

1 **Q. If the Board should find that the proposed sale of joint use support structures**  
2 **results in a negative impact to customers and/or does not pass the “no harm” test**  
3 **referred to in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*,**  
4 **[2006] 1 S.C.R. 140, 2006 SCC 4, what options does the Company propose to the**  
5 **Board in that instance?**

6  
7 **A. *The ATCO Case***  
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9 In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R.  
10 140 (the “*ATCO Gas* case”), the Supreme Court of Canada considered an appeal from a  
11 decision of the Alberta Court of Appeal setting aside a decision of the Alberta Energy &  
12 Utilities Board (“EUB”) regarding disposition of the proceeds of sale of real property in  
13 Calgary, Alberta, owned by ATCO Gas – South (“ATCO”), a regulated gas utility.  
14

15 In its consideration of the proposed sale, the EUB employed a two-step process with  
16 respect to ATCO’s application. The first step involved consideration by the EUB of  
17 whether the sale should be approved. In the second step, following the EUB’s approval  
18 of the sale, the matter of the allocation of the net proceeds of sale was considered. It was  
19 the decision regarding the proceeds of sale that was ultimately appealed to the Supreme  
20 Court of Canada.<sup>1</sup>  
21

22 The EUB’s reasons for approving the sale of the ATCO property are set out in EUB  
23 Decision 2001-78. In approving the sale, the EUB applied the “no-harm” test  
24 subsequently referred to by the Supreme Court of Canada in the *ATCO Gas* case.  
25

### 26 ***The “No Harm” Test***

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28 According to the “no harm” test, the EUB has stated, the regulator must be satisfied that  
29 the proposed transaction “will either not harm customers or, on balance, leave them at  
30 least no worse off than before in terms of financial impact and reliability of service.”<sup>2</sup>  
31

32 The EUB further stated that “...the Board is of the view that, subject to those issues  
33 which can be dealt with in future regulatory proceedings..., it must consider whether the  
34 disposition will adversely impact the rates customers would otherwise pay and whether it  
35 would disrupt safe and reliable service to customers.”<sup>3</sup>

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<sup>1</sup> EUB Decision 2001-78, *Atco Gas and Pipelines Ltd., Disposition of Calgary Stores Block and Distribution of Net Proceeds – Part 1*, (October 24, 2001); Decision 2002-037, *Atco Gas and Pipelines Ltd., Disposition of Calgary Stores Block and Distribution of Net Proceeds – Part 2*, (March 21, 2002).

<sup>2</sup> EUB Decision 2000-41, *TransAlta Utilities Corporation, Sale of Distribution Business* (July 5, 2000), in which the EUB approved the sale by TransAlta of its electric distribution business to UtiliCorp Newtorks Canada (Alberta) Ltd., page 8, as quoted in EUB Decision 2002-037 at page 5.

<sup>3</sup> *Ibid.*

1 The EUB approved the ATCO sale on the basis that it was satisfied that:

- 2 (i) customers would not be harmed by the sale, with a prudent lease arrangement to  
3 replace the sold facility;  
4 (ii) there would not be a negative impact on customer rates, at least during the five-year  
5 initial term of the lease, rather, there appeared to be cost savings to customers;  
6 (iii) there should be no impact on the level of service to customers as a result of the sale,  
7 and;  
8 (iv) customers had not specifically objected to the sale.<sup>4</sup>  
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### 10 ***Applying the No Harm Test to the Application***

11  
12 Bell Aliant's 2001 sale of its Joint Use Support Structures to Newfoundland Power and  
13 the right of repurchase of 40% of Joint-Use Support Structures by Bell Aliant in 2011  
14 were both terms of a single agreement negotiated between the parties. The agreement has  
15 proven to be very beneficial to the customers of Newfoundland Power through 2010 and  
16 the repurchase by Bell Aliant in 2011, if approved by the Board, will provide additional  
17 benefits to Newfoundland Power's customers.<sup>5</sup>  
18

19 The evidence shows that there has been a positive impact on customer rates over the  
20 period 2001 through 2010 and that there will be further cost savings for the initial 5-year  
21 period following the repurchase by Bell Aliant in 2011.<sup>6</sup>  
22

23 The evidence further shows that there will be no negative impact on the level of service  
24 to customers as a result of the agreement.<sup>7</sup>  
25

26 Finally, there appears to be no specific customer objections to the agreement or Bell  
27 Aliant's repurchase of 40% of the Joint Use Support Structures in evidence.  
28

29 In summary, there is *no* evidence in this proceeding of a negative impact on customers,  
30 from either a rates perspective or a service perspective. Accordingly, it is difficult for  
31 Newfoundland Power to envisage any basis for a finding by the Board that the proposed  
32 sale does not pass the "no harm" test referred to in the *ATCO Gas* case.  
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### 34 ***Options Available to the Board***

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36 In its decision approving the ATCO sale, the EUB stated that in applying the "no harm"  
37 test, it considers the potential impact on both rates and the level of service to customers,  
38 *and whether the availability of future regulatory processes might be able to address any*  
39 *potential adverse impacts that could arise from a transaction.*<sup>8</sup> (emphasis added)

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<sup>4</sup> EUB Decision 2001-78, page 3.

<sup>5</sup> The total cost benefits associated with this agreement are approximately \$10.6 million (see Prefiled Evidence, Exhibits 4 and 8). The *additional* benefits associated with the repurchase by Bell Aliant in 2011 are in excess of those which would exist upon a 2011 renewal of the 2001 Joint-Use Facilities Partnership Agreement and are approximately \$0.5 million (see Prefiled Evidence, Exhibit 8).

<sup>6</sup> See Prefiled Evidence, page 11, line 7 to page 12, line 13; Exhibits 4 and 8; Responses to Requests for Information PUB-NP-45 and PUB-NP-74.

<sup>7</sup> See Prefiled Evidence, page 10, lines 14-17; Response to Request for Information PUB-NP-1.

<sup>8</sup> EUB Decision 2001-78, page 3.

1 Should the Board be concerned that, despite all of the evidence to the contrary in this  
2 proceeding, the proposed sale might result in a negative impact on customers, from either  
3 a service or a rates perspective, there are measures available under the *Public Utilities Act*  
4 (the “Act”) whereby any impact on customers could be considered, and addressed if  
5 necessary, in future regulatory proceedings.  
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7 Under the Act, the Board has the general supervision of all public utilities, including  
8 Newfoundland Power, and may obtain such information from Newfoundland Power as  
9 the Board may require to fulfill its duties.<sup>9</sup> In accordance with its general powers under  
10 the Act, the Board can at any time order that Newfoundland Power report on specific  
11 aspects of Joint Use, including matters related to the completion of the proposed sale and  
12 ongoing Joint Use following the sale. In addition, the Act contains specific provisions  
13 that empower the Board to investigate matters related to, among other things, service and  
14 rates, and to impose such remedies as may be appropriate.<sup>10</sup>  
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16 The evidence on the Application clearly indicates that Bell Aliant’s 2001 sale of its Joint  
17 Use Support Structures to Newfoundland Power and Bell Aliant’s 2011 repurchase of  
18 40% of Joint Use Support Structures has and will provide benefits to customers of  
19 Newfoundland Power. Any remedial order by the Board would necessarily be in  
20 response to and address a specific, identified negative customer impact. It is not possible  
21 to propose *specific* options to the Board in the absence of evidence of any such negative  
22 customer impact.

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<sup>9</sup> Section 16 of the Act.

<sup>10</sup> Sections 82 and 87 of the Act.