendes raisonnables et attirer du capital par la vente d'actions ou de valeurs mobilières. À mon avis, une fois la décision prise, la loi imposait à la Commission d'approuver des taux qui permettraient à la compagnie d'obtenir ce rendement ou le rendement inférieur qu'elle pourrait choisir de demander. [Je souligne.]

Dans l'arrêt *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] R.C.S. 186, le juge Lamont a décrit de la façon suivante ce dont il fallait tenir compte pour déterminer ce qui constitue des taux justes et raisonnables (à la p. 190):

> [TRADUCTION] Pour fixer des taux justes et raisonnables comme il lui incombe de le faire, le Conseil devait examiner certains éléments qui doivent toujours être pris en considération pour fixer un taux qui soit juste et raisonnable pour les consommateurs et pour la compagnie. L'un de ces éléments est la base tarifaire qui représente le montant que le Conseil estime avoir été investi dans l'entreprise par son propriétaire et pour lequel il a droit à un rendement juste. Un autre élément est le pourcentage qui doit être autorisé comme rendement juste.

Ces dispositions exigent que le tribunal administratif soupèse les intérêts des consommateurs en fonction de la nécessité que l'organisme réglementé puisse gagner des revenus suffisants pour financer les coûts des services qu'il vend au public.

Thus, it is trite to say that in fixing fair and reasonable tolls the appellant must take into consideration the level of revenues needed by the respondent. In fact, the respondent would be the first to complain if its financial situation was not taken into consideration when tolls are fixed. By so doing, the appellant regulates the respondent's revenues albeit in a seemingly indirect manner. I would therefore dismiss this argument.

(C) *The Power to Revisit the Period During Which Interim Rates Were in Force*

(i) Introduction

As indicated above, the appellant has examined the period during which interim rates were in force, i.e. from January 1, 1985 to October 14, 1986, for the purpose of ascertaining whether these interim rates were in fact just and reasonable. Following a factual finding that these rates were not just and reasonable, the one-time credit order now contested before this Court was made in order to remedy this situation. Thus, the effect of Decision 86-17 was not retroactive in nature since it does not seek to establish rates to replace or be substituted to those which were charged during that period. The one-time credit order is, however, retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive. Thus, the question before this Court is whether the appellant has jurisdiction to make orders for the purpose of remedying the inappropriateness of rates which were approved by it in a previous interim decision.

This question involves a determination of whether rates approved by interim order are inherently contingent as well as provisional or whether the statutory scheme established by the *Railway Act* and the *National Transportation Act* is so prospective in nature that it precludes such a retrospective review of interim rates approved by the appellant. Finally, it is also necessary to determine whether the appellant has jurisdiction to order the reimbursement of amounts which exceed the reve-

Il est donc évident que pour fixer des taxes justes et raisonnables, l'appelant doit tenir compte des besoins en revenus de l'intimée. D'ailleurs, l'intimée serait la première à se plaindre si on ne tenait pas compte de sa situation financière au moment de fixer les taxes. Ce faisant, l'appelant réglemente les revenus de l'intimée quoique d'une façon apparemment indirecte. Je suis donc d'avis de rejeter cet argument.

(C) *Le pouvoir de réexaminer la période pendant laquelle les taux provisoires étaient en vigueur*

(i) Introduction

Comme je l'ai déjà indiqué, l'appelant a examiné la période pendant laquelle les taux provisoires étaient en vigueur, c'est-à-dire la période s'étendant du 1er janvier 1985 au 14 octobre 1986, afin de vérifier si ces taux provisoires étaient effectivement justes et raisonnables. Après avoir tiré la conclusion de fait que ces taux n'étaient pas justes et raisonnables, l'ordonnance de crédit forfaitaire maintenant contestée devant cette Cour a été rendue pour remédier à cette situation. Ainsi, la décision 86-17 n'a pas eu d'effet rétroactif puisqu'elle n'avait pas pour but de fixer des taux qui remplaceraient ceux imposés au cours de cette période. L'ordonnance de crédit forfaitaire est cependant rétroactive en ce sens qu'elle vise à remédier à l'imposition des taux approuvés antérieurement qui ont été jugés excessifs en dernier ressort. Par conséquent, la question dont est saisie cette Cour est de déterminer si l'appelant a compétence pour rendre des ordonnances visant à remédier, dans la mesure où ils se sont avérés injustifiés, à des taux qu'il a approuvés dans une décision provisoire antérieure.

Pour répondre à cette question, il faut déterminer si les taux approuvés dans l'ordonnance provisoire sont en soi conditionnels et temporaires ou si le régime juridique établi par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux* est de nature prospective au point d'empêcher un tel examen rétrospectif des taux provisoires approuvés par l'appelant. Enfin, il est également nécessaire de décider si l'appelant a compétence pour ordonner le remboursement des montants

nues actually collected as a direct result of the interim rates.

(ii) The Distinction Between Interim and Final Orders

The respondent argues that the *Railway Act* and the *National Transportation Act* establish a regulatory regime which is exclusively prospective in nature because all rates, whether interim or final, must be just and reasonable. Thus, if interim rates have been approved on the basis that they are just and reasonable, no excessive revenues can be earned by charging such rates; interim rates, by reason only of their approval by the appellant, are presumed to be just and reasonable until they are modified by a subsequent order. According to the respondent, interim orders are therefore orders made "for the time being" until a more permanent order is made.

In his dissenting reasons, Hugessen J. points out quite accurately that if interim orders are simply orders made "for the time being", it will be impossible to distinguish final orders from interim orders within the statutory scheme established by the *Railway Act* and the *National Transportation Act* since all final orders may be revised by the appellant of its own motion and at any time: s. 335(1) of the *Railway Act* and s. 52 of the *National Transportation Act*. It is therefore impossible to say that final orders made under these statutes are final in the sense that they may never be reconsidered. The on-going nature of the appellant's regulatory activities necessarily entails a continuous review of past decisions concerning tolls and tariffs. Thus, all orders, whether final or interim, would be orders "for the time being" within the statutory scheme established by the *Railway Act* and the *National Transportation Act*.

Both the appellant and Hugessen J. rely heavily on *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta.

excédentaires des revenus effectivement perçus comme conséquence directe des taux provisoires.

(ii) La distinction entre les ordonnances provisoires et définitives

L'intimée soutient que la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux* établissent un système de réglementation qui est exclusivement de nature prospective parce que tous les taux, qu'ils soient provisoires ou définitifs, doivent être justes et raisonnables. Ainsi, si les taux provisoires ont été approuvés parce qu'ils sont justes et raisonnables, ils ne peuvent donner lieu à des revenus excédentaires lorsqu'ils sont imposés; les taux provisoires, du seul fait de leur approbation par l'appelant, sont présumés justes et raisonnables à moins d'être modifiés par une ordonnance ultérieure. Selon l'intimée, les ordonnances provisoires sont donc rendues «pour le moment» jusqu'à ce qu'une ordonnance de nature plus permanente soit rendue.

Dans ses motifs de dissidence, le juge Hugessen a souligné tout à fait à juste titre que si les ordonnances provisoires ne sont que des ordonnances rendues «pour le moment», il sera impossible de distinguer les ordonnances définitives des ordonnances provisoires au sens du régime juridique établi par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux*, puisque toutes les ordonnances définitives peuvent être révisées par l'appelant de son propre chef et en tout temps: par. 335(1) de la *Loi sur les chemins de fer* et art. 52 de la *Loi sur les transports nationaux*. On ne peut donc affirmer que les ordonnances définitives rendues en application de ces lois sont finales en ce sens qu'elles ne pourront jamais être révisées. La nature continue des fonctions de réglementation de l'appelant comporte inévitablement une révision constante des décisions antérieures sur les taxes et les tarifs. Ainsi, toutes les ordonnances, définitives ou provisoires, seraient rendues «pour le moment» au sens du régime juridique établi par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux*.

L'appelant et le juge Hugessen s'appuient largement sur l'arrêt *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d)

C.A.) for the proposition that interim decisions must be distinguished from final decisions in that they may be reviewed in a retrospective manner. This distinction is based on the fact that interim decisions are made subject to "further direction" as prescribed by s. 60(2) of the *National Transportation Act* which, for convenience, I cite again:

60. . . .

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

The statutory scheme analysed by the Alberta Court of Appeal in *Re Coseka* is substantially similar to though more clearly prospective than the statutory scheme established by the *Railway Act* and the *National Transportation Act*. Furthermore, s. 52(2) of the *Public Utilities Board Act*, R.S.A. 1970, c. 302, is identical in wording to s. 60(2) of the *National Transportation Act*. Laycraft J.A., as he then was, cited with approval by Hugessen J., wrote the following with respect to the possibility of revisiting the period during which interim rates were in force for the purpose of deciding whether those interim rates were in fact just and reasonable, at pp. 717-18:

In my view, to say that an interim order may not be replaced by a final order is to attribute virtually no additional powers to the Board from s. 52 beyond those already contained in either the *Gas Utilities Act* or the *Public Utilities Board Act* to make final orders. The Board is by other provisions of the statute empowered by order to fix rates either on application or on its own motion. An interim order would be the same, and have the same effect, as a final order unless the "further direction" which the statute contemplates includes the power to change the interim order. On that construction of the section the interim order would be a "final" order in all but name. The Board would need no further legislative authority to issue a further "final" order since it may fix rates under s. 27 on its own motion without a further application. The provision for an interim order was intended to permit rates to be fixed subject to

705 (C.A. Alb.) pour affirmer que les décisions provisoires doivent être distinguées des décisions finales en ce qu'elles peuvent être révisées rétroactivement. Cette distinction repose sur le fait que les décisions provisoires sont susceptibles de «plus amples instructions» comme le prévoit le par. 60(2) de la *Loi sur les transports nationaux* que j'estime utile de reproduire à nouveau:

60. . . .

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

Le régime juridique que la Cour d'appel de l'Alberta a analysé dans *Re Coseka* est essentiellement le même, bien que plus clairement prospectif, que le régime juridique établi par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux*. De plus, le texte du par. 52(2) de la *Public Utilities Board Act*, R.S.A. 1970, chap. 302, est identique à celui du par. 60(2) de la *Loi sur les transports nationaux*. Le juge Hugessen a cité et approuvé les propos suivants du juge Laycraft, tel était alors son titre, quant à la possibilité de réexaminer la période pendant laquelle les taux provisoires étaient en vigueur pour déterminer si ces taux étaient effectivement justes et raisonnables, aux pp. 717 et 718:

[TRADUCTION] À mon sens, dire qu'on ne peut substituer une ordonnance finale à une ordonnance provisoire, c'est attribuer à la Commission pratiquement aucun pouvoir supplémentaire en vertu de l'art. 52, si ce n'est les pouvoirs de rendre des ordonnances définitives, que prévoient déjà la *Gas Utilities Act* et la *Public Utilities Board Act*. D'autres articles de la loi autorisent la Commission à établir des tarifs, par ordonnance, soit sur requête ou de sa propre initiative. Une ordonnance provisoire serait la même, et aurait le même effet, qu'une ordonnance définitive si les «plus amples instructions» qu'envisage la Loi ne comprenaient pas le pouvoir de modifier l'ordonnance provisoire. Selon une telle interprétation de l'article, l'ordonnance «provisoire» serait «définitive» sauf en titre. La Commission n'aurait pas à être autorisée davantage par le législateur à rendre une autre ordonnance «définitive» puisqu'en vertu de l'art. 27 elle peut fixer des tarifs de sa propre initiative sans autre requête à cet égard. L'objet des ordonnances provisoires est de permettre la fixation de tarifs suscepti-

correction to be made when the hearing is subsequently completed.

It was urged during argument that s. 52(2) was merely intended to enable the Board to achieve "rough justice" during the period of its operation until a final order is issued. However, the Board is required to fix "just and reasonable rates" not "roughly just and reasonable rates". The words "reserve for further direction", in my view, contemplate changes as soon as the Board is able to determine those just and reasonable rates. [Emphasis added.]

I agree with Hugessen J. and with the reasons of Laycraft J.A. in *Re Coseka* where he made a careful review of previous cases. The statutory scheme established by the *Railway Act* and the *National Transportation Act* is such that one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. I hasten to add that the words "further directions" do not have any magical, retrospective content. Under the *Railway Act* and the *National Transportation Act*, final orders are subject to "further [prospective] directions" as well. It is the interim nature of the order which makes it subject to further retrospective directions.

The importance of distinguishing final orders from interim orders is illustrated by the case of *City of Calgary v. Madison Natural Gas Co.* (1959), 19 D.L.R. (2d) 655 (Alta. C.A.) In *Madison*, the Public Utility Board (the "Board") was faced with an application by the City of Calgary for the reimbursement of amounts earned in excess of the rates of return allowed in orders 34 and 41 for the sale of natural gas. The Board had allowed a rate of return of 7 per cent but, due to its lack of useful information to predict the effect of rates on

bles d'être corrigés une fois terminée l'audition de l'affaire.

On a fait valoir au cours des plaidoiries que le par. 52(2) avait simplement pour objet de permettre à la Commission de rendre une justice «approximative» tant qu'était en vigueur la mesure provisoire en attendant qu'une ordonnance définitive soit rendue. Cependant, la Commission est tenue de fixer des «tarifs justes et raisonnables» et non des «tarifs approximativement justes et raisonnables». J'estime que les mots «se réserver la faculté de donner de plus amples instructions» envisagent des modifications dès que la Commission est en mesure de déterminer ce que sont les tarifs justes et raisonnables. [Je souligne.]

Je suis d'accord avec le juge Hugessen et les motifs rédigés par le juge Laycraft dans l'affaire *Re Coseka* où ce dernier a fait un examen minutieux des décisions antérieures. Le régime juridique de la *Loi sur les chemins de fer* et de la *Loi sur les transports nationaux* est tel que l'une des différences entre les ordonnances provisoires et définitives doit être que les décisions provisoires peuvent être révisées et modifiées rétroactivement dans une décision finale. Il relève de la nature même des ordonnances provisoires que leur effet ainsi que toute divergence entre une ordonnance provisoire et une ordonnance définitive peuvent être révisés et corrigés dans l'ordonnance définitive. Je m'empresse d'ajouter que les mots «de plus amples instructions» ne comportent en soi aucun sens magique ni rétroactif. En vertu de la *Loi sur les chemins de fer* et de la *Loi sur les transports nationaux*, les ordonnances définitives sont également sujettes à «de plus amples instructions [prospectives]». C'est le caractère provisoire de l'ordonnance qui la rend sujette à de plus amples instructions rétroactives.

L'arrêt *City of Calgary v. Madison Natural Gas Co.* (1959), 19 D.L.R. (2d) 655 (C.A. Alb.), illustre l'importance de distinguer les ordonnances définitives des ordonnances provisoires. Dans l'affaire *Madison*, la ville de Calgary avait présenté à la Public Utility Board (la «Commission») une demande de remboursement des sommes gagnées en sus des taux de rendement autorisés dans les ordonnances 34 et 41 pour la vente de gaz naturel. La Commission avait autorisé un taux de rendement de 7 pour 100, mais parce qu'elle ne disposait

the actual financial performance of the regulated entity, the rates per volume fixed by the Board actually yielded greater profits than anticipated. The Board refused to grant the demands made in the application because it felt it had no jurisdiction to revisit periods during which rates approved in a final decision were in force. This decision was confirmed by the Court of Appeal on the basis that, contrary to arguments made by the City of Calgary, orders 34 and 41 were final orders not governed by s. 35*a*(3) of the *Natural Gas Utilities Act*, which read as follows:

> **35***a*— . . .
>
> (3) The Board is hereby authorized, empowered and directed, on the final hearing, to give consideration to the effect of the operation of such interim or temporary order and in the final order to make, allow or provide for such adjustments, allowances or other factors, as to the Board may seem just and reasonable.

Order 34 provided that the price was set at 9 cents per mcf and that "if it should turn out that there is a surplus, it can be dealt with when the time arrives" which led to the argument that this order was in fact an interim order. Johnson J.A. dismissed this argument in the following terms, at pp. 662-63:

> It is the submission of the appellants that O. 34 and O. 41 are interim or temporary orders and the Board can now deal with these surpluses in accordance with s-s (3). As I have mentioned, orders fixing interim prices were made while the Board was hearing the application and considering its report. These, of course, were superseded by the order now under consideration. Orders 34 and 41 are, of course, not final orders in the sense that judgments are final. The Act contemplates that subsequent applications will be made to change the price fixed by these orders. They are nonetheless final so far as each application is concerned.

It is useful to note that the respondent relies heavily on the *Madison* case for the proposition that a regulated entity cannot be forced to dis-

pas des renseignements utiles pour prévoir l'effet des taux sur le rendement financier réel de l'organisme réglementé, les taux par volume que la Commission avait fixés ont effectivement généré plus de profits que prévu. La Commission a refusé de se rendre aux demandes qui lui étaient faites parce qu'elle estimait qu'elle n'avait pas le pouvoir de réexaminer les périodes pendant lesquelles les taux approuvés dans une décision finale étaient en vigueur. La Cour d'appel a confirmé cette décision en affirmant, contrairement aux arguments présentés par la ville de Calgary, que les ordonnances 34 et 41 étaient des ordonnances définitives non régies par le par. 35*a*(3) de la *Natural Gas Utilities Act*, qui prévoyait:

> [TRADUCTION] **35***a*— . . .
>
> (3) La Commission peut et doit, à la dernière audience, tenir compte de l'effet de l'ordonnance provisoire ou temporaire et faire dans l'ordonnance définitive les rajustements qu'elle estime justes et raisonnables.

Dans l'ordonnance 34, le prix avait été fixé à 9 cents par millier de pieds cubes et il avait été prévu que [TRADUCTION] «si jamais il y avait un surplus, on pourrait en traiter en temps et lieu», d'où l'argument que cette ordonnance était en fait provisoire. Le juge Johnson de la Cour d'appel a rejeté cet argument dans les termes suivants, aux pp. 662 et 663:

> [TRADUCTION] Les appelantes prétendent que les ordonnances 34 et 41 sont provisoires ou temporaires et que la Commission peut maintenant traiter de ces surplus conformément au par. (3). Comme je l'ai mentionné, les ordonnances dans lesquelles la Commission a fixé provisoirement les prix ont été rendues alors que la Commission entendait la demande et préparait son rapport. Ces ordonnances ont été évidemment remplacées par l'ordonnance qui est examinée actuellement. Il va de soi que les ordonnances 34 et 41 ne sont pas définitives dans le sens où les jugements sont définitifs. La Loi prévoit que des demandes ultérieures seront présentées pour modifier le prix fixé dans ces ordonnances. Elles sont néanmoins définitives en ce qui concerne chaque demande.

Il convient de souligner que l'intimée s'appuie largement sur l'arrêt *Madison* pour affirmer qu'une entreprise réglementée ne peut être forcée

gorge profits legally earned by charging rates approved by the relevant regulatory authority on the basis that they are just and reasonable. Since the City of Calgary sought to obtain the reimbursement of profits earned by charging rates approved by final order, this case does not support the respondent's position.

A consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, unlike final decisions, subject to retrospective review and remedial orders. The appellant may make a wide variety of interim orders dealing with hearings, notices and, in general, all matters concerning the administration of proceedings before the appellant. Such orders are obviously interim in nature. However, this is less obvious when an interim order deals with a matter which is to be dealt with in the final decision, as was the case with the interim rate increase ordered in Decision 84-28. If interim rate increases are awarded on the basis of the same criteria as those applied in the final decision, the interim decision would serve as a preliminary decision on the merits as far as the rate increase is concerned. This, however, is not the purpose of interim rate orders.

Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.

In Decision 84-28, the appellant granted the respondent an interim rate increase on the basis of

de rembourser les profits qu'elle a gagnés légalement en imposant les taux approuvés par l'organisme de réglementation compétent pour le motif qu'ils sont justes et raisonnables. Puisque la ville de Calgary tentait d'obtenir le remboursement des profits gagnés en imposant les taux approuvés dans l'ordonnance définitive, cet arrêt ne saurait étayer la thèse de l'intimée.

L'examen de la nature des ordonnances provisoires et des circonstances dans lesquelles elles sont accordées explique et justifie davantage pourquoi elles peuvent, contrairement aux décisions finales, être révisées rétroactivement et faire l'objet d'une ordonnance de redressement. L'appelant peut rendre toute une gamme d'ordonnances provisoires concernant les audiences, les avis et, généralement, les questions relatives à l'administration des procédures devant lui. De toute évidence, ces ordonnances ont un caractère provisoire. Toutefois, cela est moins évident lorsque l'ordonnance provisoire porte sur une question qui doit être traitée dans la décision finale, comme dans le cas de la majoration tarifaire provisoire ordonnée dans la décision 84-28. Si les majorations tarifaires provisoires étaient accordées selon les mêmes critères que ceux qui sont appliqués dans la décision finale, la décision provisoire constituerait une décision préliminaire sur le fond en ce qui concerne la majoration tarifaire. Là n'est cependant pas l'objet des ordonnances tarifaires provisoires.

Traditionnellement, les ordonnances tarifaires provisoires qui traitent de manière interlocutoire de questions devant faire l'objet d'une décision finale sont accordées pour éviter que le requérant ne subisse les effets néfastes de la longueur des procédures. Ces décisions sont prises rapidement à partir d'éléments de preuve qui seraient souvent insuffisants pour rendre une décision finale. Le fait qu'une ordonnance ne porte pas sur le fond d'une question devant être traitée dans une décision finale et le fait qu'elle ait pour objet d'accorder un redressement temporaire contre les effets néfastes de la longueur des procédures constituent des caractéristiques fondamentales d'une ordonnance tarifaire provisoire.

Dans la décision 84-28, l'appelant a accordé à l'intimée une majoration tarifaire provisoire en

the following criteria which, for convenience, I cite again (at p. 9):

> The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an applicant absent a general interim increase.

Decision 84-28 was truly an interim decision since it did not seek to decide in a preliminary manner an issue which would be dealt with in the final decision. Instead, the appellant granted the interim rate increase on the basis that such an increase was necessary in order to prevent the respondent from having serious financial difficulties.

Furthermore, the appellant consistently reiterated throughout the procedures which led to Decision 86-17 its intention to review the rates charged for the test year 1985 and up to the date of the final decision. Holding that the interim rates in force during that period cannot be reviewed would not only be contrary to the nature of interim orders, it would also frustrate and subvert the appellant's order approving interim rates.

It is true, as the respondent argues, that all telephone rates approved by the appellant must be just and reasonable whether these rates are approved by interim or final order; no other conclusion can be derived from s. 340(1) of the *Railway Act*. However, interim rates must be just and reasonable on the basis of the evidence filed by the applicant at the hearing or otherwise available for the interim decision. It would be useless to order a final hearing if the appellant was bound by the evidence filed at the interim hearing. Furthermore, the interim rate increase was granted on the basis that the length of the proceedings could cause a serious deterioration in the financial condition of

fonction des critères formulés dans l'extrait de la p. 9, que j'estime utile de reproduire de nouveau:

> Le Conseil estime que, en principe, les majorations tarifaires générales ne devraient être accordées qu'à la suite du processus public complet envisagé à la partie III de ses Règles de procédure en matière de télécommunications. En l'absence d'un tel processus, les majorations tarifaires générales ne devraient pas, selon le Conseil, être accordées même de façon intérimaire sauf si le requérant peut démontrer qu'il s'agit de circonstances spéciales. Ce pourrait être le cas, par exemple, si de longs délais dans le traitement d'une requête entraînaient une dégradation sérieuse de la situation financière d'un requérant à moins d'une majoration tarifaire intérimaire.

La décision 84-28 était véritablement une décision provisoire puisqu'elle ne visait pas à trancher d'une manière préliminaire une question qui serait traitée dans une décision finale. L'appelant a plutôt accordé la majoration tarifaire provisoire considérant qu'une majoration était nécessaire pour éviter que l'intimée connaisse de graves difficultés financières.

De plus, l'appelant a constamment réitéré tout au long des procédures qui ont abouti à la décision 86-17 son intention de réviser les taux imposés à compter de l'année témoin 1985 jusqu'à la date de la décision finale. Conclure que les taux provisoires en vigueur au cours de cette période ne peuvent être révisés serait non seulement contraire à la nature des ordonnances provisoires mais encore aurait pour effet de contrecarrer l'ordonnance dans laquelle l'appelant a approuvé les taux provisoires.

Il est vrai, comme le soutient l'intimée, que tous les tarifs de téléphone approuvés par l'appelant doivent être justes et raisonnables peu importe qu'ils soient approuvés dans une ordonnance provisoire ou définitive; aucune autre conclusion ne saurait être tirée du par. 340(1) de la *Loi sur les chemins de fer*. Toutefois, les taux provisoires doivent être justes et raisonnables en regard des éléments de preuve produits par le requérant à l'audience ou des éléments par ailleurs disponibles pour rendre une décision provisoire. Il serait inutile d'ordonner la tenue d'une audience finale si l'appelant était lié par les éléments de preuve produits à l'audience intérimaire. En outre, la majoration

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

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

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

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

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

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

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

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

> Finally, petitioners contend that the Commission has no power to subject them to an obligation to account for and refund amounts collected under the interim rates in effect during the suspension period and the initial rates which would become effective at the end of such a period .... In response, we note first that we have already recognized in *Chessie* that the Commission does have powers "ancillary" to its suspension power which do not depend on an express statutory grant of authority. We had no occasion in *Chessie* to consider what the full range of such powers might be, but we did indicate that the touchstone of ancillary power was a "direc(t) relat(ionship)" between the power asserted and the Commission's "mandate to assess the reasonableness of ... rates and to suspend them pending investigation if there is a question as to their legality." 426 U.S., at 514.
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> . . .
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> Thus, here as in *Chessie*, the Commission's refund conditions are a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation," in that they allow the Commission, in exercising its suspension power, to pursue "a more measured course" and to "offe(r) an alternative tailored far more precisely to the particular circumstances" of these cases. Since, again as in *Chessie*, the measured course adopted here is necessary to strike a proper balance between the interests of carriers and the public, we think the Interstate Commerce Act should be construed to confer on the Commission the

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

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

> [TRADUCTION] Enfin, les requérants prétendent que la Commission ne peut les obliger à rendre compte des sommes perçues en vertu des taux provisoires en vigueur pendant la période de suspension et des taux imposés à l'origine qui entreraient en vigueur à la fin de cette période et à les rembourser ... En réponse à cet argument, soulignons d'abord que nous avons déjà reconnu dans l'arrêt *Chessie* que la Commission a des pouvoirs «accessoires» à son pouvoir de suspension et que ces derniers ne découlent pas d'une disposition législative les lui conférant expressément. Nous n'avons pas eu l'occasion de déterminer ce que pourrait comprendre toute l'étendue de ces pouvoirs dans l'arrêt *Chessie*, mais nous avons indiqué que la pierre de touche de ce pouvoir accessoire était un «rapport direct» entre le pouvoir invoqué et le «mandat [de la Commission] d'évaluer le caractère raisonnable des [...] taux et de les suspendre pendant l'enquête si leur légalité est mise en doute.» 426 U.S., à la p. 514.
>
> . . .
>
> Ainsi, en l'espèce comme dans l'arrêt *Chessie* les conditions de remboursement imposées par la Commission sont «légitimes, raisonnables et directement accessoires au pouvoir légal exprès de la Commission de suspendre les taux pendant l'enquête» en ce qu'elles lui permettent, dans l'exercice de son pouvoir de suspension, de poursuivre une «ligne de conduite plus appropriée» et d'«offrir une solution de rechange beaucoup mieux adaptée aux circonstances particulières» de ces instances. Encore une fois comme dans l'arrêt *Chessie*, puisque la ligne de conduite appropriée adoptée en l'espèce est nécessaire pour établir un équilibre convenable entre les

authority to enter on this course unless language in the Act plainly requires a contrary result.

This approach to the interpretation of statutes conferring regulatory authority over rates and tariffs is only the expression of the wider rule that the court must not stifle the legislator's intention by reason only of the fact that a power has not been explicitly provided for.

The appellant has also argued that the power to "vary" a previous decision, whether interim or final, found in s. 66 of the *National Transportation Act*, includes the power to vary these decisions in a retroactive manner. Given my conclusion based on the inherent nature of interim orders, it is unnecessary for me to deal with this argument.

(iii) The Relevance of the Distinction Between Positive Approval and Negative Disallowance Schemes of Rate Regulation

Much was said in argument about the difference between positive approval schemes and negative disallowance schemes with respect to the power to act retrospectively. The first category includes schemes which provide that the administrative agency is the only body having statutory authority to approve or fix tolls payable to utility companies; these schemes generally stipulate that tolls shall be "just and reasonable" and that the administrative agency has the power to review these tolls on a *proprio motu* basis or upon application by an interested party. The second category includes schemes which grant utility companies the right to fix tolls as they wish but also grant users the right to complain before an administrative agency which has the power to vary those tolls if it finds that they are not "just and reasonable". It has generally been found that negative disallowance schemes provide the power to make orders which are retroactive to the date of the application by the ratepayer who claims that the rates are not "just and reasonable". On the other hand, positive approval schemes have been found to be exclusively prospective in nature and not to allow orders

intérêts des transporteurs et ceux du public, nous croyons que l'Interstate Commerce Act devrait être interprétée de façon à conférer à la Commission le pouvoir d'adopter cette ligne de conduite à moins que le texte de la loi ne dicte clairement un résultat contraire.

Cette façon d'interpréter les lois qui confèrent un pouvoir de réglementation des taux et des tarifs n'est qu'une façon de formuler la règle plus large selon laquelle le tribunal ne doit pas réprimer l'intention du législateur pour la seule raison qu'un pouvoir n'a pas été prévu expressément.

L'appelant a également soutenu que le pouvoir de «modifier» une décision antérieure, provisoire ou finale, que confère l'art. 66 de la *Loi sur les transports nationaux*, comporte le pouvoir de les modifier rétroactivement. Étant donné ma conclusion sur la nature inhérente des ordonnances provisoires, il ne m'est pas nécessaire de traiter de cet argument.

(iii) L'importance de la distinction entre les systèmes positifs d'approbation et les systèmes négatifs de rejet en matière de réglementation des tarifs

On a beaucoup insisté dans les plaidoiries sur la différence entre les systèmes positifs d'approbation et les systèmes négatifs de rejet relativement au pouvoir d'agir rétroactivement. La première catégorie comprend les systèmes qui prévoient que seul l'organisme administratif a le pouvoir légal d'approuver ou de fixer les taxes payables aux services publics; ces systèmes prévoient généralement que les taxes doivent être «justes et raisonnables» et que l'organisme administratif a le pouvoir de réviser ces taxes de sa propre initiative ou à la demande d'une partie intéressée. La deuxième catégorie couvre les systèmes qui reconnaissent aux services publics le droit de fixer les taxes comme ils l'entendent, mais qui reconnaissent aussi aux usagers le droit de se plaindre auprès d'un organisme administratif qui a le pouvoir de modifier les taxes s'il conclut qu'elles ne sont pas «justes et raisonnables». On a conclu de façon générale que les systèmes négatifs de rejet permettent de rendre des ordonnances qui sont rétroactives à la date de la demande du contribuable qui prétend que les taux ne sont pas «justes et raisonnables». D'autre part, on a jugé que les systèmes positifs d'approbation

applicable to periods prior to the final decision itself. A full discussion of this issue was made by Estey J. in *Nova v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437, at pp. 450-51, and I do not propose to repeat or to criticize what was said in that case with respect to the power to review rates approved by a previous final order. I am of the opinion that the regulatory scheme established by the *Railway Act* and the *National Transportation Act* is a positive approval scheme inasmuch as the respondent's rates are subject to approval by the appellant. However, the *Nova* case only dealt with the power to review rates approved in a previous final decision and, as I have said before, entirely different considerations apply when interim rates are reviewed.

étaient de nature exclusivement prospective et ne permettaient pas de rendre des ordonnances applicables à des périodes antérieures à la décision finale elle-même. Le juge Estey traite cette question de façon exhaustive dans l'arrêt *Nova c. Amoco Canada Petroleum Co.*, [1981] 2 R.C.S. 437, aux pp. 450 et 451, et je n'ai pas l'intention de répéter ou de critiquer ce qui a été dit dans cet arrêt quant au pouvoir de réviser les taux approuvés dans une ordonnance définitive antérieure. Je suis d'avis que le système de réglementation établi par la *Loi sur les chemins de fer* et la *Loi sur les transports nationaux* est un système positif d'approbation dans la mesure où les taux de l'intimée sont sujets à l'approbation de l'appelant. L'arrêt *Nova* ne portait toutefois que sur le pouvoir de réviser les taux approuvés dans une décision finale antérieure et, comme je l'ai déjà affirmé, des considérations tout à fait différentes s'appliquent lorsque des tarifs provisoires sont révisés.

It has often been said that the power to review its own previous final decision on the fairness and the reasonableness of rates would threaten the stability of the regulated entity's financial situation. In *Regina v. Board of Commissioners of Public Utilities* (1966), 60 D.L.R. (2d) 703, Ritchie J.A., wrote the following comments on this issue, at p. 729:

> The distributor contends that in the absence of any express limitation or restriction or an express provision as to the effective date of any order made by the board, the jurisdiction conferred on the board by the Legislature includes jurisdiction to make orders with retrospective effect. Reliance is placed on *Bakery and Confectionery Workers International Union of America, Local 468 v. Salmi, White Lunch Ltd. v. Labour Relations Board of British Columbia*, 56 D.L.R. (2d) 193, [1966] S.C.R. 282, 55 W.W.R. 129 which it is contended must be applied when interpreting s. 6(1) of the Act.
>
> The clear object of the Act is to ensure stability in the operation of public utilities and the maintenance of just, reasonable and non-discriminatory rates. That object would be defeated if the board having, on November 14, 1962, made an order fixing the rates to be paid by the distributor for natural gas purchased from the producer, reduced those rates on February 19, 1966, more than three years later, and directed the reduced rates be

On a souvent dit que le pouvoir de réviser sa propre décision finale quant au caractère juste et raisonnable des taux compromettrait la stabilité de la situation financière de l'entreprise réglementée. Dans l'arrêt *Regina v. Board of Commissioners of Public Utilities* (1966), 60 D.L.R. (2d) 703, le juge Ritchie a fait les remarques suivantes sur cette question, à la p. 729:

> [TRADUCTION] Le distributeur prétend qu'en l'absence d'une limite ou restriction expresse ou d'une disposition expresse quant à la date d'entrée en vigueur d'une ordonnance rendue par la commission, la compétence que le législateur confère à cette dernière comprend le pouvoir de rendre des ordonnances rétroactives. On invoque l'arrêt *Bakery and Confectionery Workers International Union of America, Local 468 v. Salmi, White Lunch Ltd. v. Labour Relations Board of British Columbia*, 56 D.L.R. (2d) 193, [1966] R.C.S. 282, 55 W.W.R. 129, qui, prétend-on, doit s'appliquer à l'interprétation du par. 6(1) de la Loi.
>
> Il est clair que l'objet de la Loi est d'assurer la stabilité de l'exploitation des services publics et le maintien de taux justes, raisonnables et non discriminatoires. Cet objet ne serait pas atteint si la commission, après avoir rendu le 14 novembre 1962 une ordonnance fixant les taux payables par le distributeur de gaz naturel acheté au producteur, réduisait ces taux le 19 février 1966, plus de trois ans plus tard et ordonnait que les

effective as from January 1, 1962, or as from any other date prior to February 19, 1966.

and further at p. 732:

In no section of the Act do I find any wording indicating an intention on the part of the Legislature to confer on the board authority to make orders fixing rates with retrospective effect or any language requiring a construction that such authority has been bestowed on the board. To so interpret s. 6(1) would render insecure the position of not only every public utility carrying on business in the Province but also the position of every customer of such public utility.

However, Ritchie J.A.'s comments deal with the *Public Utilities Act*, R.S.N.B. 1952, c. 186, which did not provide the Board with any power to make interim orders. I readily agree that Ritchie J.A.'s concerns about the financial stability of utility companies are valid when one is faced with the argument that a Board has the power to revisit its own previous final decisions. Since no time limit could be placed on the period which could be revisited, any power to revisit previous final decisions would have to be explicitly provided in the enabling statute. Furthermore, even if final orders are "for the time being", it does not necessarily follow that they must be stripped of all their finality through the judicial recognition of a power to revisit a period during which final rates were in force.

However, there should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. In fact, in this case, the respondent asked for and was granted interim rate increases on the basis of serious apprehended financial difficulties. The added flexibility provided by the power to make interim orders is meant to foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which interim orders made in emergency situations may

taux réduits entrent en vigueur à compter du 1er janvier 1962 ou à compter d'une autre date antérieure au 19 février 1966.

et plus loin, à la p. 732:

[TRADUCTION] Je ne trouve nulle part dans la Loi un article qui indique que le législateur a voulu conférer à la commission le pouvoir de rendre des ordonnances fixant des taux avec effet rétroactif ou des mots exigeant une telle interprétation. Interpréter ainsi le par. 6(1) rendrait non seulement incertaine la situation de tous les services publics qui font des affaires dans la province, mais celle également de chacun de ses usagers.

Les remarques du juge Ritchie portent cependant sur la *Public Utilities Act*, R.S.N.B. 1952, chap. 186, qui ne conférait à la Commission aucun pouvoir de rendre des ordonnances provisoires. J'accepte volontiers que les préoccupations du juge Ritchie quant à la stabilité financière des services publics sont valables face à l'argument que la Commission a le pouvoir de réexaminer ses propres décisions finales antérieures. Puisqu'aucun délai ne pouvait s'appliquer à la période qui pouvait faire l'objet d'un réexamen, il aurait fallu prévoir explicitement dans la loi habilitante le pouvoir de réexaminer les décisions finales antérieures. En outre, même si les ordonnances définitives sont rendues «pour le moment», il ne s'ensuit pas forcément qu'on doive les priver de tout caractère définitif par la reconnaissance judiciaire d'un pouvoir de réexaminer la période pendant laquelle les taux définitifs étaient en vigueur.

La stabilité financière des services publics réglementés ne devrait cependant soulever aucune difficulté lorsqu'il s'agit de traiter du pouvoir de réexaminer des tarifs provisoires. L'objet même des tarifs provisoires est de dissiper les risques d'instabilité financière liés à la longueur des procédures devant un tribunal administratif. D'ailleurs, en l'espèce, l'intimée a demandé et obtenu des majorations tarifaires provisoires en raison des graves difficultés financières qu'elle appréhendait. La souplesse supplémentaire que procure le pouvoir de rendre des ordonnances provisoires vise à favoriser la stabilité financière tout au long du processus de réglementation. Le pouvoir de réexaminer la période pendant laquelle les taux provisoires étaient en vigueur est forcément accessoire à ce

cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable.

Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the appellant is empowered to make orders as of the date at which the initial application was made or as of the date the appellant initiated the proceedings of its own motion. The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in *obiter* in *Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission* (1978), 87 D.L.R. (3d) 727 (B.C.C.A.), with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final decision for the period during which they are in effect so as to achieve just and reasonable rates throughout that period.

pouvoir sans lequel les ordonnances provisoires rendues dans des situations d'urgence peuvent causer un préjudice irréparable et contrecarrer l'objectif fondamental d'assurer le maintien de taux justes et raisonnables.

Même si le Parlement a décidé d'adopter un système de réglementation des tarifs de téléphone par voie d'approbation, la souplesse additionnelle que procure le pouvoir de rendre des ordonnances provisoires indique que l'appelant peut rendre des ordonnances effectives à compter de la date du dépôt de la demande initiale ou de la date à laquelle l'appelant a entrepris les procédures de son propre chef. La théorie qui sous-tend la règle portant qu'un système positif d'approbation permet seulement de rendre des ordonnances prospectives repose sur la présomption que les taux sont justes et raisonnables jusqu'à leur modification pour le motif que l'organisme de réglementation qui les a approuvés l'a fait parce qu'ils étaient effectivement justes et raisonnables. Cependant, le pouvoir de rendre des ordonnances provisoires comporte forcément le pouvoir de modifier en entier la structure des taux établie antérieurement dans l'ordonnance définitive. Par conséquent, on ne saurait affirmer que le processus de révision des taux commence à la date de la dernière audience; la révision des taux commence plutôt lorsque l'appelant établit des taux provisoires en attendant qu'une décision finale sur le fond soit rendue. Comme il a été dit dans une opinion incidente dans *Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission* (1978), 87 D.L.R. (3d) 727 (C.A.C.-B.), au sujet d'un régime législatif semblable mais non identique, le pouvoir de rendre des ordonnances provisoires comporte effectivement le pouvoir de les rendre exécutoires à compter de la date du début des procédures. À son tour, ce pouvoir doit comprendre celui de rendre des ordonnances appropriées pour corriger tout écart entre le taux de rendement généré par les taux provisoires et le taux de rendement autorisé dans la décision finale pour la période pendant laquelle ils sont en vigueur, et ce, pour parvenir à des taux justes et raisonnables pendant toute cette période.

(iv) The Power to Make a One-time Credit Order

Once it is decided, as I have, that the appellant does have the power to revisit the period during which interim rates were in force for the purpose of ascertaining whether they were just and reasonable, it would be absurd to hold that it has no power to make a remedial order where, in fact, these rates were not just and reasonable. I also agree with Hugessen J. that s. 340(5) of the *Railway Act* provides a sufficient statutory basis for the power to make remedial orders including an order to give a one-time credit to certain classes of customers.

CNCP Telecommunications argues that the one-time credit order should be limited to the amount of revenues actually derived as a direct result of the 2 per cent interim rate increase and that these excess revenues should be refunded to the actual customers who paid them. The presumption behind this argument is that the portion of the interim rates corresponding to the final rates in force prior to the beginning of the proceedings cannot be held to be unjust or unreasonable until a final decision is rendered. As I have held that the appellant has jurisdiction to review the fairness and the reasonableness of these interim rates in their entirety because the rate-review process starts as of the date of the beginning of the proceedings, this argument must be dismissed.

Finally, it is true that the one-time credit ordered by the appellant will not necessarily benefit the customers who were actually billed excessive rates. However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one-time credit is not the perfect way of reimbursing excess revenues. However, in view of the cost and the complexity of finding who actually paid excessive rates, where these persons reside and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in

(iv) Le pouvoir d'ordonner l'attribution d'un crédit forfaitaire

Une fois qu'il a été décidé, comme je l'ai fait, que l'appelant a le pouvoir de réexaminer la période pendant laquelle les taux provisoires étaient en vigueur pour déterminer s'ils sont justes et raisonnables, il serait absurde de décider qu'il n'a pas le pouvoir d'ordonner un redressement lorsqu'en fait ces taux n'étaient pas justes et raisonnables. Je partage également l'avis du juge Hugessen selon lequel le par. 340(5) de la *Loi sur les chemins de fer* fournit un fondement légal suffisant au pouvoir d'ordonner un redressement, y compris celui d'ordonner l'attribution d'un crédit forfaitaire à certaines catégories d'abonnés.

Télécommunications CNCP soutient que le crédit forfaitaire ordonné devrait être restreint aux revenus qui proviennent directement de la majoration tarifaire provisoire de 2 pour 100 et que ces revenus excédentaires devraient être remboursés aux abonnés qui les ont effectivement payés. La présomption qui sous-tend cet argument est qu'on ne peut affirmer que la portion des taux provisoires qui correspond aux taux définitifs en vigueur avant le début des procédures est injuste ou déraisonnable jusqu'à ce qu'une décision finale soit rendue. Puisque j'ai conclu que l'appelant a compétence pour examiner intégralement le caractère juste et raisonnable de ces taux provisoires en raison du fait que le processus de révision des taux commence à la date du début des procédures, cet argument doit être rejeté.

Enfin, il est vrai que ce ne sont pas les abonnés à qui des taux excessifs ont été facturés qui vont nécessairement profiter du crédit forfaitaire ordonné. Cependant, une fois qu'on a conclu que l'appelant a le pouvoir d'ordonner un redressement, la nature et l'étendue de cette ordonnance relèvent de sa compétence en l'absence d'une disposition législative expresse sur la question. L'appelant reconnaît que le crédit forfaitaire n'est pas le moyen par excellence de rembourser les revenus excédentaires. Étant donné toutefois le coût et la complexité liés à l'identification des personnes qui ont payé des taux excessifs ainsi qu'à la détermination de leur lieu de résidence et de la somme que chacune a versée en trop, et compte tenu de la

weighing the many factors involved in apportioning respondent's revenue requirement amongst its several classes of customers to determine just and reasonable rates, the appellant's decision was eminently reasonable and I agree with Hugessen J. that it should not be overturned.

VI—Conclusion

In my opinion, the appellant had jurisdiction to review the interim rates in force prior to Decision 86-17 for the purpose of ascertaining whether they were just and reasonable, had jurisdiction to order the respondent to grant the one-time credit described in Decision 86-17 and has committed no error in so doing.

I would allow the appeal and confirm the appellant's decision, with costs in all courts.

Appeal allowed with costs.

Solicitor for the appellant: Avrum Cohen, Hull.

Solicitors for the respondent: Clarkson, Tétrault, Montréal.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Consumers' Association of Canada: Janet Yale, Ottawa.

Solicitor for the intervener Canadian Business Telecommunications Alliance: Kenneth G. Engelhart, Toronto.

Solicitor for the intervener the CNCP Telecommunications: Michael Ryan, Toronto.

Solicitors for the intervener the National Anti-Poverty Organization: Andrew Roman and Glenn W. Bell, Ottawa.

compétence générale de l'appelant pour ce qui est d'évaluer les nombreux facteurs qui entrent en jeu dans la répartition des besoins en revenus de l'appelant parmi ses différentes catégories d'abonnés en vue de fixer des taux justes et raisonnables, la décision de l'appelant était tout à fait raisonnable et je partage l'avis du juge Hugessen qu'elle ne devrait pas être écartée.

VI—Conclusion

À mon avis, l'appelant avait le pouvoir d'examiner les taux provisoires en vigueur avant que la décision 86-17 soit rendue pour vérifier s'ils étaient justes et raisonnables et il avait le pouvoir d'ordonner à l'intimée d'accorder le crédit forfaitaire décrit dans la décision 86-17 et, ce faisant, il n'a commis aucune erreur.

Je suis d'avis d'accueillir le pourvoi et de confirmer la décision de l'appelant, avec dépens dans toutes les cours.

Pourvoi accueilli avec dépens.

Procureur de l'appelant: Avrum Cohen, Hull.

Procureurs de l'intimée: Clarkson, Tétrault, Montréal.

Procureur de l'intervenant le procureur général du Canada: Le sous-procureur général du Canada, Ottawa.

Procureur de l'intervenante l'Association des consommateurs du Canada: Janet Yale, Ottawa.

Procureur de l'intervenante l'Alliance canadienne des télécommunications de l'entreprise: Kenneth G. Engelhart, Toronto.

Procureur de l'intervenante Télécommunications CNCP: Michael Ryan, Toronto.

Procureurs de l'intervenante l'Organisation nationale anti-pauvreté: Andrew Roman et Glenn W. Bell, Ottawa.

TAB 6

Reasons of the IESO Board in respect of amendments to the market rules

Terms and acronyms used herein that are italicized have the meanings ascribed thereto in Chapter 11 of the *market rules*.

The following sets out the *IESO Board's* reasons for its decision on the proposed *amendments* to the *market rules* identified in Part 1 below (the "**Amendments**").

PART 1 – MARKET RULE INFORMATION

Identification No.: MR-00481-R00-R13
Title: Market Renewal Program: Final Alignment

The *IESO Board* convened to consider the Amendments on the date and location set out in Part 2 below.

PART 2 – BOARD MEETING INFORMATION

Date: October 18, 2024
Location: 120 Adelaide Street West, Toronto ON

Prior to considering the Amendments, the Chair of the *IESO Board* enquired whether any director of the *IESO Board* had a conflict of interest to declare, the result of which is set out in Part 3 below.

PART 3 – CONFLICTS OF INTEREST

☒ No conflict was declared. ☐ Any director declaring a conflict of interest abstained from voting on the adoption of the Amendments.

The *IESO Board* was presented with the materials in respect of the Amendments identified in Part 4 below (the "**Materials**"), all of which is *published* on the *IESO's* website subject to such redactions as *IESO* staff determined reasonably necessary.

PART 4 – MATERIALS

- Presentation
- Appendix A – Market Renewal Program: Summary of Market Rule Amendment Batches
- Memorandum from the *Technical Panel* Chair
- *Market Rule* Amendment Proposals as recommended by *Technical Panel*
- *IESO* Staff memo to the *Technical Panel*
- Draft Resolution
- *Technical Panel* member vote and rationale (Appendix to Memorandum)
- Consumer Impact Assessment (this assessment is required to support the *Ontario Energy Board market rule* amendments review process)
- *Technical Panel* and Stakeholder Comments (this assessment is required to support the *Ontario Energy Board market rule* amendments review process)

Having considered the Amendments and the Materials, the *IESO Board* decided as identified in Part 5 for the reasons set out in Part 6.

PART 5 – DECISION

☒ The *IESO Board* decided in favour of the adoption of the Amendments.

☐ The *IESO Board* referred the Amendments back to the *Technical Panel* for further consideration and vote.

☐ The *IESO Board* decided against the adoption of the Amendments.

PART 6 – REASONS

The *IESO Board* reviewed the Materials including the *Technical Panel* unanimous vote to recommend MR-00481-R00-R13 for approval by the *IESO Board*. The Markets Committee of the *IESO Board* discussed the Amendments and subsequently recommended them for adoption at the October 18, 2024, *IESO Board* meeting.

The *IESO Board* decided to adopt the Amendments recommended by the *Technical Panel*.

The *IESO Board* adopted the Amendments for the following reasons:

1. the Amendments, as part of the Market Renewal Program (MRP), are intended to increase the efficiency of Ontario's electricity markets and reduce system costs paid for by consumers;
2. the *IESO* has engaged extensively with stakeholders concerning the Amendments as further detailed in the Memorandum from the *Technical Panel* Chair in the materials;
3. the *Technical Panel* reviewed the Amendments and unanimously recommended that they be approved;
4. the *IESO's* management recommended that the *IESO Board* accept the unanimous recommendation of the *Technical Panel* to approve the Amendments;
5. the Amendments will enable the implementation of the MRP framework;
6. the Calculation Engine Amendments were independently assessed to confirm that the implementation of the new engines are compliant with the amended *market rules;*
7. the *IESO* has committed to continue working with the Electricity Distributors Association (EDA) and Ontario Energy Board (OEB) to assist Local Distribution Companies (LDCs) in their preparation for MRP go-live;
8. the *IESO* has committed to establish and work with the Market Power Mitigation (MPM) Working Group in identifying unintended outcomes of the MPM framework and recommending means to address such unintended outcomes;
9. for MPM, the *IESO* has also committed to further delay designation of constrained areas, enhance end-to-end testing, and apply discretion to not issue ex-post mitigation assessments if warranted; and
10. the *IESO* will continue to assess the need for any additional amendments to *market rules* or *market manuals* and will obtain stakeholder feedback as required in advance of MRP go-live.

TAB 7

Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2007-0040

IN THE MATTER OF the *Electricity Act, 1998*, S.O.1998, c.15 (Schedule B);

AND IN THE MATTER OF an Application by the Association of Major Power Consumers in Ontario under section 33 of the *Electricity Act, 1998* for an Order revoking an amendment to the market rules and referring the amendment back to the Independent Electricity System Operator for further consideration, and for an Order staying the operation of the amendment to the market rules pending completion of the Board's review.

PROCEDURAL ORDER NO. 1

On February 9, 2007, the Association of Major Power Consumers in Ontario ("AMPCO") filed with the Ontario Energy Board (the "Board") an Application under section 33(4) of the *Electricity Act, 1998* seeking the review of an amendment to the market rules made by the Independent Electricity System Operator (the "IESO") on January 18, 2006. The Board has assigned file number EB-2007-0040 to the Application.

The amendment that is the subject matter of the Application is identified as MR-00331-R00: "Specify the Ramping Capability in the Market Schedule" and relates to the ramp rate assumption used in the market dispatch algorithm within the IESO-administered markets (the "Amendment").

On February 9, 2007, the Board issued its Notice of Application and Oral Hearing ("Notice") in relation to the Application.

Stay of Operation of the Amendment

The Amendment was scheduled to have an effective date of February 10, 2007. AMPCO also applied for an order under section 33(7) of the *Electricity Act, 1998* staying the operation of the amendment pending completion of the Board's review. On February 9, 2007, the IESO filed a letter with the Board indicating the IESO's consent to the stay of the operation of the Amendment. Also on February 9, 2007, the Board issued an Order staying the operation of the Amendment pending completion of the Board's review of the Amendment. A copy of the Order is attached as Appendix A to this Procedural Order.

Interventions and Cost Awards

In accordance with the Notice, interested parties had until Thursday, February 15, 2007 to notify the Board of their intention to intervene in this proceeding. Notices of intervention have been received from the following interested parties: the IESO; the Vulnerable Energy Consumers Coalition ("VECC"); the Association of Power Producers of Ontario ("APPrO"); TransCanada Energy Ltd. ("TransCanada"); Coral Energy Canada Inc. ("Coral Energy"); Ontario Power Generation Inc. ("OPG"); the Electricity Market Investment Group ("EMIG") and Hydro One Networks Inc. ("Hydro One").

In accordance with section 33(6) of the *Electricity Act, 1998*, the Board is required to issue an order that embodies its final decision in this proceeding within 60 days of the date of receipt of AMPCO's Application. In order to meet the statutory deadline, the Board will vary its customary intervention process and will grant intervenor status to all those who requested it. A list of parties to this proceeding is set out in Appendix B to this Procedural Order.

The Board will make cost awards available in this proceeding to eligible intervenors. In its application, AMPCO has requested that an award of costs be payable to it and to other eligible intervenors by the IESO. The following other parties have requested an award of costs in this proceeding: APPrO, VECC and the IESO. In the case of applications, cost awards are typically recovered from the applicant and applicants are, absent special circumstances, not eligible for an award of costs. However, the Board believes that it may be appropriate for cost awards to be recovered from the IESO in cases where the application relates to a review of an amendment to the market rules. The Board would benefit from submissions by the parties on this issue.

Direction to Provide Materials

Materials relevant to this proceeding are maintained by the IESO. The Board considers it expedient to direct the IESO, under section 21 of the *Ontario Energy Board Act, 1998*, to file materials associated with the development and adoption of the Amendment.

The Board considers it necessary to make provision for the following procedural matters. Further procedural orders may be issued from time to time.

THE BOARD ORDERS THAT:

1. The issues to be considered in this proceeding shall be those set out in Attachment C to this Procedural Order.

2. Any party that wishes to make written submissions on the issue of cost awards shall file those submissions with the Board on or before Monday, February 26, 2007.

3. AMPCO shall file any additional evidence with the Board on or before Monday, February 26, 2007, and shall deliver a copy of this evidence to all intervenors.

4. The IESO is directed to file the following materials with the Board on or before Monday, February 26, 2007, and to deliver a copy of those materials to AMPCO and to all intervenors:

    i. the Market Rule Amendment Submission relating to the Amendment, including the covering memorandum;

    ii. all written submissions received by the IESO in relation to the Amendment;

    iii. minutes or meeting notes of all meetings of the Market Pricing Working Group or the Stakeholder Advisory Group at which the Amendment or the subject matter of the Amendment was discussed;

iv. a list of all materials related to the Amendment or the subject matter of the Amendment tabled before the Market Pricing Working Group or the Stakeholder Advisory Group;

v. a list of all materials tabled before the Board of Directors of the IESO in relation to the Amendment or the subject matter of the Amendment, and a copy of all such materials other than those already captured by items i to iv above;

vi. a copy of the decision of the Board of Directors of the IESO adopting the Amendment;

vii. any written material on the impact of the Amendment on the price, reliability and quality of electricity service; and

viii. all materials prepared by the IESO in relation to the Amendment or the subject matter of the Amendment, other than materials already captured by items i to vii above.

5. Each intervenor, including the IESO, shall file its evidence with the Board on or before Friday, March 9, 2007, and shall deliver a copy of its evidence to AMPCO and to all other intervenors.

6. A Technical Conference will be held to review the evidence filed by the parties. The Technical Conference will commence at 9:30 a.m. on Thursday, March 22, 2007, and if need be, continue on Friday March 23, 2007 in the Board's West Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto. At the end of the Technical Conference, parties will have the opportunity to make submissions as to whether oral testimony before the panel is required, or whether the matter can proceed directly to oral argument.

7. An oral hearing will commence at 9:30 a.m. on Thursday, March 29, 2007 in the Board's North Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto. The hearing is currently scheduled for up to 2 days. If oral testimony is not required, these dates will be used to hear oral argument.

All filings to the Board noted in this Procedural Order must be in the form of 8 hard copies and must be received by the Board Secretary by **4:45 p.m.** on the stated dates. The Board requests that parties also submit an electronic copy of their filings in searchable, accessible Adobe Acrobat (PDF), if available, or MS Word. Electronic copies should be sent to boardsec@oeb.gov.on.ca, with a copy to the case manager Harold Thiessen at harold.thiessen@oeb.gov.on.ca.

DATED at Toronto, February 16, 2007.

ONTARIO ENERGY BOARD

Original signed by

Peter H. O'Dell
Assistant Board Secretary

APPENDIX A

to

Procedural Order No. 1
February 16, 2007

Association of Major Power Consumers in Ontario
Review of Market Rules Amendment
EB-2007-0040

Order of the Board Issued February 9, 2007

(see attached document)

Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2007-0040

IN THE MATTER OF the *Electricity Act, 1998*, S.O.1998, c.15 (Schedule B);

AND IN THE MATTER OF an Application by the Association of Major Power Consumers in Ontario under section 33 of the *Electricity Act, 1998* for an Order revoking an amendment to the market rules and referring the amendment back to the Independent Electricity System Operator for further consideration, and for an Order staying the operation of the amendment to the market rules pending completion of the Board's review.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Pamela Nowina
Vice Chair

Bill Rupert
Member

ORDER

On February 9, 2007, the Association of Major Power Consumers in Ontario ("AMPCO") filed with the Ontario Energy Board (the "Board") an application under section 33(4) of the *Electricity Act, 1998* seeking the review of an amendment to the market rules made by the Independent Electricity System Operator on January 18, 2007. The Board has assigned the application Board file number EB-2007-0040.

The amendment that is the subject-matter of AMPCO's application is identified as MR-00331-R00: "Specify the Ramping Capability in the Market Schedule" and relates to the ramp rate assumption used in the market dispatch algorithm within the IESO-administered markets (the "Amendment").

The Amendment has an effective date of February 10, 2007. AMPCO has also applied for an order under section 33(7) of the *Electricity Act, 1998* staying the operation of the Amendment pending completion of the Board's review of the Amendment. AMPCO's arguments in that regard are as follows:

i. It is in the public interest to order the stay. The Amendment will have a significant impact on electricity consumers, who will immediately face considerable electricity cost increases for no discernable benefits.

ii. There are legitimate concerns with respect to the Amendment that should be considered by the Board.

iii. The balance of convenience favours a stay:

a) the existing ramp rate multiplier has been in place since market opening in 2002, and there is no urgency to implementation of the Amendment, whereas the impact of the Amendment on consumers is substantial;

b) adjusting the ramp rate now with the possibility that the Amendment will be reversed later will lead to customer confusion and possibly the need to reverse charges to load customers and payments to generators with the attendant administrative costs for those adjustments; and

c) the Board is required to make a final decision in this proceeding within 60 days.

On February 9, 2007, the Independent Electricity System Operator ("IESO") filed a letter with the Board indicated that it consents to the stay of the operation of the Amendment, such consent being without prejudice to any arguments that the IESO may make in relation to the Board's review of the Amendment. In

consenting to the stay, the IESO noted that it has given due consideration to the balance of convenience and the short duration of the stay given the Board's statutory deadline for issuing an order embodying its final decision in relation to the review of the Amendment.

The Board has considered the matters identified in section 33(8) of the *Electricity Act, 1998* and AMPCO's submissions in that regard. The Board is satisfied that the operation of the Amendment should be stayed pending completion of the Board's review of the Amendment. In particular, the Board agrees that the balance of convenience is in favour of staying the operation of the Amendment, particularly given the long history of the ramp rate issue in the IESO-administered markets.

THE BOARD ORDERS THAT:

The operation of the amendment to the market rules entitled MR-00331-R00: "Specify the Ramping Capability in the Market Schedule", made by the Board of Directors of the Independent Electricity System Operator on January 18, 2007 and scheduled to come into effect on February 10, 2007, is hereby stayed pending completion of the Board's review of the amendment and issuance by the Board of its order embodying its final decision on AMPCO's application for review of the amendment.

DATED at Toronto, February 9, 2007.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX B

to

Procedural Order No. 1
February 16, 2007

Association of Major Power Consumers in Ontario
Review of Market Rules Amendment
EB-2007-0040

List of Parties

ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO "AMPCO"
MARKET RULE AMENDMENT
EB-2007-0040
APPLICANT & LIST OF INTERVENTIONS

February 16, 2007

	Applicant	**Rep. and Address for Service**
	Association of Major Power Consumers in Ontario ("AMPCO")	Adam White AMPCO 162 Cumberland St. Suite 305 Toronto ON M5R 3N5 Tel: 416-260-0225 Fax: 416-260-0442 Email: awhite@ampco.org
	Applicant's Counsel	J. Mark Rodger Borden Ladner Gervais LLP Scotia Plaza, 40 King St. W. Toronto ON M5H 3Y4 Tel: 416-367-6190 Fax: 416-361-7088 Email: mrodger@blgcanada.com
	Intervenors	**Rep. And Address for Service**
1	**Association of Major Power Producers of Ontario ("APPrO")**	David Butters President APPrO 25 Adelaide St. E. Suite 1602 Toronto ON M5C 3A1 Tel: 416-322-6549 Fax: 416-481-5758 Email: david.butters@appro.org
	AND	Elisabeth Demarco Counsel Macleod Dixon LLP Toronto Dominion Centre Canadian Pacific Tower 100 Wellington St. W. Suite 500, P.O. Box 128 Toronto ON M5K 1H1 Tel: 416-203-4431 Fax: 416-360-8277 Email: Elisabeth.demarco@macleoddixon.com

	AND	Heather Landymore Macleod Dixon LLP Toronto Dominion Centre Canadian Pacific Tower 100 Wellington St. W. Suite 500, P.O. Box 128 Toronto ON M5K 1H1 Tel: 416-202-6702 Fax: 416-360-8277 Email: heather.landymore@macleoddixon.com
	AND	Nicki Pellegrini Toronto Dominion Centre Canadian Pacific Tower 100 Wellington St. W. Suite 500, P.O. Box 128 Toronto ON M5K 1H1 Tel: none given Fax: 416-360-8277 Email: nicki.pellegrini@macleoddixon.com
2	**Coral Energy Canada Inc.**	Paul Kerr Manager, Market Affairs Coral Energy Canada Inc a Shell Trading Company 60 Struck Court, Suite 100 Cambridge ON N1R 8L2 Tel: 519-620-7712 Fax: 519-624-7712 Email: paul.kerr@shell.com
3	**Electricity Market Investment Group (EMIG)**	Robert G. Power Blakes, Cassels & Graydon LLP Suite 2800, 199 Bay St Toronto ON M5L 1A9 Tel: 416-853-2434 Fax: 416-863-2653 Email: Robert.power@blakes.com

4	**Hydro One Networks Inc**	Glen MacDonald Senior Advisor – Regulatory Research and Administration Hydro One Networks Inc. 8th Floor, South Tower 483 Bay St. Toronto ON M5G 2P5 Tel: 416-345-5913 Fax: 416-345-5866 Email: regulatory@HydroOne.com
5	**Independent Electricity System Operator (IESO)**	George Katsuras Senior Regulatory Analyst 655 Bay St, Suite 410, P.O. Box 1 Toronto ON M5G 2K4 Tel: 416-506-2852 Fax: 416-506-2843 Email: george.katsuras@ieso.ca
	AND	Alan H. Mark - Counsel for IESO Ogilvy Renault LLP Royal Bank Plaza, South Tower Suite 3800 200 Bay St. P.O. Box 84 Toronto ON M5J 2Z4 Tel: 416-216-4865 Fax: 416-216-3930 Email: amark@ogilvyrenault.com
6	**Ontario Power Generation**	Barry Green Director, Markets and Research – Reg. Affairs Ontario Power Generation Inc. 700 University Avenue H18-G2 Toronto ON M5G 1X6 Tel: 416-592-7883 Fax: 416-592-8519 Email: barry.green@opg.com

	AND	Josie Erzetic Solicitor Ontario Power Generation Inc. 700 University Avenue H18-G2 Toronto ON M5G 1X6 Tel: 416-592-5885 Fax: 416-592-1466 Email: j.erzetic@opg.com
7	**Trans Canada Energy Ltd**	Angela Avery TransCanada Energy Ltd. 450 – 1st St. S.W. Calgary Alberta T2P 5H1 Tel: 403-920-2171 Fax: 403-920-2422 Email: angela_avery@transcanada.com
	AND	Margaret Duzy TransCanada Energy Ltd. 55 Yonge St., 8th Floor Toronto ON M5E 1J4 Tel: 416-869-2180 Fax: 416-869-2114 Email: Margaret_duzy@transcanada.com
8	**Vulnerable Energy Consumers Coalition (VECC)**	Michael Buonaguro Counsel c/o Public Interest Advocacy Centre 34 King St. E. Suite 1102 Toronto ON M5C 2X8 Tel: 416-767-1666 Fax: 416-348-0641 Email: mbuonaguro@piac.ca
	AND	Bill Harper Econalysis Consulting Services 34 King St. E. Suite 1102 Toronto ON M5C 2X8 Tel: 416-348-0193 Fax: 416-348-0641 Email: bharper@econalysis.ca

APPENDIX C

to

Procedural Order No. 1
February 16, 2007

Association of Major Power Consumers in Ontario
Review of Market Rules Amendment
EB-2007-0040

Issues List

1) Is the market rule amendment inconsistent with the purposes of the *Electricity Act, 1998*?

2) Does the market rule amendment unjustly discriminate against or in favour of a market participant or class of market participants?