IN THE MATTER OF the *Public Utilities Act,* (the "Act"); and

IN THE MATTER OF an application by Newfoundland Power Inc., ("Newfoundland Power"_ for an Order pursuant to Section 48 of the Act, and all other enabling powers for approval of the sale by Newfoundland Power to Bell Aliant Regional Communications Inc. ("Bell Aliant") of certain utility poles, anchors and related equipment ("Support Structures").

CONSUMER ADVOCATE'S WRITTEN SUBMISSIONS

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Introduction

1. Newfoundland Power Inc. (Newfoundland Power) is a poles and wires utility regulated by the Board of Commissioners of Public Utilities pursuant to the Public Utilities Act, RSN 1990, c-P-47 (the "Act")

2. Newfoundland Power has entered into a Joint Use Support Structures Purchase Agreement ("Purchase Agreement") pursuant to which it has agreed to sell inter alia 40% of its Joint Use Support Structures to Bell Aliant Regional Communications Inc. (Bell Aliant) for approximately $46,000,000, subject to adjustments, effective January 1, 2011. Newfoundland Power also entered into a Joint Use Agreement ("JUA") which provide the terms of continuing Joint Use of Support Structures, effective January 1, 2011.

3. The agreement of Newfoundland Power to sell the "Purchased Assets" is expressly subject to and conditional upon the Public Utilities Board's (Board's) approval of the sale of the Purchased Assets.[1]

4. On February 1, 2011 Newfoundland Power applied to the Board requesting an Order pursuant to S.48 of the Act:

> "(a) approving the sale to Bell Aliant by Newfoundland Power of Joint Use Support Structures as provided for in the Purchase Agreement; and
>
> (b) such other matters as may appear just and reasonable upon the

[1]Article 3.2 of the Joint Use Support Structures Purchase Agreement

hearing of this Application."

The Appropriate Test to be Applied - S.48

5. S.48 of the Act simply states:

> A public utility shall not sell, assign or transfer the whole of its undertaking or a part of it to a person or corporation until the approval of the board has been granted.

6. In Alberta's Public Utilities Act, section 101 (2) (d) states as follows:

> 101(2) No owner of a public utility designated under subsection (1) shall
>
> [...]
>
> (d) without the approval of the Commission,
>
> (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or
>
> (ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,
>
> and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

Reference: S. 101(2)(d) of the Public Utilities Act, RSA 2000, Chapter P-45, **Tab 1**

7. As can be observed, like this province's Act, Alberta's Act does not prescribe a particular test for the Board to apply. It appears that the Board in Alberta has developed a so-called "no-harm test" when evaluating applications under section 101(2).

8. In Re Fortis Alberta Inc., Disposition of High River Service Centre [Decision 2010-615], the Board at paras 7 and 8 state:

> 7. The requirements for an approval under section 101(2) of the *Public Utilities Act* were developed by the Commission's predecessor, the Alberta Energy and Utilities Board (Board). The Board developed a no-harm test when evaluating applications under that section to determine whether the application should be denied, approved, or approved with conditions. The no-harm test balances the potential positive and negative effects of the proposed sale to determine whether it is in the overall public interest. That test originates from the Commission's authority to safeguard the public interest in the nature and quality of the service provided to the community by public utilities, an authority reaffirmed in the *ATCO Ltd. v. Calgary Power Ltd,* where the Supreme Court stated that the Commission's authority in this regard is of the widest proportions. (emphasis added)
>
> 8. The rationale for applying the no-harm test was summarized by the Board in Decision 2000-41. The no-harm test was acknowledged by the Supreme Court in the *Stores Block* decision. The Supreme Court held that when harm was found, the Commission could either deny the sale transaction or attach a condition to an approval:
>
> > The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the

condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system. (footnotes omitted)

Reference: AUC Decision 2010 - 615, Fortis Alberta Inc., Disposition of High River Services Centre (December 23, 2010), **Tab 2**

9. The Alberta EUB has also stated that:

"As a result, rather than simply asking whether customers will be adversely impacted by some aspect of the transactions, the Board concludes that it should weigh the potential positive and negative impacts of the transactions to determine whether the balance favours customers or at least leaves them no worse off, having regard to all of the circumstances of the case."

References: EUB Decision 2000 - 41, TransAlta Utilities Corporation, Sale of Distribution Business (July 5, 2000), page 8 as quoted in EUB Decision 2002 - 037 at page 5, **Tabs 3 and 4** respectively

10. In the Consumer Advocate's respectful submission, this Board, as did the Alberta Board, may develop a test when evaluating applications under S.48 of the Act. That test would originate from the Board's authority to safeguard the public's interest in the nature and quality of the service provided. In Alberta, that test has been called the "no-harm test" under which the regulator (see para. 11 of Re Fortis Alberta Inc.) must "determine whether customers have been harmed either as the result of a detrimental impact to the quality or quantity of customer service or by way of a rate impact as a result of the proposed disposition of the asset." Or, as put another way in EUB Decision 2000 - 41, the regulator must determine "whether the balance favours customers or at least leaves them no worse off, having regard to all of the circumstances of the case." The Consumer Advocate does not take issue with these

formulations but would caution the Board against being tied down to a particular formulation. The key question is whether the proposed sale transaction is in the overall public interest having regard to all of the relevant circumstances.

11. The relevant circumstances may be many and may be varied, depending upon the case. In the respectful submission of the Consumer Advocate, a non-exhaustive list of the relevant circumstances that may apply are:

(a) whether the proposed sale may benefit or detriment customers from a service and/or financial perspective; and

(b) Regulatory Considerations Impacting Customers including:

(i) the nature of the assets, property, franchises, privileges or rights proposed to be sold;
(ii) whether the particular assets are surplus assets or used and useful assets;
(iii) the identity and characteristics of the purchaser where the assets are essential to the provision of the utility service.

Application of the Test

Potential Benefits and Potential Harm to Customers

12. Newfoundland Power states (PUB NP 34) that it identified two primary risks to its customers arising from the sale of the Joint Use Support Structures to Bell Aliant.

These primary risks were:

(i) the potential for increased cost associated with future Joint Use Support Structure Management; and

(ii) the potential for degradation of service associated with future Joint Use Support Structure Management.

Costs

13. On the costs side, Newfoundland Power's key consideration (PUB NP 34, line 11) was that Bell Aliant bear 40% of the costs associated with Joint Use Support Structures. According to the Company's evidence (p. 1, lines 16 - 18) since the late 1980s, the terms of Joint Use between Newfoundland Power and Bell Aliant (and its predecessors) have included Support Structure cost sharing arrangements based on 60% Newfoundland Power and 40% Bell Aliant. Of course, it must be observed that such a 60/40 arrangement would not necessitate that Newfoundland Power sell any current joint use structures to Bell Aliant.

14. Newfoundland Power goes on to state in PUB NP 34 that Bell Aliant's assumption of 40% of the cost of Joint Use Support Structure as agreed with Newfoundland Power results in a (i) positive levelized revenue requirement impact (indicating a financial benefit to customers) of approximately $123,000 per year, or (ii) a cumulative net present value benefit of approximately $0.5 million over the 5-year period (2011 to 2015) when compared with a 2011 renewal of the 2001 Joint Use Facilities Partnership Agreement. Newfoundland Power has indicated (see CA NP

04, lines 12 - 15) that the positive levelized revenue requirement and cumulative net present value benefit makes the new Joint Use Requirement consistent with least cost management of Joint Use Facilities.

15. As can be observed from Exhibit 8 of the Evidence, for 2011 and 2012, revenue requirement impacts are positive, $918, 976 and $156, 699 respectively. The Company states (p. 12, lines 1 - 2) that the positive revenue requirement impacts over the first two years of the proposed arrangement are primarily due to arrangements associated with the transition to the future Joint Use Requirement. Specifically, this principally reflects forecast additional revenue related to the Company's provision of certain capital and operating maintenance on behalf of Bell Aliant during the operational transition in 2011 and 2012. (Company Evidence, p. 12, footnote 30) Beyond the first two years, once the transitional effects are in the past, the annual revenue requirement impacts are negative for each of 2013, 2014 and 2015. Given Newfoundland Power Inc.'s assumptions on cost of capital and operating expenses, a surplus of $1,075,675 results in the first two years of the agreement and a deficiency of $461,229 from 2013 to 2015. These results are shown in Exhibit 8 as giving rise to a levelized annual revenue surplus of $122,883 with a net present value of surplus of $496,847. However, with this surplus occurring entirely in the first two years, it is difficult to envisage how this will actually benefit ratepayers, since rates for 2011 have already been developed, and pursuant to Order No. P.U. 43 (2009), Newfoundland Power is not obliged to file its next general rate application before May 31, 2012, with a 2013 test year. In response to PUB NP 81, Newfoundland Power shows, based on their assumptions, that the annual deficiency would carry on until 2018, with very small surpluses of $15,148 and $67,779 in 2019 and 2020, respectively. Presumably, when rates are established at

the Company's next General Rate Application they will be determined and set on the basis of a test year which will reflect the higher costs of this proposed arrangement relative to the costs associated with a 2011 renewal of the Joint Use Facilities Partnership Agreement.

16. The Company's evidence at page 12, lines 2-4 stated, "*For 2013, revenue requirement impacts are negative. This primarily reflects ongoing diseconomies of scale due to shared ownership of Joint Use Support Structures as compared to single ownership.*" In response to CA NP 15, Newfoundland Power states that "*moving from single ownership to shared ownership. . . will alter the overall composition of. . . operating costs. The relatively small increase in administration costs will be more than fully offset over the term of the. . . 2011 JUA*" (lines 16-19). However in response to PUB NP 27, Newfoundland Power indicated that arrangements for construction and maintenance responsibilities for 2013 and beyond are currently being discussed (lines 13-14, p. 1). Newfoundland Power hints settlement of the details might reduce Newfoundland Power's costs and such potential benefits are not reflected in the analysis currently before the Board (lines 5-9, p. 2). However, there is no assurance that the opposite may not also take place. This casts further uncertainty on whether customers may not be held harmless as a result of the sale. Therefore, there is no certainty of lower operating costs past 2013. There is certainty of higher administration costs due to diseconomies of scale due to shared ownership, by the Company's own admission.

17. Leaving aside the point that the positive surpluses for 2011 and 2012 will not be reflected in customers' rates, one is reasonably left to the conclusion that based upon the Company's assumptions in Exhibit 8, that the levelized annual revenue requirement surplus of $122,883 over the 5 year period - 2011 to 2015 is relatively

thin in relation to the size, scope and importance of the transaction with Bell Aliant. The Company's response to PUB NP 81 illustrates that the levelized revenue requirement under the Joint Use regime effective 2011 based on the assumptions employed therein become thinner still over the period 2011 to 2020 - just $76,115. By contrast, in 2001, when Newfoundland Power proposed to purchase the Joint Use Structures of Aliant, the Company forecast that the levelized revenue requirement impact for the 10 year period under the Joint Use Facilities Partnership Agreement was to be a benefit of approximately $393,000 per year. (Evidence, p. 7, footnote 17).

18. The Company correctly points out in reply to CA NP 10 (see p. 1 of 1, footnote 2) that forecast uncertainty increases with the duration of any forecast and notes that there is a possibility that the terms of the Joint Use may change following the 5 year term of the 2011 Joint Use Agreement. The Consumer Advocate agrees that forecasts by their nature involve uncertainty and assumptions. Given the already relatively thin levelized annual revenue requirement surpluses forecasted by the Company in Exhibit 8 and those shown in reply to PUB NP 81, it is not difficult to envision the possibility of this levelized annual revenue requirement surplus becoming smaller still or even disappearing and turning negative over the 2011 to 2015 period and/or over the 2011 to 2020 period.

19. To illustrate the sensitivity, even a reduction of 1% in the cost of equity in 2013 - 2015 (or for that matter, a proportional decrease in the Company's cost of debt bringing the incremental cost of capital to 6.90% from the assumed 7.35%) would result in a negative levelized revenue requirement of ($66,387) and a Net Present Value of Deficiency of ($272,371) over the period 2011 to 2015. (CA NP 09,

Attachment A)

20. Newfoundland Power, in reply to PUB NP 35, observed that the actual cost benefits for its customers which will result from the new Joint Use regime could exceed those indicated in the Pre-filed Evidence. First, Newfoundland Power expects that the pole count survey will disclose more third party attachments exist than are currently billed. Second, Newfoundland Power expects that negotiations for new third party attachment rates will commence later in 2011 and any increase in rates will increase the benefits associated with the new Joint Use regime. Finally, Newfoundland Power states that the analysis contained in the Pre-filed Evidence does not assume any further co-operative construction, inspection or maintenance activities by Newfoundland Power and Bell Aliant past 2012. Newfoundland Power has acknowledged that these potential benefits were not sufficiently certain at the time of filing nor are they certain at the current time and therefore have not been included in the analysis contained in the Pre-filed Evidence supporting the Application.

21. The Consumer Advocate states that the potential benefits arising from the disclosure of more third party attachments and any rate increase from the negotiation of new third party attachment rates are certainly possibilities but that the positive benefits from such developments would also be of benefit to consumers in the context of Newfoundland Power continuing to own all of its Joint Use Support Structures. The Company acknowledges in CA NP 14 that these developments might possibly have been achieved in the absence of a sale of support structures to Bell Aliant but states that, " it is not possible to say exactly how these matters would have been reflected in a renegotiated Joint Use regime." Newfoundland Power says that in any

renegotiation of joint use arrangements that there would have been a broad range of issues under discussion making it. . . "difficult to be certain as to the outcome of such negotiation; however there is no basis upon which to conclude that any resulting agreement would have been as beneficial to Newfoundland Power's customers as the proposed sale of support structures to Bell Aliant." This underlined passage really highlights a conundrum - the Company is in effect putting the onus on the customers to show that a renegotiated joint use regime would have been as beneficial to Newfoundland Power's customers as the proposed sale to Bell Aliant where no alternatives to a sale of poles scenario was negotiated or evidently, even sought by Newfoundland Power.

22. On the whole, the proffered economic benefits associated with the sale of 40% of Newfoundland Power's Joint Use Support Structures to Bell Aliant are, at best, thin when viewed over both 5 and 10 year horizons. Over these periods, given the thinness of the proferred benefits, the existence of the proffered benefits themselves is at risk and viewed reasonably cannot be assured. Added to this concern is the fact that the Company's Evidence shows that the Net Present Value of the Surplus ($496,847) as presented would not exist at all but for annual surpluses forecast for 2011 and 2012 due primarily to transitional arrangements. The surpluses associated with these transitional arrangements are not expected to be reflected in customer rates, but it is reasonable to expect that customers' rates will reflect the deficiencies for 2013 onward. On the whole, the Consumer Advocate does submit that there is a reasonable basis to conclude that there is indeed a possibility that customers will be worse off after the sale should the application for approval of the sale be approved. Of course, the sale contemplated is a final sale of Newfoundland Power's Support Structures. Once sold, Newfoundland Power has no means to compel a re-

purchase.

Service

23. On the service side, Newfoundland Power does not assert that by selling 40% of its Joint Use Support Structures, customer service will be improved in anyway over the *status quo*. Newfoundland Power does not provide evidence that the service of its customers under the current regime is in any way deficient compared to the proposed new Joint Use regime.

24. Rather, from a service perspective, Newfoundland Power's stated key consideration was that the new Joint Use regime be consistent with the maintenance of Newfoundland Power's current customer service levels. (PUB NP 34). Newfoundland Power's stated principle concern (PUB NP 34, footnote 2) was in the standards used in construction, inspection and maintenance, including the response to damaged support structures. The Company states that these matters were explicitly addressed in the 2011 Joint Use Agreement by (i) incorporating Newfoundland Power's construction, inspection and maintenance practices explicitly in the Joint Use Agreement and (ii) by creating provisions which create an explicit economic incentive for Bell Aliant to fulfill those standards and enabling Newfoundland Power to perform necessary work not performed by Bell Aliant at Bell Aliant's expense and risk.

25. Newfoundland Power states that the proposed sale of Joint Use Support Structures to Bell Aliant will not impact any customers of Newfoundland Power. (PUB NP 01, lines 4 - 5).

26. At PUB NP 01, the Company has provided a comparison of construction and maintenance standards as well as a comparison of customer service processes under both the 2001 - 2010 Joint Use Facilities Partnership Agreement and the 2011 Joint Use Agreement.

27. Newfoundland Power's operational practices for Support Structure inspections and maintenance and for emergency response times have been incorporated in the terms of the 2011 Joint Use Agreement, an apparently unique feature in the context of Canadian multi-owner Joint Use arrangements. [Company Evidence, p. 10, lines 15 - 17].

28. Regardless of the adherence to common standards there will be changes as to who completes the work. Following completion of the proposed sale, Newfoundland Power and Bell Aliant will each be responsible for completing inspections on their respective Joint Use poles, anchors and guys and Newfoundland Power will continue to inspect the electricity fixtures on all Joint Use Support Structures. With the sale of 40% of the Joint Use Support Structures each of Newfoundland Power and Bell Aliant will take on a responsibility on the basis of pole ownership for the collection of inspection data and the completion of planned maintenance. [PUB NP 49; PUB NP 68]. As regards the provision of New Electric Service, under the Joint Use Facilities Partnership Agreement both pole installation and connection would be completed by Newfoundland Power. In the 2011 Joint Use Agreement, while the electrical connection will be completed by Newfoundland Power, pole design and installation will be completed either by Newfoundland Power or Bell Aliant: [PUB NP 01]. For Electricity Service Restoration, under the Joint Use Facilities Partnership

Agreement pole replacements would be performed by Newfoundland Power or its contractor and service restored by Newfoundland Power. Under the 2011 Joint Use Agreement, service will be restored by Newfoundland Power but if pole replacements are required, they will be performed by either Newfoundland Power or Bell Aliant.

29. The sale of 40% of Newfoundland Power's Joint Use Support Structures will bring us back to the era before the 2001 Joint Use Facilities Partnership Agreement when Newfoundland Power did not have primary or exclusive responsibility for the maintenance of Joint Use Support Structures, as confirmed in PUB NP 68. After 2011, Newfoundland Power will have responsibility for the maintenance of the Joint Use Support Structures it owns and Bell Aliant will have primary responsibility for the maintenance of the Joint Use Support Structures it owns. Newfoundland Power states in PUB NP 68 that, "Regardless of pole ownership, Newfoundland Power will continue to be responsible for the operation and maintenance of all electrical distribution facilities with its service area." Despite this statement of responsibility, one must keep in mind that the structures and standards of the 2011 Joint Use Agreement, while unique, in reality are aimed at creating methods of compensating for the fact that Newfoundland Power will no longer have exclusive or primary responsibility in relation to all Joint Use Structures - an exclusive arrangement which was put forward by the Company as being highly desirable and efficient at the time of Newfoundland Power's application to purchase the Joint Use Structures of Bell Aliant in the first place.[2] Not only was the exclusive arrangement put forward in 2001 as being highly desirable, but the evidence (PUB NP 37) from the

[2]See for example the quotes from the Company's Evidence in the questions of PUB NP 68, 71 and 75.

Company states that there has been an overall trend of improved electrical system reliability over the past decade which is primarily influenced by the condition of the electrical system assets, which includes, but is not limited to, the condition of Joint Use Support Structures. It indeed is to be noted that the increased system reliability occurred in the decade after Newfoundland Power acquired the existing joint use structures from Bell Aliant. The question posed in PUB NP 37 was, "What service benefits to current or future Newfoundland Power customers, resulting from the sale of support structures, have been identified by Newfoundland Power?" An examination of the answer reveals that actually no service benefits were identified other than the newly negotiated Joint Use Agreement which is aimed at ensuring that structures owned by Bell Aliant will be constructed and maintained consistent with Newfoundland Power standards.

30. In response to PUB NP 22, which asks Newfoundland Power if it can provide any examples of other electric utilities that have, in recent times, sold a significant portion of their support structures to a telecommunications provider, Newfoundland Power points to its response to PUB NP 20, lines 27 to 32, which indicates that Hydro Quebec and Telbec moved from a rental arrangement to a joint ownership arrangement through a sale of pole assets in 1998. In lines 34-37 of that same response, Newfoundland Power points to sales of poles by electric utilities to telecom providers to maintain agreed upon ownership ratios in Nova Scotia, New Brunswick and PEI to Bell Aliant since 2003. However, nowhere in Newfoundland Power's evidence or responses, has it shown an instance where an electric utility has purchased all the joint use structures in its service territory from a telecom provider, ostensibly due to the fact that it results in economic and operational efficiencies, and subsequently sells the structures back to the original owner.

Regulatory Considerations Impacting Customers

31. In the Consumer Advocate's respectful submission one should not lose sight of the fact that some proposed sales, such as this one, may have consequences that go beyond normal quality of service issues such as reliability, response times, and maintenance standards.

32. At the present time the Board has general supervision over Newfoundland Power's operations and the Board has no jurisdiction over Bell Aliant's operations.

33. Upon the completion of the proposed transfer of 40% of Newfoundland Power's Support Structures to Bell Aliant, the Board will continue to have no jurisdiction over Bell Aliant's operations [PUB NP 11, p. 1 of 3, line 3]. This will be, in jurisdictional terms, a return to the situation prior to 2001, when Newfoundland Power jointly used Support Structures owned by Aliant Telecom (a predecessor of Bell Aliant) to provide service to its customers even though Aliant Telecom was not a "public utility" under the Public Utilities Act.

34. Evidence of the Company [see PUB NP 11, p. 2 of 3, footnote 6] is that Support Structures owned by Bell Aliant are currently jointly used by provincially regulated electric utilities in Nova Scotia, New Brunswick, Prince Edward Island, Quebec and Ontario.

35. Newfoundland Power asserts that as a public utility it is obliged to provide ". . . service and facilities which are reasonably safe and adequate and just and

reasonable." [PUB NP 11, p. 2 of 3, lines 3 - 5] The Company states that this obligation does not require Newfoundland Power to *own* all facilities connected with the provision of service or for the Board to exercise jurisdiction over all such facilities. [Ibid, p. 2 of 3, lines 7 of 8]. Newfoundland Power points out that section 41(3)(b) of the Act indicates that a public utility may lease, as opposed to own, property necessary for the provision of electrical service to its customers. Newfoundland Power states that the joint use agreement is "conceptually similar to a lease which is a contractual right to use (as opposed to own) property". These propositions are all accurate, however, these matters must be contextualized.

36. The context here is the permanent sale of core used and useful assets of Newfoundland Power. In the usual lease situation, when the lessee does not wish to lease any longer, the lessee can decide to own instead of lease if it is deemed to be more advantageous or desirable for any number of reasons. In this situation, Newfoundland Power can only re-purchase these assets if, and only if, and at a time of Bell Aliant's choosing, Bell Aliant agrees that it suits its needs to sell them. [PUB NP 13, p. 1 of 2, lines 23 - 32]. Newfoundland Power has stated that if Bell Aliant were at any time to notify it that Bell Aliant intended to dispose of Support Structures to which Newfoundland Power required continued access, Newfoundland Power will exercise its right to purchase such Support Structures: [PUB NP 13, p. 1 of 2, lines 30 - 32]. This begs the question why Newfoundland Power would wish to sell assets which it would immediately wish to re-purchase the moment that Bell Aliant indicated that it wished to sell them?

37. In light of this and in this context, one might question whether there is any advantage to Newfoundland Power's customers of having 40% of the Joint Use

Structures of Newfoundland Power beyond the direct regulation of the Board. For instance, if joint users of Bell Aliant's support structures could not agree upon terms of access, would it be more advantageous to have that matter determined by the CRTC? More importantly, in a potential sale situation by Bell Aliant, there would be no requirement for approval of the sale of Bell Aliant's Joint Use Structures by the Public Utilities Board or indeed even a requirement that the Public Utilities Board be provided notice of the sale. [PUB NP 13]. The Board's jurisdiction in the context of a sale situation would only be triggered if, as Newfoundland Power says, Newfoundland Power were to intend to re-purchase the Joint Use Support Structures, essentially at a time of Bell Aliant's choosing. Then the Board would have to approve the purchase pursuant to S. 41(3) of the Act. Otherwise, the Board would have no role to play and it is unclear how the rights and interests of electricity customers would be protected. Considerations such as these weigh decidedly against the proposed sale of core used and useful assets to Bell Aliant, in the Consumer Advocate's respectful submission, particularly in light of the compelling reasons put forward for their acquisition from Bell Aliant just 10 years ago.

OTHER ISSUES

Legal Liability

38. Newfoundland Power has stated (CA NP 03) that if its Application were denied, Bell Aliant would be effectively denied the right to repurchase the Joint Use Support

Structures as agreed in 2001 as part of Newfoundland Power's acquisition of the Bell Aliant Joint Use Support Structures. Newfoundland Power has stated, "In such a circumstance, it is possible that Bell Aliant could seek to hold Newfoundland Power contractually responsible for any loss that it may suffer as a result." In the Consumer Advocate's respectful submission, there is no sound legal basis to suggest that Bell Aliant may hold Newfoundland Power contractually responsible for its losses if the Board denies the application.

39. The Joint Use Support Structures Purchase Agreement stipulates in Article 2.1 that the Vendor's agreement to sell the Purchased Assets is "Subject to the provisions of this Agreement. . .". One of the provisions of the Agreement is "Article III - Conditions Precedent". Article 3.2 states:

> "PUB Approval
>
> The agreement of the Vendor to sell the Purchased Assets is subject to and conditional upon the PUB's approval of the sale of the Purchased Assets and the Vendor shall seek that approval in accordance with this agreement."

40. In fact, in Article V - Representations and Warranties of the Vendor, Newfoundland Power as Vendor makes a representation and gives a warranty (see 5.4) that,

> "No Violation
>
> 5.4 Provided that the PUB issues no contrary order, the execution and delivery of this Agreement and the consummation of the transactions herein provided for will not, in all material respects, result in:
>
> (a) the breach or violation of any of the provisions of, or constitute a default under, or conflict with or cause the acceleration of any obligations of the

Vendor under;

. . .

. . .

(v) any applicable law, statute, ordinance, regulation or rule;"

41. In Article 5.11 - Consent and Approvals, also found in the Representations and Warranties Article, the Vendor represented and warranted:

"Consent and Approvals

5.11 There is no requirement to make any filing with, give any notice to or to obtain any license, permit, certificate, registration, authorization, consent or approval of, any Governing Body as a condition of the lawful consummation of the transactions contemplated by this Agreement, except for the approval of the PUB. . ." (emphasis added)

42. The upshot of these Articles is that not only was Board approval an agreed upon condition precedent that had to be satisfied in order for this transaction to take place, but also the parties recognized that if the Public Utilities Board were to issue a contrary order prohibiting the transaction, the consummation of the transactions would result in a breach of statute, a state of affairs whose non-existence the Purchaser was relying upon in connection with its purchase of the Purchased Assets.

43. The leading case on conditions precedent is the Supreme Court of Canada's 1959 decision in Turney v. Zhilka [1959]. Factually, the case concerned a contract of purchase and sale in relation to land. The contract contained the following condition:

"Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision."

The date of completion was fixed "60 days after plans are approved." The court held (para 11) that:

> "[T]he obligations under the contract, on both sides, depend upon a future certain event, the happening of which depends entirely on the will of a third party - the Village council. This is a true condition precedent - an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur."

Reference: Turney v. Zhilka [1959] S.C.R. 578, 1959 CarswellOnt 81, **Tab 5**

44. In the Turney case, the purchaser sued in the courts to make the vendor liable on his promise to convey the property in circumstances where the obligations under the contract depended upon a true condition precedent - the Village Council's approval. The vendor's defence was that a pre-condition - council approval - was not obtained and therefore the endor was held not liable. This defence was held to succeed by the Supreme Court of Canada.

45. Newfoundland Power has prepared and filed in a timely manner a necessary application for the approval of the sale transaction to the Board and has diligently prosecuted the same, all in accordance with the covenant it gave to the Purchaser in Article 8.1(a). Newfoundland Power cannot be held liable to the purchaser if, despite its efforts, the Board in the exercise of its statutory responsibility decides not to approve the transaction. Article IX deals expressly with the "Failure of a Condition Precedent" in Article 9.1(a):

> "In the event that the PUB renders a decision not to approve the transaction

herein contemplated, then this Agreement shall terminate without recourse by any party against the other as a consequence thereof."

Article 9.1(c) provides:

"(c) The parties agree that no termination of this Agreement pursuant to this section 9.1 shall prejudice or otherwise adversely affect the rights or recourses of either party under the JUFPA which shall, upon termination of this Agreement, remain in effect upon its terms. For greater certainty, the parties agree that in the event of termination of this Agreement, pursuant to section 9.1, either party may pursue its contractual rights and remedies under the JUFPA. The Joint Use Agreement and the Services Agreement, shall become null and void and neither of these agreements, nor this Agreement, shall be used by either party in the interpretation of the rights and responsibilities of the parties under JUFPA." (emphasis added)

46. This provision must be put in context. Article 9.07 of the 2001 Joint Use Facilities Partnership Agreement (JUFPA) provides:

"9.07 Upon any termination of this Agreement, other than pursuant to Article XII:

(a) either Party may require confirmation of the number of Support Structures. In the absence of agreement between the Parties as to the appropriate methodology to obtain this confirmation, the Parties shall participate equally in the completion of a pole count survey and shall share equally in any expenses reasonably incurred n connection with the survey for services rendered by any Third party;

(b) subject to this Clause, Aliant shall purchase from NP a forty percent (40%) interest in the Support Structures at forty percent (40%) of the Net Book Value of the Support Structures;

NP shall transfer to Aliant, at no cost to Aliant the right to bill

and collect monies from Third Parties with respect to Attachments to the portion of the Support Structures to be purchased by Aliant; and

(d)(sic) existing Support Structures shall continue to be covered by the provisions of this Agreement including the billing and payment provisions of this Agreement until either:

(i) the use of Support Structures has been discontinued by Aliant; or

(ii) a new revenue-neutral joint use agreement in relation to Support Structures, using the JUA as a model, is reached between the Parties."

47. When Bell Aliant triggered the termination of this Agreement the provisions of Article 9.07 applied, including the obligation on Aliant to purchase from Newfoundland Power a 40% interest in the Support Structures and the obligation on Newfoundland Power to transfer to Aliant, at no cost to Aliant, the right to bill and collect monies from third parties with respect to Attachments to the portion of the Support Structures to be purchased by Aliant.

48. Each of the parties to the JUFPA recognized that the other was subject to regulation. Article XIX deals with Regulatory Impact. Article 19.02 states:

"19.02 The Parties recognize that NP is subject to regulation by the Board. NP shall provide notice to Aliant, as soon as possible, of any regulatory hearing scheduled by the Board which involves consideration of any term of this Agreement. Subject to clause 19.03, where the Board makes an order affecting any term of this Agreement, this Agreement shall be deemed to be modified to comply with such order." (emphasis added)

49. Accordingly, if this Board were to make an order which affected the obligation of Bell Aliant to purchase and the obligation upon Newfoundland Power to transfer the Support Structures and ancillary rights under Article 9.07, that contractual obligation, pursuant to the express written agreement of the parties, is deemed to be modified to comply with such an order. Accordingly, the preservation in 9.1(c) of the Joint Use Agreement of whatever rights or recourses either party have under the 2001 JUFPA would be subject to the express Regulatory Impact provisions. A contrary Board Order would be deemed to modify the agreement so as not to oblige Newfoundland Power to transfer the Support Structures under Article 9.07.

50. Even in the absence of Article 19.02 of the JUFPA which explicitly recognizes this point, Newfoundland Power would not be liable or contractually responsible for any loss Bell Aliant may claim to suffer by effectively being denied the right to re-purchase to Joint Use Support Structures. Regardless of Article 19.02, both parties were fully aware that Board approval, pursuant to the Act, was required for a sale of this nature to be consummated. The obtaining of Board approval was a statutory prerequisite that was an implied term of the JUFPA and, in effect, a condition precedent. Obtaining the approval of the Board remains a condition precedent to the purchase and sale of the Support Structures contemplated in Article 9.07 of the 2001 JUFPA in the event of a termination. Without that condition precedent being satisfied, the Purchaser has no claim for specific performance of the contract or of damages. In its 1978 decision in Dynamic Transport Ltd. v. O.K. Detailing Ltd. the Supreme Court of Canada dealt with an action for specific performance brought by the Appellant to enforce a contract between it as purchaser and the respondent as vendor for the sale of land in Edmonton, Alberta. Both parties were aware that subdivision approval, pursuant to the Planning Act, was required, but the

agreement was silent as to whether the vendor or purchaser would obtain this approval. The Court held [para. 19] that the "*statutory prerequisite became an implied term of the agreement. The obtaining of subdivision approval was, in effect, a condition precedent to the performance of the obligations to sell and to buy: see Turney v. Zhilka, supra; Barnett v. Harrison, [1976] 2 S.C.R. 531, 57 D.L.R. (3d) 225, 5 N.R. 131.*" The Court further held [para. 25] that, "*The common intention to transfer a parcel of land in the knowledge that a subdivision is required in order to effect such transfer must be taken to include agreement that the vendor will make a proper application for subdivision and use his best efforts to obtain such subdivision.*" The Supreme Court declared [para. 33], "*. . . that the contract between the parties is a binding contract in accordance with its terms, including the implied term that the respondent will seek subdivision approval. The appellant is further entitled to an order that the respondent make and pursue a bona fide application as may be necessary to obtain registration of an approved plan of subdivision. . .*" However, as would be equally applicable to the situation between Newfoundland Power and Bell Aliant, the Court concluded:

> "In the event that the respondent makes and pursues a bona fide application as aforesaid and such application is rejected, then the appellant's claim for specific performance of the provisions concerning sale and purchase stands dismissed, as does the claim for damages in the alternative, and the caveat filed by the appellant shall be discharged. . ."

Reference: Dynamic Transport Ltd. v. O.K. Detailing Ltd. [1978] 2 S.C.R. 1072, 1978 CarswellAlta 62, **Tab 6**

51. In conclusion and for the foregoing reasons, the Consumer Advocate respectfully submits that there is no sound legal basis to suggest that Bell Aliant may hold Newfoundland Power contractually responsible for its loss if the Board denies the

application.

Remedy and Order Sought

52. In the Consumer Advocate's respectful submission, if the Board concludes that there is a possibility that consumers will be worse off after the sale, then the application for approval of the sale should be denied.

53. The Company [CA NP 01, p. 3 of 3, lines 1 to 6] has stated that should the Board be concerned that the proposed sale might result in a negative impact on customers, from either a service or rates perspective, "there are measures available under the Public Utilities Act (the "Act") whereby any impact on customers could be considered, and addressed if necessary, in future regulatory proceedings." The Company noted that the Board had the power to investigate matters related to, amongst other things, service and rates, and to impose such remedies as may be appropriate. The Company's view, however, as expressed in reply to CA NP 01 was that the evidence clearly indicated that Bell Aliant's 2001 sale of its Joint Use Support Structures and Bell Aliant's repurchase of 40% of Joint Use Support Structures "has and will provide benefits to customers of Newfoundland Power."

54. Given that its view that any remedial order by the Board "would necessarily be in response to and address a specific, identified negative customer impact" the Company has stated that "It is not possible to propose *specific options* (italics in original) to the Board in the absence of any such negative customer impact."

55. The Company's answer while referring in general terms to the possibility of the

Board considering measures in future regulatory proceedings, does not refer to the Board's power to deny the application and not approve the sale. Given the implications of a final sale of these core used and useful assets to a party beyond the Board's regulatory powers, and in light of the lack of significant proferred benefits to customers of this arrangement and indeed the potential for customers being worse off after the sale, the Consumer Advocate would not see it as advisable to approve a sale to Bell Aliant, whether with or without conditions. The application should be denied.

THESE SUBMISSIONS MADE at St. John's, Newfoundland and Labrador, this 26th day of May, 2011

THOMAS JOHNSON,
CONSUMER ADVOCATE

List of Statutes and Authorities

Statutes and Regulations

Authorities

(a) make, impose or extract an unjust or unreasonable or unjustly discriminatory or unduly preferential individual or joint rate, commutation rate, mileage or kilometre rate or other special rate, toll, fare, charge or schedule for any product or service supplied or rendered by it within Alberta,

(b) adopt or impose an unjust or unreasonable classification in the making of or as the basis of an individual or joint rate, toll, fare, charge or schedule for any product or service supplied or rendered by it within Alberta,

(c) adopt, maintain or enforce a regulation, practice or measurement that is unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or otherwise in contravention of law, or provide or maintain a service that is unsafe, improper or inadequate, or withhold or refuse a service that can reasonably be demanded and furnished when ordered by the Commission, or

(d) make or give, directly or indirectly, an undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject a particular person or corporation or locality or a particular description of traffic to any prejudice or disadvantage in any respect whatever.

RSA 2000 cP-45 s100;2007 cA-37.2 s82(25)

Designated public utilities

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

(2) No owner of a public utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Commission that the proposed issue is to be made in accordance with law and has obtained the approval of the Commission for the purposes of the issue and an order of the Commission authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Commission, capitalize any lease, or

(d) without the approval of the Commission,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or

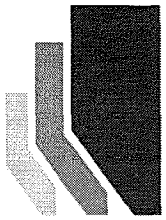
(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

(3) Notwithstanding subsection (2), the approval, authority, permission or consent of the Commission is not required in or with respect to

(a) the issue of any shares of its capital stock by an owner of a public utility under the exercise of an optional right of conversion attaching to any shares, stocks, bonds, debentures, debenture stock or other evidence of indebtedness the issue of which has previously been approved by the Commission or was not required to be approved by the Commission by reason of an existing declaration made under subsection (4),

(b) a right of entry, sale, disposition or other proceedings for the enforcement of a mortgage or charge created by trust deed or other instrument or security, in the enforcement of, or pursuant to, the security constituted by it or in the exercise of the rights or remedies granted in it or



AUC

Alberta Utilities Commission

FortisAlberta Inc.

Disposition of High River Service Centre

December 23, 2010

ALBERTA UTILITIES COMMISSION
Decision 2010-615: FortisAlberta Inc.
Disposition of High River Service Centre
Application No. 1606380
Proceeding ID. 734

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Decision 2010-615
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FORTISALBERTA INC.
DISPOSITION OF HIGH RIVER SERVICE CENTRE

1 INTRODUCTION

1. In Application 1605170/ID. 212 FortisAlberta Inc. (FAI) applied for permission to close its existing service centre facility (Old Facility) in High River Alberta, replace it with a newly constructed facility (New Facility) and sell the land and building of the Old Facility to the Town of High River. In Decision 2010-309[1] the Alberta Utilities Commission (Commission) approved FAI's application to construct the New Facility as well as the forecast costs associated with the proposed construction on a preliminary basis.[2] Part of the Commission's determination was that a "no harm" analysis be conducted to assess the impact of the proposed activity on ratepayers. The Commission noted that this assessment would be done as part of a subsequent filing required by FAI under section 101 of the *Public Utilities Act* to dispose of the Old Facility.

2. On July 19, 2010 FAI applied under section 101(2)(d) of the *Public Utilities Act* (Application) for permission to sell the Old Facility. Notice of Application was issued on July 20, 2010 indicating that parties that wished to participate in the proceeding must file a Statement of Intent to Participate (SIP) by August 3, 2010. ATCO Electric Ltd. (AE) and the Office of the Utilities Consumers Advocate (UCA) each filed SIPs. On August 4, 2010 a Process Letter was issued by the Commission that set out the following dates:

Information Requests to FAI	August 16, 2010 – 2 p.m.
Information Responses from FAI	August 25, 2010 – 2 p.m.
Arguments	September 15, 2010 – 2 p.m.
Reply Arguments	September 30, 2010 – 2 p.m.

3. On September 7, 2010, a second round of Information Requests (IRs) was issued to FAI by the Commission with a response date of August 25, 2010.

4. On September 7, 2010, a revised schedule and process letter was issued with the following dates for the filing of arguments and reply arguments:

Arguments	September 20, 2010 – 2 p.m.
Reply Arguments	October 4, 2010 – 2 p.m.

5. For purposes of this Decision, the record closed on October 4, 2010.

[1] Decision 2010-309: FortisAlberta Inc. 2010-2011 Distribution Tariff – Phase I (Application No. 1605170, Proceeding ID. 212) (Released: July 6, 2010).
[2] Decision 2010-309, paragraph 449.

2 REGULATORY FRAMEWORK

6. FAI filed its Application to sell the Old Facility pursuant to section 101(2)(d) of the *Public Utilities Act*. That section states:

> **101(2)** No owner of a public utility designated under subsection (1) shall
>
> [...]
>
> (d) without the approval of the Commission,
>
> (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or
>
> (ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,
>
> and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

7. The requirements for an approval under section 101(2) of the *Public Utilities Act* were developed by the Commission's predecessor, the Alberta Energy and Utilities Board (Board). The Board developed a no-harm test when evaluating applications under that section[3] to determine whether the application should be denied, approved, or approved with conditions. The no-harm test balances the potential positive and negative effects of the proposed sale to determine whether it is in the overall public interest. That test originates from the Commission's authority to safeguard the public interest in the nature and quality of the service provided to the community by public utilities, an authority reaffirmed in *ATCO Ltd. v. Calgary Power Ltd,* where the Supreme Court stated that the Commission's authority in this regard is of the widest proportions.[4]

8. The rationale for applying the no-harm test was summarized by the Board in Decision 2000-41.[5] The no-harm test was acknowledged by the Supreme Court in the *Stores Block* decision.[6] The Supreme Court held that when harm was found, the Commission could either deny the sale transaction or attach a condition to an approval:

> The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never

[3] This test has been applied by the Board and subsequently the Commission when considering asset dispositions including transfers of regulated businesses. The test was first set out in Decision 2000-41: TransAlta Utilities Corporation, Sale of Distribution Business (July 5, 2000).

[4] *ATCO Ltd. v. Calgary Power Ltd.* [1982] 2 S.C.R. 557, at 576 (per Estey J.).

[5] Decision 2000-41: TransAlta Utilities Corporation Sale of Distribution Business (July 5, 2000), pages 6-8.

[6] *ATCO Gas and Pipelines v. Alberta (Energy and Utilities Board),* [2006] 1 S.C.R. 140, 2006 SCC 4, paragraph 84 (*Stores Block*).

> attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.[7]

9. In the *Harvest Hills* case, the Alberta Court of Appeal also acknowledged the no-harm test[8] but added that there must be a close connection to the disposition in order for the Commission to attach a condition to an approval:

> The respondent City further submits that the closing words from para. 77 of the majority decision in Stores Block support the Board's jurisdiction to impose the condition: "[The Board] could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves optimal growth of the system." The City points out that this Court has approved the use of deferral accounts in the rate setting context: ATCO Electric Limited v. Alberta (Energy and Utilities Board), 2004 ABCA 215, 361 A.R. 1. In light of other conclusions reached by the majority in Stores Block, it is not reasonable to interpret this passage as giving the Board the power to impose the condition which it did in this case. The Supreme Court condemned any allocation for ratepayers "based on an unquantified future potential loss" (at para. 84). In our view, a more reasonable interpretation of the Supreme Court's words would permit the Board to impose a condition if there was a close connection between the sale of the asset and the immediate resulting need to replace it. For example, the utility might sell a pumping station and, in order to service the public, it might need to access a different pumping station or even replace the existing one. The sale and purchase would be closely connected. This is what the majority of the Supreme Court had in mind when it stated that in some circumstances the Board could impose a condition that required the utility to reinvest the proceeds of sale into the system.[9]

10. The courts' jurisprudence, therefore, affirms the Commission's traditional no-harm test where a close connection can be established between the asset sold and asset purchased.

11. As such, approval under section 101(2)(d) of the *Public Utilities Act* requires two determinations by the Commission (after a review of the prudence of the sale of the asset):

- The Commission must determine whether there is an immediate and close connection between the sale and the need to replace the asset.
- The Commission must determine whether customers have been harmed either as the result of a detrimental impact to the quality or quantity of customer service or by way of a rate impact as a result of the proposed disposition of the asset.

12. Should the Commission find harm, the Commission may deny the transaction or, if there is a close connection, it may attach a condition to the transaction for the purpose of ameliorating the harm.

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[7] *Stores Block*, paragraph 77.
[8] *ATCO Gas and Pipelines v. Alberta Energy and Utilities Board et al.*, 2009 ABCA 171, at paragraph 31 (*Harvest Hills*).
[9] Ibid. at paragraph 35.

3 VIEWS OF THE PARTIES

13. In its Application FAI submitted that there would be no harm to customers from the proposed sale of the Old Facility and provided a number of reasons including the following:

- As per paragraph 444 of Decision 2010-309 no party raised concern with the need for the New Facility and the Commission accepted that the Old Facility was inadequate to meet the longer term requirements of FAI.
- Service standards would deteriorate due to the inadequacies of the Old Facility in serving the needs of a distribution system that is growing in terms of customers and facilities needed to serve these new customers.
- The New Facility and its costs are prudent as per Decision 2010-309 and the sale of the Old Facility does not bear on the prudence of the costs of the New Facility.
- Growth in the number of customers, and the size and costs of the facilities needed to serve a growing system, cannot, in and of itself, be a matter of "harm" or else every addition of a new feeder or larger conductor would also be an occasion of harm to customers.
- Customer service needs could not be met without facilities reflecting the growth of the system so the addition of the New Facility will benefit customers rather than harm them.[10]

14. Regarding the disposition of the proceeds from the sale of the Old Facilities, which FAI submitted should flow through to FAI's shareholders, FAI asserted that:

> [T]he investment in the New Facility will be completed prior to the sale of the Old Facility, and reinvestment of proceeds from the sale [of the Old Facility] is thus an inapplicable concept. FortisAlberta already owns the land upon which the New Facility is being built so no land purchase is required for the New Facility.[11]
> ....
> As part of the results of Decision 2010-309, the Old Facility has been removed from rate base, and customers will not be bearing costs in respect of it. The New Facility is needed regardless of whether the Old Facility is sold or not, and customers will properly bear the costs, including the related equity and debt costs, of the New Facility in rates. No direction to 'reinvest' is needed, and even if it were, a direction to reinvest in a prudent investment cannot effect an appropriation of value from shareholders.[12]

15. With regard to the prudence of the transaction, FAI noted that even though the Old Facility was not listed for public sale, the purchase price to be paid by the Town of High River for the Old Facility had been based on a fair market valuation of $1.5 million as determined by Colliers International.[13]

16. The main issue among the parties was whether FAI should be required to reinvest the proceeds of the sale of the Old Facility in the construction of the New Facility by way of a

[10] FAI Application, pages 1-2.
[11] FAI Application, page 2.
[12] FAI Application, page 3.
[13] UCA-FAI-001(a).

condition to the Commission's approval of the disposition as contemplated in the *Stores Block* and *Harvest Hills* decisions.

17. AE was of the view that there would be no harm to customers as a result of the sale and the sale should be approved without conditions. AE also argued that the case law requires the proceeds to sale to accrue to FAI shareholders. AE submitted that:

> The Commission cannot find that there is 'financial harm' arising from the sale of the [Old Facility] simply because the New Facility will be included [in the] rate base. As such, there is no justification for the imposition of a condition on the sale of the ... [Old Facility] that the proceeds of sale be used to offset the costs of the New Facility. To do so would be contrary to the law established in *Stores Block*, *Carbon* and *Harvest Hills* and there is nothing [in] the circumstances of the ... Application which distinguishes it from the circumstances of those cases.[14]

18. The UCA submitted that "absent a condition imposed by the Commission directing FAI to reinvest the net proceeds of sale [from the Old Facility], customers will suffer financial harm."[15] The UCA based its position on what it saw as the close connection between the sale of the Old Facility and the immediate need to replace it by means of the New Facility. The UCA argued that these transactions were sufficiently connected to warrant the Commission attaching a condition to the disposition requiring the proceeds to be reinvested to offset some of the cost of construction of the New Facility:

> ... absent a condition imposed by the Commission directing FAI to reinvest the net proceeds of sale, customers will suffer financial harm .... This combination of transactions, namely, selling the Old Facility and replacing it with the New Facility, results in customers being worse off than before in that they are paying higher rates without seeing any difference in the service being offered.[16]

19. The UCA argued that the facts of the Application form one of the circumstances envisioned by the Court of Appeal and the Supreme Court of Canada where the Commission could impose a condition on a utility to reinvest the proceeds of sale of an asset or facility.[17]

4 COMMISSION FINDINGS

4.1 Prudence of the Sale

20. A decision on FAI's application requires a review of the prudence of the sale of the Old Facility, an assessment of whether there is any harm arising from the transaction and whether a sufficiently close connection exists between the sale of the Old Facility and the need to replace it so as to permit the attachment of a condition on the proceeds of sale. In Decision 2010-309, the Commission found FAI's proposal to proceed with the New Facility prudent and approved the forecast costs, subject to an assessment of the no-harm test in this Application.[18]

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[14] AE Argument, paragraph 24.
[15] UCA Argument, paragraph 5.
[16] UCA Argument, paragraph 1.
[17] UCA Argument, paragraph 11.
[18] Decision 2010-309, paragraphs 445-449.

21. With respect to the prudence of the sale price, FAI retained Colliers International to assess the value of the property. As of December 1, 2008, Colliers valued the property at $1.5 million which reflects the selling price of the Old Facility. In response to AUC-FAI-001, FAI stated that the $1.5 million was still reflective of the value of the property at the time of entering into the agreement with the Town of High River for the sale of the Old Facility. FAI also stated that the sale to the Town of High River was secured on a timely basis as suggested by the Commission in Decision 2010-309. The Commission accepts FAI's evidence in this regard and finds that the sale price of the Old Facility is prudent.

4.2 Close Connection

22. The second aspect for the Commission to review is whether the sale of the Old Facility and the need for construction of the New Facility are closely connected.

23. On the issue of whether there is a close connection between the sale and the purchase, FAI argued that the Commission need not consider this issue given that as FAI is "proceeding in any event to reinvest in the system via the New Facility"[19] and that the investment in the New Facility will be completed prior to the existence of the sale proceeds from the Old Facility.

24. The Commission does not accept the argument that the investment in the New Facility prior to the sale of the Old Facility would preclude a finding that there is a close connection between these two transactions. The reason the investment in the New Facility will be complete prior to the sale of the Old Facility is that FAI would not be able to continue to provide the same service levels to customers if it had neither the Old Facility nor the New Facility. In other words, the services provided by the Old Facility will continue to be required thereby preventing the sale of the Old Facility and its removal from rate base until the New Facility is operational.

25. The Commission is not persuaded by FAI's arguments. Rather, the Commission views the fact scenario in this case to be what the Court of Appeal envisaged in the scenario provided in *Harvest Hills*:

> The respondent City further submits that the closing words from para. 77 of the majority decision in *Stores Block* support the Board's jurisdiction to impose the condition: "[The Board] could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves optimal growth of the system." .... In our view, a more reasonable interpretation of the Supreme Court's words would permit the Board to impose a condition if there was a close connection between the sale of the asset and the immediate resulting need to replace it. For example, the utility might sell a pumping station and, in order to service the public, it might need to access a different pumping station or even replace the existing one. The sale and purchase would be closely connected. This is what the majority of the Supreme Court had in mind when it stated that in some circumstances the Board could impose a condition that required the utility to reinvest the proceeds of sale into the system.[20]

26. As the Commission found in Decision 2010-309:

> In this case, it is undisputed that the Old Facility is being replaced and improved by the New Facility. It is not the case that the functionality provided by the Old Facility is no

[19] FAI Argument, page 2.
[20] *Harvest Hills,* paragraph 35.

> longer required to provide utility service and accordingly the Old Facility should be removed from utility rates.[21]

27. In the present circumstances, the sale of the Old Facility would not proceed without the construction of the New Facility and the same is true stated in the reverse. Therefore, the Commission finds that there is a close connection between the sale and purchase.

4.3 Harm from the Sale

28. Thirdly, the Commission must assess whether there is the potential for harm from the sale.

29. FAI and AE argued that according to *Harvest Hills* an assessment of harm must be limited to harm relating to the sale transaction only and should not consider the construction of the New Facility. The UCA argued that the Commission must look at the transaction as a whole, considering the combination of the sale of the Old Facility and the replacement of it with the New Facility.

30. A review of the facts in *Harvest Hills* is important to understand the context of the Court's finding that harm must be "related to the transaction itself." In *Harvest Hills*, ATCO Gas applied for approval to sell a four acre parcel of land as it was surplus land to a larger parcel and was not required for utility service. There was evidence before the Board that additional land would be required for a similar purpose within four-five kilometers of the Harvest Hills property within five years. On that basis, the Board considered that there would be financial harm to customers if ATCO Gas shareholders were allowed to retain the proceeds of sale given the foreseeable need for similar facilities in the same area in the future. As a result, the Board imposed a condition that the proceeds of sale be placed into a deferral account.

31. The Court held that the Board did not have jurisdiction to impose this condition as the asset was no longer needed to provide service to customers.[22] The Court stated:

> In *Stores Block*, the Board found that there would be no harm to customers as a result of the sale. In the Supreme Court, Bastarache J. observed that even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm (at para. 84). In our view, the harm contemplated by the Supreme Court must be harm related to the transaction itself. Here, the Board found that there would be no harm to customers in terms of quality or quantity of service as a result of the sale. Indeed, once the Harvest Hills property was removed from the rate base, there would be a small reduction in the cost to customers. Merely because the utility has plans to spend funds on capital assets in the future cannot be "harm" in any logical sense. As the appellant points out, these expenditures will be incurred independently of the sale of the Harvest Hills property. The Board's proposal to subsidize those future expenditures by diverting the sale proceeds of the Harvest Hills property is effectively an appropriation of the sale proceeds to subsidize rates. This was prohibited in *Carbon* (at para. 30). "Financial harm" resulting from the denial of access to a revenue stream that could be used to subsidize rates is not properly characterized as

[21] Decision 2010-309, paragraph 447.
[22] *Harvest Hills*, paragraph 29.

"harm" in this context. Accordingly, this rationale in support of the imposition of the condition is unreasonable.[23]

32. The Commission interprets the Court of Appeal's decision in *Harvest Hills* as not precluding the Commission from assessing harm from the transaction as a whole where a utility has definitive plans to invest in capital assets and has indeed received approval from the Commission for that investment which is predicated on the future unsuitability and concurrent disposal of an asset. In Decision 2010-309, the Commission concluded that it could not make a final determination on the costs associated with the New Facility until its decision on FAI's application to sell the Old Facility. In this case, the transaction and related circumstances before the Commission is both the sale of the Old Facility and the replacement of it with the New Facility being constructed. Therefore, in assessing harm the Commission will look at the transaction and the consequences of the surrounding circumstances as a whole which includes both the sale of the Old Facility and the construction of the New Facility.

33. The Commission accepts FAI's arguments with respect to the need for a larger facility to meet growing demand in the High River area and the fact that the number of employees working in the Old Facility has increased.[24] The Commission also accepts FAI's evidence that the New Facility is required to maintain existing levels of customer service, and that if FAI were to have stayed in the Old Facility service levels would have declined over time. These facts formed the basis for the Commission's approval of the proposal to proceed with the New Facility in Decision 2010-309.

34. These arguments, however, go towards establishing that there is indeed a close connection between the sale of the Old Facility and the purchase of the New Facility.

35. The evidence in this proceeding shows that the impact of the transaction on FAI's revenue requirement would be $56,000 in 2010 and $675,600 in 2011.[25] This equates to an anticipated rate impact from the transaction of 0.0 percent in 2010 and 0.2 percent in 2011 if FAI's shareholders receive the sale proceeds.

36. There is no service level impact associated with the sale because the Old Facility will be replaced by the New Facility. While there is an anticipated rate increase of 0.2 percent in 2011, the Commission concludes that this rate impact is negligible or *de minimis*.

37. Given the prudence of the sale price and the *de minimis* nature of any harm resulting from the transaction, the Commission concludes that the sale transaction should be approved. While there is a close connection between the sale and purchase, given the lack of harm, there is no basis for the Commission to attach a condition to its approval requiring reinvestment of the proceeds. Therefore, the sale proceeds can accrue to FAI's shareholders.

38. The sale price of the land and building is $1.5 million; the book value is estimated at $0.3 million, resulting in a pre-tax gain of $1.2 million and a post-tax gain of $1.0 million.[26] FAI stated its shareholders will bear the tax, appraisal fee and legal fees. The post-tax gain of $1.0 million will accrue to FAI's shareholders. Fortis is directed to finalize and confirm all

[23] *Harvest Hills*, paragraph 32.
[24] AUC-FAI-003(e).
[25] AUC-FAI-003 (a) (1).
[26] AUC-FAI-001.

numbers upon finalization of the sale transaction once the New Facility is complete and costs are known. This update can be provided in FAI's next general rate application.

5 ORDER

39. IT IS HEREBY ORDERED THAT:

(1) FortisAlberta Inc. be permitted to proceed with the sale of the Old Facility to the Town of High River as proposed.

(2) FortisAlberta Inc. is directed to finalize and confirm all numbers upon completion of the sale transaction and construction of the New Facility once all costs are known. This update can be provided in FAI's next general rate application.

Dated on December 23, 2010.

ALBERTA UTILITIES COMMISSION

(original signed by)

Carolyn Dahl Rees
Vice-Chair

(original signed by)

Tudor Beattie, Q.C.
Commissioner

(original signed by)

Moin A. Yahya
Commissioner

APPENDIX 1 – PROCEEDING PARTICIPANTS

Name of Organization (Abbreviation) Counsel or Representative
FortisAlberta Inc. (FAI) J. Walsh
ATCO Electric Ltd. (AE) L. Keough K. Worton D. DeChamplain B. Yee L. Kizuk
Office of the Utilities Consumer Advocate (UCA) T. D. Marriott K. Kellgren L. Kerckof R. Daw R. Bell

Alberta Utilities Commission
Commission Panel C. Dahl Rees, Vice-Chair T. Beattie, Q.C., Commissioner M. A. Yahya, Commissioner
Commission Staff R. Marx (Commission Counsel) M. Jurijew S. Allen J. Thygesen U. Pillai B. Schroeder

APPENDIX 2 – SUMMARY OF COMMISSION DIRECTIONS

This section is provided for the convenience of readers. In the event of any difference between the Directions in this section and those in the main body of the Decision, the wording in the main body of the Decision shall prevail.

1. The sale price of the land and building is $1.5 million; the book value is estimated at $0.3 million, resulting in a pre-tax gain of $1.2 million and a post-tax gain of $1.0 million. FAI stated its shareholders will bear the tax, appraisal fee and legal fees. The post-tax gain of $1.0 million will accrue to FAI's shareholders. Fortis is directed to finalize and confirm all numbers upon finalization of the sale transaction once the New Facility is complete and costs are known. This update can be provided in FAI's next general rate application. ..... Paragraph 38

Decision **2000-41**

TransAlta Utilities Corporation
Sale of Distribution Business

July 5, 2000

Alberta Energy and Utilities Board

CONTENTS

ALBERTA ENERGY AND UTILITIES BOARD
Calgary, Alberta

Decision 2000-41
TRANSALTA UTILITIES CORPORATION **Application No. 2000051**
SALE OF DISTRIBUTION BUSINESS **File No. 6404-3**

1 BACKGROUND

TransAlta Utilities Corporation (TransAlta) and 860023 Alberta Ltd. (Subco) filed an application (the Application)with the Alberta Energy and Utilities Board (the Board) on February 8, 2000, for approval for TransAlta to transfer its electricity distribution business to Subco, its wholly owned subsidiary, and for TransAlta to sell the shares of Subco.

Notice of hearing was published in the major Alberta daily newspapers in TransAlta's service area on February 23, 2000. Notice was also served on interested parties by fax on February 17, 2000. The Notice included a schedule of dates for the proceeding.

The Board held a pre-hearing conference on April 14, 2000. At the pre-hearing conference the Board heard submissions from parties regarding the items that should be considered as issues in this proceeding. At the pre-hearing conference, the Board rendered its decision on the list of issues for the proceeding. This preliminary issues list was subsequently confirmed by letter dated April 17, 2000 and sent to all interested parties. The Board's ruling and the issues list are attached as Appendix 1.

A public hearing was held from May 23 to June 2, 2000, comprising seven hearing days. The Board panel assigned to this application was N. McCrank, Q.C., Presiding Member, B. T. McManus, Q.C., Member and B. Torrance, Acting Member.

2 DETAILS OF THE APPLICATION

TransAlta is requesting required approvals to

(i) transfer its entire electricity distribution business to Subco;
(ii) sell the shares of Subco; and
(iii) transfer the service area for the electric distribution system to Subco.

Subco is a newly incorporated, wholly owned subsidiary of TransAlta. It is proposed that TransAlta's electric distribution system and retailer functions, both as defined in the *Electric Utilities Act* (EU Act), would be transferred to Subco. The electric distribution system and retailer functions together comprise the 'bundled' electricity distribution business as currently operated and regulated.[1] TransAlta would then sell the Subco shares to TransAlta Energy

[1] Throughout this Decision, the Board will use the term "distribution business" to refer to the bundled distribution and retailer functions of TransAlta.

Corporation (TEC)[2] who would, in turn, sell the Subco shares to UtiliCorp Canada Corp. (UtiliCorp), a wholly owned subsidiary of UtiliCorp United Inc..

The transactions are for the sale of the entirety of TransAlta's distribution business. Subco would carry on the distribution business formerly carried on by TransAlta. Both Subco and its acquiring company, UtiliCorp, would be owners of public utilities and, therefore, would be subject to regulation by the Board.

TransAlta stated that the transfer of its distribution business to Subco is intended to conform with current rate regulation parameters as established pursuant to Board Decision U99099 dated November 25, 1999. In the Application, TransAlta stated that the transfer and sale are not intended to affect year 2000 customer rates, as determined by the Board in Decision U99099, and would not adversely impact the regulated services provided to its customers.

TransAlta stated that it would only proceed with the transactions once approval is given by the Board. The closing of the sale of the distribution business and the transfer of the Subco shares to UtiliCorp will be at a date as soon after Board approval as the parties can arrange (the Transfer Date). TransAlta will advise the Board and interested parties of the Transfer Date as soon as it is determined. Until the Transfer Date, TransAlta will continue to own and operate the distribution business and will be the entity providing distribution service including the carriage of regulatory proceedings relevant to the distribution business.

In Decision U99035 dated August 10, 1999, the Board categorized the costs of the distribution business as being comprised of:

- energy supply costs
- Transmission Administrator (TA) billings
- distribution costs.

For 2000, energy supply costs, TA billings and distribution costs will be as determined by Decision U99099 and by Decision 2000-1 dated February 2, 2000. The rates and terms and conditions of service will be as determined by Decision U99035 and subsequently finalized in Decision 2000-12 dated March 1, 2000, plus any rate riders or other approved changes reflecting the effects of Decision U99099. Underlying TransAlta's distribution costs are assets of the distribution business, as reviewed by the Board in Decision U99099. The distribution assets that form part of TransAlta's distribution business would be transferred to Subco in exchange for common shares of Subco on the Transfer Date. This Application includes a request for approval of that transfer. TransAlta stated that, as at December 31, 1999, the rate base value of distribution assets to be transferred was $472 million. This value will be altered by the time of the Transfer Date as it reflects the continued operation of the distribution business by TransAlta between December 31, 1999, and the Transfer Date. Following finalization of the transfer and sale, TransAlta undertakes to file updated versions of the value of the rate base assets and a proforma regulatory balance sheet that were included in the Application.

[2] A subsidiary of TransAlta Corporation. TransAlta Utilities Corporation is also a subsidiary of TransAlta Corporation.

The price at which the distribution business is to be transferred to Subco and at which UtiliCorp would acquire the shares of Subco is to be equal to 1.5 times the net book value of the depreciable assets at the Transfer Date. As at December 31, 1999, this value was estimated to be $472 million. However, TransAlta used the estimated figure of $430 million at the Transfer Date to arrive at a purchase price of $645 million. The excess of purchase price over net book value yields a gain on sale which TransAlta proposed in the Application should be allocated to its shareholders. From UtiliCorp's perspective, the excess of the purchase price over book value represents a premium it will pay to acquire the distribution business.

A pro rata share of corporate services assets and certain other TransAlta assets used only in part to support the distribution business would not be transferred from TransAlta to Subco. In respect of these assets, service agreements will be put in place between TransAlta and Subco to provide to Subco all support needed to carry on the distribution business.

TransAlta's electric distribution system lies within a service area that has been approved and designated by the Board under the *Hydro and Electric Energy Act* (HEE Act). The Application includes a request for an order of the Board transferring that service area to Subco to be effective on the Transfer Date.

TransAlta currently holds all of the issued shares of Farm Electric Services Limited (FESL) and certain Rural Electrification Association (REA) deposit funds. The FESL shares and the REA deposit funds would be included in the assets transferred to Subco, so that FESL would become a subsidiary of Subco and the activities of FESL would continue to be carried out under the wires services provider function of Subco, all effective on the Transfer Date. All contracts of TransAlta relevant to the distribution business would be assigned or otherwise transferred to Subco, effective on the Transfer Date.

Subco would become, upon transfer of the distribution business and assets to it, a wires services provider as defined in the EU Act and would, effective January 1, 2001, be responsible for provision of the distribution tariff and the regulated rate option tariff.[3] The Application includes a request to establish Subco's rates and terms and conditions of service to be those of TransAlta as at the Transfer Date. Subco would become bound by such codes of conduct as may be imposed on the wires services provider by the Board or by regulation under the EU Act or other legislation.

The specific approvals requested by TransAlta and Subco in the Application were stated as follows:

- In respect of TransAlta
  - Approval under the *Public Utilities Board Act* (PUB Act) of the transfer of the property, franchises, privileges and rights of TransAlta, as they pertain to the

[3] TransAlta has applied for Board approval of a distribution tariff pursuant to the Distribution Tariff Regulation, AR 84/2000 (Application No. 2000137).

distribution business, to Subco, and approval of the sale of the shares of Subco by TransAlta.
    - Approval of the transfer of the service area that TransAlta holds under the HEE Act to Subco, to be effective the Transfer Date.

- In respect of Subco
    - Approval of the rates, tariffs and terms and conditions of service of TransAlta's distribution business, as effective the Transfer Date, to become the rates, tariffs, terms and conditions of Subco on that date.
    - Approval, in so far as the Board may give it, of the transfer of the energy supply costs and the TA billings costs of TransAlta to Subco effective upon the Transfer Date.

- Other
    - Such further and other orders, exemptions and declarations of the Board necessary to permit and facilitate the transactions described.

The FIRM Customers and the City of Calgary (Calgary) proposed that the Application, as TransAlta has framed it, should be denied. The FIRM Customers went on to recommend that if the Board approves the sale, conditions should be placed on the approval to ensure that there is no resulting harm to customers. Both the Industrial Power Consumers and Cogenerators Association of Alberta (IPCCAA) and the Independent Power Producers Society of Alberta and Senior Petroleum Producers Association (IPPSA/SPPA) recommended that the Application be approved subject to certain conditions. IPPSA/SPPA recommended that the approval be conditioned so that the gain on the sale would go to customers.

IPCCAA requested the following conditions:

- Any portion of the gain on sale that relates to the assets that have been included in TransAlta's rate base should accrue to the benefit of customers.
- UtiliCorp should be formally bound to its commitment not to seek an adjustment to rate base with respect to the acquisition premium.
- UtiliCorp should not be permitted to recover from customers the difference in income tax calculations arising because of the difference between regulatory undepreciated capital costs (UCC) and actual UCC available for income taxes payable purposes.
- TransAlta should not retain or use customer information that it has acquired as the owner and operator of an electric distribution system except to the extent that such retention or use is required by the company to discharge its obligations as a transmission facilities owner.
- As neither UtiliCorp nor Subco are designated owners of a public utility, there should be an express condition that no further sales can occur whether as a sale of shares, assets, or otherwise without the Board's prior approval.

3 STRUCTURE OF TRANSACTION

The proposed sale by TransAlta of its distribution business involves a series of transactions that would be implemented one immediately after the other.

Initially, TransAlta would sell the distribution business and related assets to Subco, which would also assume specified liabilities of the business. TransAlta would receive common shares of Subco as consideration for the sale. In aggregate, the value of the common shares, together with assumed liabilities, would equal the fair market value of the business transferred. As part of this proposed transaction TransAlta and Subco would elect under Section 85 (1) of the *Income Tax Act* an aggregate value of $500 million, plus adjustments made until the Transfer Date for "depreciable property" and $1.00 for "eligible capital property," as each of those terms is defined, in the *Income Tax Act*. Section 85(1) would be used to establish the actual income tax cost for the shares and the property transferred. For accounting purposes TransAlta would transfer the business using amounts reflecting book values. The $500 million also represented the fair market value of the depreciable property as at December 31, 1999, as negotiated between TransAlta and UtiliCorp.

A following transaction would involve the sale of the common shares of Subco held by TransAlta to TEC, in consideration for redeemable and retractable preferred shares of TEC having a fair market value of the distribution business. Under Section 85(1) of the *Income Tax Act*, TransAlta and TEC would elect a value (estimated to be $515 million) for the common shares for income tax purposes. For accounting purposes the shares would reflect the book value of the distribution business.

TEC would then sell to UtiliCorp the common shares of Subco for cash proceeds equal to 1.5 times the book value of the distribution business. After the ultimate sale to UtiliCorp, the preferred shares of TEC held by TransAlta could be redeemed.[4]

A number of the intervenors argued that the Board's consideration of the Application should depend on how the transactions were characterized, namely, whether TransAlta is proposing a sale of assets or a sale of shares.

Position of the Intervenors

FIRM Customers

On behalf of the FIRM Customers, Mr. Pous stated that he did not distinguish between the sale of assets and the sale of shares, but viewed the transactions contemplated by the Application as carefully crafted to circumvent the normal regulatory process.[5] The FIRM Customers noted that there must be a sale of assets to Subco before there can be a sale of shares to UtiliCorp and that the proposed sale is, in form and substance, an asset sale with underlying risks to Subco and its customers. However, the FIRM Customers also argued that under the circumstances it did not really matter how the sale was structured.[6]

[4] Numerical details of the transactions are outlined in Exhibits 22 and 30.
[5] Tr. p.785
[6] Tr. p.920, 924

The FIRM Customers also noted that Subco would forgo a future income tax deduction for eligible capital expenditures (e.g., goodwill) because of the elected value of $1.00 to be made for those types of expenditures on the transfer of the distribution business to Subco.[7]

Position of TransAlta

TransAlta stated that it was establishing the distribution business as a separate business entity and was transferring ownership of that business through the sale of shares of that entity. TransAlta also stated it was incorrect to suggest that the transaction structure was just an asset sale. Had TransAlta previously set up its generation, transmission and distribution businesses as distinct corporate entities, as periodically suggested by the Board, no one would have or could have asserted that an asset sale was proposed.[8] TransAlta disagreed with the FIRM Customers' position on the nature, structure and effect of the transactions.[9]

TransAlta stated that goodwill is currently not recognized for income tax purposes and is therefore not deductible. It noted that this situation will not change in Subco after the transfer of the business.[10]

Board Findings

The Board notes that TransAlta is proposing a series of transactions to effect the sale of its distribution business. These transactions involve both the sale of assets, the transfer of underlying obligations and the assumption of certain related liabilities to a subsidiary followed by the sale of shares of that subsidiary. The Board considers that it need not determine in this case whether the transactions should, as a whole, be characterized as an asset sale or share sale. Regardless of how the transactions are structured, and as already noted by the Board, what TransAlta is proposing in substance is the sale by one regulated entity of its entire distribution business as a going concern, including its customers, to another regulated entity. It is against this backdrop that the Board considers its review of the Application must be carried out. In other words, it is to the substance of the transactions to which the analytical framework adopted by the Board must be applied. It is to that framework that the Board will now turn.

4 IMPACTS OF THE TRANSACTION ON CUSTOMERS

4.1 General Principles

TransAlta seeks approval of the transactions contemplated by the Application pursuant to Paragraph 91.1(2)(d) of the PUB Act, which reads, in relevant part:

> (2) No owner of a public utility designated under subsection (1) shall
>
> (d) without the approval of the Board,

[7] Tr. p.929
[8] Tr. p.97, 98
[9] Tr. p.863
[10] Tr. p.1111

> (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part thereof, or
>
> (ii) merge or consolidate its property, franchises, privileges or rights, or any part thereof,
>
> and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of his business.

By virtue of its general supervisory power over public utilities and the specific provisions of the *Alberta Energy and Utilities Board Act* (AEUB Act) authorizing the Board to condition orders made in exercise of its jurisdiction, the Board considers that, if necessary in the public interest, it can impose appropriate conditions on any approval granted under this provision.[11]

TransAlta is an owner of a public utility designated by regulation pursuant to Subsection 91.1(1).[12] No one argued that these sale transactions are within TransAlta's ordinary course of business. The Board has previously stated its view that sales of major rate base assets where the frequency of disposition is low and the proceeds material are not within the ordinary course of business.[13] Here, TransAlta proposes to sell its entire distribution business at an estimated price of $645 million.[14] Therefore, the Board accepts that the transactions proposed by TransAlta in the Applications are not in the ordinary course and require approval under Paragraph 91.1(2)(d) of the PUB Act.

As indicated by the Board in a letter from its counsel dated May 16, 2000, the onus is on TransAlta and Subco, as applicants, to satisfy the Board that the Application should be approved in the terms proposed, including any proposed treatment of the gain on sale.

The Supreme Court of Canada has stated that the Board's jurisdiction to "safeguard the public interest in the nature and quality of the service provided to the community by public utilities" is "of the widest proportions."[15] The Board has also noted that its governing legislation provides no explicit guidance for the exercise of the Board's discretion in approving an asset disposition by a designated owner of a public utility.[16]

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[11] PUB Act, Sections 28, 29 and 77; AEUB Act, Paragraph 10(3)(d). See also Decision U99102, *Canadian Utilities Limited, et al., Application for Approval of the Reorganization of Northwestern Utilities Limited and Canadian Western Natural Gas Company Limited* (November 1, 1999), p.9.

[12] AR 173/85, Paragraph 1(i)

[13] Order E93023, *Re Northwestern Utilities Limited* (March 17, 1993), p.12

[14] The $645 million was calculated based on 1.5 times book value.

[15] *ATCO Ltd. v. Calgary Power Ltd.* [1982] 2 S.C.R. 557, at 576 (per Estey J.)

[16] Decision U99102, p.7

The Board has held that its discretion under essentially similar provisions of the GU Act must be exercised according to a "no harm" standard. More specifically, the Board has held that it must be satisfied that customers of the utility will experience no adverse impact as a result of the reviewable transaction.[17] The Board considers that a similar principle applies when it is asked to approve transactions pursuant to Section 91.1(2) of the PUB Act and believes that guidance in the application of this principle can be found in other provisions of its governing legislation. The Board believes, however, that in applying this principle, it must have regard to the policy of deregulation reflected in the EU Act, which distinguishes this case from those involving similar provisions of the GU Act.

Prior to the passage of the EU Act in 1995, electric utilities were subject to the provisions of the PUB Act respecting their rates, tolls and charges and the services they provided. These provisions made it clear that the primary concern of the Board was to ensure that public utilities provided safe and reliable service at just and reasonable rates.[18] With the passage of the EU Act, these provisions of the PUB Act no longer apply to electric utilities.[19] To the extent they remain regulated, electric utilities are now subject to generally similar provisions of the EU Act.[20]

The Board believes that its duty to ensure the provision of safe and reliable service at just and reasonable rates informs its authority to approve an asset disposition by a public utility pursuant to Section 91.1(2) of the PUB Act. Therefore, the Board is of the view that, subject to those issues which can be dealt with in future regulatory proceedings (see Appendix 1), it must consider whether the disposition will adversely impact the rates customers would otherwise pay and whether it will disrupt safe and reliable service to customers. As already noted, the Board also accepts that it must assess potential impacts on customers in light of the policy reflected in the EU Act, namely the unbundling of the generation, transmission and distribution components of electric utility service and the development of competitive markets and customer choice. As a result, rather than simply asking whether customers will be adversely impacted by some aspect of the transactions, the Board concludes that it should weigh the potential positive and negative impacts of the transactions to determine whether the balance favours customers or at least leaves them no worse off, having regard to all of the circumstances of the case. If so, then the Board considers that the transactions should be approved.

In the following sections, the Board considers the impact of the transactions on the continuity of safe and reliable service, potential positive impacts arising from the sale, and the risk of harm to customers as a result of future rate changes. In relation to the latter consideration, the Board has identified three potential risks as being material: the treatment of pension surplus, the reduction in UCC available for capital cost allowance claims, and the recovery by UtiliCorp of the premium paid to acquire TransAlta's business.

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[17] See Decision U98084, *NOVA Corporation, et al., Application for Regulatory Approvals in Connection with a Proposed Merger of NOVA Corporation and TransCanada Pipelines Limited* (May 19,1998), p.6; Decision U98097, *Westcoast Energy Inc. et al., Sale of Shares in Centra Gas Alberta Inc. from Westcoast Energy Inc. to AltaGas Services Inc.* (June 29, 1998), p.3; Decision U99102, *supra,* p.8

[18] See, especially, PUB Act, Sections 72, 73, 80, 81 and 91

[19] PUB Act, Section 106.1

[20] See, especially, EU Act, Sections 51 and 58

In appropriate circumstances, it might be open to the Board to mitigate or offset any of these potential risks by apportioning some of the gain on sale to customers. Generally speaking, however, the Board believes that the disposition of the gain is a matter to be decided according to a somewhat different set of considerations and principles. For example, the Board could conclude that, on balance, customers would be no worse off as a result of the sale, but having regard to the circumstances, they should be entitled to all or a portion of the gain on sale. Therefore, the disposition of the gain is discussed following the Board's discussion of potential impacts on customers and rates.

4.2 Continuity of Safe and Reliable Service

One of the issues that the Board identified in its preliminary issues list was the continuity of safe and reliable service.

Position of the Intervenors

FIRM Customers

The FIRM Customers submitted that, should the Board approve the transaction, specific directions should be given to the resulting entities with regard to service levels. The FIRM Customers submitted that a group of service measures and reporting requirements should be developed and submitted for approval to ensure that service quality levels do not decline with the sale. The FIRM Customers stated their concern that service levels could deteriorate as a result of cost cutting measures that are undertaken to recover the investment in Subco. The FIRM Customers noted that in Decision U99099 the Board stated the importance of adequate measures to monitor the quality of service, especially as the industry moves through restructuring.

REAs

The Alberta Federation of REAs Ltd. (REAs) raised some public interest concerns with respect to UtiliCorp's entrance in the market. First, the REAs noted that UtiliCorp's head office would not be in Alberta. Second, stakeholders would no longer have the financial strength of a vertically integrated corporation to back up problems that may arise.

Aboriginal Communities

On behalf of the First Nations, Aboriginal Communities, and Metis Settlements (Aboriginal Communities), Mr. Graves noted that TransAlta had a long history dealing with its aboriginal customers. Mr. Graves questioned whether UtiliCorp. had the necessary experience to deal with the unique characteristics and requirements of these customers.

UtiliCorp

UtiliCorp pointed out that it is an international energy company, which presently serves over 4.5 million customers. It currently is upgrading its customer service capability across its service territories, and will be reviewing the use of various systems in Alberta, targeting those which will enable more responsive customer service and efficient operations.

UtiliCorp assured parties that it is firmly committed to ensuring that the change of ownership will not negatively impact customers' rates or the quality of service. UtiliCorp submitted that customers will be no worse off and that it believed customers would be better off over time.[21]

UtiliCorp acknowledged that measuring no worse off may be difficult but noted that the commitment is also a risk for UtiliCorp. UtiliCorp stated that:

> This commitment is a meaningful commitment which may be raised in the future, although the hope and expectation of UtiliCorp is that that will never become necessary, that the customer will be satisfied with the service and the value received.[22]

UtiliCorp noted the FIRM Customers' suggestion that service measures and reporting requirements be put in place to ensure that the quality of service does not decline when UtiliCorp takes over. UtiliCorp agreed to maintain existing standards and acknowledged that it is bound by all existing Board orders. UtiliCorp also stated that a direction or condition as suggested by the FIRM Customers would require a specific definition of the service measures. UtiliCorp noted that there was no record in the proceeding on the matter of service measures. UtiliCorp lastly noted that the Board retains jurisdiction to deal with any service issues in the future when and if they arise.

With respect to the concerns raised by the Aboriginal Communities, UtiliCorp noted that its managers receive considerable autonomy to deal with local issues.

UtiliCorp also noted its commitment to the continuity of rates at current levels for 2000 and that it will be bound by all existing EUB decisions pertaining to the distribution system. As owners of electric utilities and public utilities under the EU Act and PUB Act, Subco and UtiliCorp will also be subject to continuing regulation by the Board. Furthermore, UtiliCorp has agreed to assume all utility obligations and that it will hold TransAlta harmless from any failure to perform utility obligations.

In its reply argument, UtiliCorp also offered a five-year rate freeze, in an attempt to provide additional assurance to customers. This rate freeze would be subject to adjustments for costs increased or decreased by changes in the law, and for inflation over two per cent.

Position of TransAlta

TransAlta stated that the transaction was structured as a sale of shares of a company ready, willing and able to continue to provide high quality regulated service for regulated rates. TransAlta noted that approximately 630 employees, including front line service providers will become employees of Subco and will see to continuity of service.

[21] Tr. p.887
[22] Tr. p.887

Board Findings

The first consideration in assessing this Application is a determination of whether or not UtiliCorp will be able to continue to provide safe and reliable service to the DISCO customers. Unless appropriate conditions could be developed, if the company purchasing a utility were not able to meet this criteria, the application for approval to sell the utility business would likely be denied regardless of the financial consequences of the sale.

During the proceeding there was little discussion of UtiliCorp's ability to operate a safe and reliable distribution utility. There appeared to be general agreement among the parties that no concern arises in this respect. The Board notes that UtiliCorp is retaining the existing staff of the distribution utility thereby retaining the current expertise. As well, UtiliCorp operates utilities in many other jurisdictions, including its operation of West Kootenay Power Ltd. in British Columbia. Therefore, the Board is satisfied that UtiliCorp has demonstrated its ability to operate a distribution business safely and reliably.

With respect to the comments of the REAs, the Board notes that UtiliCorp will be based in Calgary. Also, the restructuring of the electric industry has encouraged the separation of the previously integrated utilities into separate functions regardless if there was a change in ownership or not. The Board further notes that Subco will be a wholly-owned subsidiary of UtiliCorp United Inc., a company much larger than TransAlta. The Board does not, therefore, consider the REAs concerns to be well-founded.

The Board also notes that the distribution employees of TransAlta will become employees of Subco on the Transfer Date, bringing with them their experience in dealing with all of TransAlta's customer classes, including its aboriginal customers. The Board heard no evidence to suggest that these employees would be unable to maintain the levels of service to which aboriginal communities have become accustomed while being served by TransAlta. UtiliCorp also confirmed that the dispute between TransAlta and some aboriginal communities with respect to ownership of distribution assets would remain alive after the transactions are closed. As a result, the Board does not believe that aboriginal customers will experience any diminution in their service as a result of the sale to UtiliCorp or otherwise be prejudiced in relation to any of the legal issues identified as outstanding with TransAlta.

4.3 Potential Positive Impacts

Before turning to the risk of harm to customers as a result of future rate changes, the Board considers that it is necessary to reflect on the potential positive impacts of the sale.

Position of the Intervenors

UtiliCorp

UtiliCorp noted that, with the restructuring of the electricity market in Alberta, electric utilities are moving away from an area dominated by the integrated utility to distinct areas of specialization. UtiliCorp stated that it had demonstrated its ability to perform the distribution and

retail role. UtiliCorp further noted that TransAlta is clearly no longer interested in the electric distribution business whereas UtiliCorp is eager to fill the role.[23]

CCA

The Consumers Coalition of Alberta (CCA) noted that, in the deregulated electric industry, having the functions of TransAlta split into separate unrelated companies would be a positive point.[24]

IPPSA/SPPA

IPPSA/SPPA supported the entry of UtiliCorp into the market. IPPSA/SPPA noted that restructuring of the electric industry ought to be further advanced by the addition of a new and qualified participant that is at arm's length from TransAlta. IPPSA/SPPA further noted that it can reasonably be expected that UtiliCorp will operate at arm's length from TransAlta.[25]

Board Findings

The Board notes that in recent proceedings, including the 1999/2000 electric tariff applications, intervenors expressed concern that there was insufficient separation between the functions of the integrated utility. For example, although EPCOR had separated its generation company (GENCO), transmission company (TRANSCO) and distribution company (DISCO) into separate legal entities, the degree of their separation was questioned as these entities shared common Boards of Directors. It appears to the Board that in selling its distribution business, TransAlta would achieve the maximum possible separation of TransAlta DISCO from TransAlta GENCO and TransAlta TRANSCO. This separation would alleviate concerns previously expressed by customers, such as the DISCO sharing customer information inappropriately with an affiliated GENCO. Both the CCA and IPPSA/SPPA noted the benefit of the separation of the functions in their submissions.

The Board also notes that, to the extent that an additional participant is introduced into the Power Purchase Arrangements (PPA) auction due to UtiliCorp's entry into the market, there is likely to be some indirect benefit to consumers in Alberta. Lastly, the Board notes that UtiliCorp is a company that focuses on the provision of electric distribution and retail services. It can reasonably be expected that they will introduce some innovation in their provision of service in Alberta. UtiliCorp is obviously choosing to enter the Alberta market with some enthusiasm. In contrast, TransAlta clearly stated its desire to exit the distribution business in Alberta in order to focus on electricity generation and transmission.

The Board notes the offer made by UtiliCorp in reply argument to freeze rates for a five-year period. The Board appreciates the spirit and intent of this offer made by UtiliCorp. However, the Board considers that this offer, particularly coming at the point in proceedings at which it did, would more appropriately be made to customers in a PBR negotiation as proposed by UtiliCorp. The Board acknowledges UtiliCorp's expressed interest in pursuing a PBR scheme and considers

[23] Tr. pp.872-874
[24] Tr. p.985
[25] Tr. p.1040

that to the extent it so chooses, UtiliCorp can address many of the concerns of customers in that context.

While these items all appear beneficial to customers, the Board notes that as compared with the potential harms to be discussed below, there is greater uncertainty attached to the potential benefits of the sale, and there is no possibility of quantifying them. The Board will, however and to the extent possible, bear these potential benefits in mind when considering the cost impacts and their potential risk to customers in greater detail in the following sections.

4.4 Pension Surplus

Several parties explored the proposed treatment of the surplus in TransAlta's pension fund during the proceeding. Although not initially identified by the parties or the Board as a significant issue, pension took on significance as a result of information submitted to the Board after the pre-hearing conference on April 14, 2000.[26] Pension was specifically addressed in the Asset Transfer Agreement and the letter agreement dated February 7, 2000 (Letter Agreement) provided on April 19, 2000. Because some parties viewed the proposed treatment of the pension surplus as creating a potential harm to customers, the Board considers it appropriate to address this issue.

To provide some background and to keep pension matters in context, the Board considered it appropriate to refer to Decision U99099 in which, the Board addressed the pension surplus and other matters related to pension in its findings.[27] The Board noted that TransAlta's basic Defined Benefit Plan had a surplus and that TransAlta requested a negative pension expense for both 1999 and 2000. The Board concurred that customers were benefiting from the pension surplus through reduced pension expenses as the pension surplus was amortized into pension expense over the "Employee Average Remaining Life".

Position of TransAlta

TransAlta confirmed the proposed manner by which the Pension Reserve would be transferred from the books of TransAlta to Subco. It was noted however that the pension fund assets and liabilities, and the pension surplus were considered to be "off balance sheet" for both accounting and regulatory purposes, and therefore would not be recognized on TransAlta's balance sheet.[28]

The proposed treatment of the pension surplus was contained in the Letter Agreement, the intent of which was clarified by TransAlta during the hearing. TransAlta submitted that the future regulatory treatment of the pension surplus was uncertain and that the Letter Agreement was intended to address any future disputes that might arise should any portion of the pension surplus not be allocated to Subco's customers.[29] TransAlta emphasized that the Letter Agreement was

[26] Exhibit 4, Article 6.4 and Schedule 6.4(e) of the Asset Transfer Agreement and the February 7, 2000 Letter Agreement
[27] Decision U99099; Tr. pp.661-664
[28] Tr. p.206
[29] Tr. p.143

not final in that the mechanism by which any remaining surplus would be returned to TransAlta by Subco was still under negotiation between the two parties.[30]

TransAlta explained that, because 630 TransAlta employees will become Subco employees on the Transfer Date, TransAlta's pension plan and the assets it contained must also be proportionately split and a new plan created in Subco for the benefit of the transferred employees. The actuarial surplus in the TransAlta plan was to be split with the proportionate share of the surplus moving into the new pension plan. Subco's portion of the surplus was estimated to be $16 million at the time of the signing of the transaction agreements. The figure for closing will be actuarially determined as of the Transfer Date.

TransAlta submitted that neither the splitting of the pension plan nor the final agreement between TransAlta and Subco/UtiliCorp pertaining to the pension surplus would harm customers. Customers would not be harmed because the same funds now in the pension plan of TransAlta employees providing distribution and retail service would be transferred into the Subco plan for the same employees. TransAlta maintained that the point of the Letter Agreement was also clear. Only if and to the extent that the existence of the surplus in the plan provided some measurable value to shareholders in some future rate-making proceeding before this Board would that value be dealt with as between the old and the new shareholder. No surplus was being appropriated from anyone and no harm arose to customers as a result.[31] TransAlta noted that the Board would continue to determine the appropriate treatment of pension costs as they bear on customers in future cases.[32]

Position of the Intervenors

UtiliCorp

UtiliCorp confirmed that the disposition of pension funds was uncertain as between Subco and TransAlta, adding that the matter was still being negotiated between TransAlta and UtiliCorp. UtiliCorp submitted that the pension surplus should remain as a surplus to ensure that the employees' pension entitlements could be satisfied.[33]

Without specific mention to the pension surplus, UtiliCorp accepted that it would be bound by all existing Board decisions pertaining to the distribution system. UtiliCorp submitted that parties should be confident that it would preserve existing regulatory parameters.

FIRM Customers

The FIRM Customers argued that customers would be harmed by any loss of entitlement to the pension surplus.[34] According to the FIRM Customers,[35] the pension surplus represented value that did not arise from the sales transactions. The FIRM Customers noted that pension expense

[30] Tr. p.143, 145
[31] Tr. p.1109
[32] Tr. p.861
[33] Tr. pp.613-614
[34] Tr. p.908
[35] Tr. pp.936-937

had been funded through the rates paid by customers, and that customers carried the burden of the pension expense. If that expense was excessive, having regard to the amounts required to properly fund the pension plan, customers should have the benefit of any excess payments in accordance with the regulatory compact. The FIRM Customers submitted that any reduction in the pension surplus at this time would have to be made up by customers in the future. Any appropriation of the pension surplus to TransAlta and/or UtiliCorp could result in a future cost to distribution customers.

Calgary

Calgary submitted that TransAlta and UtiliCorp appeared to have structured an agreement that could see the $16 million pension surplus collected from TransAlta customers accrue to the benefit of TransAlta shareholders.[36]

Board Findings

Generally, it appeared to the Board that the parties' understanding of this issue was an evolving one, perhaps due to the fact that some issues remain to be negotiated between TransAlta and UtiliCorp, but also perhaps due to the timing of TransAlta's submissions on this issue. It appears to the Board that much of the lack of clarity on this issue could have been resolved if TransAlta had offered its explanation of the Letter Agreement earlier in the proceedings.

At the outset, the Board concludes that where, as part of the sale of an ongoing utility business, employees are being transferred to the new owner, it is appropriate for pension funds, including surplus funds, to be transferred to the new owner to support future pension entitlements of the utility's employees. In this case, the Board notes that the parties to the transaction have addressed pension-related issues in Section 6.4 of the Asset Transfer Agreement.[37]

The Board notes that the final amount of the pension surplus to be transferred to Subco will be determined according to the Asset Transfer Agreement. Although the Board considers this to be a matter for TransAlta and UtiliCorp to finalize, it is a subjective exercise that could potentially have some future impact on customers. The Board notes that Subco's future pension expense and funding amounts will be impacted to some degree, positively or negatively, by the final pension assets and liabilities agreed to by TransAlta and Subco.[38]

The Board notes from Decision U99099 and the proceedings leading up to it that TransAlta's customers were benefiting from the pension surplus because it was being amortized against TransAlta's pension expense, thereby reducing TransAlta's revenue requirement for 2000. In the hands of Subco, the estimated pension surplus of $16 million may still be available to customers as an offset to pension expense in future rate applications by Subco. However, the Board notes that the future treatment of pension surplus will depend, in part, on the ongoing performance of the pension fund and how, or whether, any gains or losses should be passed on to customers.

[36] Tr. p.1001

[37] Exhibit 4

[38] For example, the Board notes that an Investment Return of 7.0% has been used in Schedule 6.4(e) of the Asset Transfer Agreement as opposed to the 7.5% approved in Decision U99099 and is aware of the impact this assumption, and others, may have on the final determination of the pension surplus.

The Board considers that Subco's future pension expense and funding amounts continue to be subject to regulation by this Board. The Board notes UtiliCorp's commitment to maintain regulatory parameters, and considers the "Actuarial Assumptions for Pension Valuation Purposes"[39] to be among those parameters.

As alluded to earlier, the Board notes that the interpretation of the Letter Agreement appeared to evolve during the hearing. Interveners were apparently left with the view that all, or some portion of, the pension surplus would be transferred from Subco to TransAlta after the Transfer Date. Based in particular on the submissions of TransAlta in reply argument and the Board's reading of the Letter Agreement, the Board understands that this interpretation is not correct. The Board is not presently being asked to approve the final pension amounts to be transferred, or the final agreement between TransAlta and UtiliCorp regarding the future treatment of the pension surplus.

Meanwhile, the Board is being asked to approve the sale of the distribution business assets to Subco, which will include the transfer of pension assets and liabilities and the pension surplus. To provide some comfort to customers, the Board considers Subco's shareholder to be accountable for any immediate transfer of the pension surplus to TransAlta, should that transfer occur outside the context of a GRA or a negotiated settlement with customers. Beyond that, the Board agrees that customers have recently benefited from the surplus in the pension fund, and notes UtiliCorp's submission that the pension surplus should remain as a surplus to ensure that the employees' pensions are met. In any event, the Board notes that pension matters are regularly before this Board for review.

In light of this understanding of the intent of the Letter Agreement and the commitments of UtiliCorp, the Board does not believe that the proposed treatment of the pension surplus as part of the overall transaction raises any risk of harm to customers. Indeed, it is possible that Subco customers will continue to reap the benefit of the pension surplus in future rate-making proceedings. Any impact on customers can be addressed in that context. Therefore, the Board does not consider the pension surplus issue to require any condition to be attached to any approval of the Application.

4.5 Reduction of Available Undepreciated Capital Cost

UCC represents the amounts relating to depreciable assets that are available for income tax deduction purposes as capital cost allowance at rates prescribed by the federal Income Tax Regulations. As a result of segregating its business functions, TransAlta determined that, at December 31, 1999, approximately $911 million of UCC was available for federal income tax purposes in relation to its distribution business. This balance was used by TransAlta to determine the income tax components of TransAlta's revenue requirement for its 1999/2000 Refiling pursuant to Decision U99099. A similar amount was also determined to be available for Alberta provincial income tax purposes.

[39] Exhibit 4, Schedule 6.4(e) of the Asset Transfer Agreement

In the Asset Transfer Agreement, TransAlta and Subco have agreed that the fair market value of the depreciable assets being transferred is $500 million at December 31, 1999. This is the amount, subject to closing adjustments, that they are also proposing to elect in aggregate under the *Income Tax Act* to be the opening balance of UCC available to Subco for future capital cost allowance deductions used to determine actual income taxes payable in the year. Therefore, the UCC available to Subco for actual income tax purposes will be $411 million less than the amount otherwise available to TransAlta if the sale were not to occur.

From TransAlta's perspective, the sale should give rise to substantial terminal losses. For income tax purposes, a terminal loss arises when all of the properties in a class of depreciable assets are disposed of for proceeds less than the UCC of that class. Under the proposed sale of its distribution business, TransAlta would dispose of all of its depreciable assets in all UCC classes of that business, which in turn would result in terminal losses estimated to aggregate $411 million (i.e., using the difference between the UCC of $911 million in those classes at December 31, 1999 and the related elected values of $500 million). As a terminal loss can be deducted for income tax purposes in the year incurred, TransAlta estimated that it would be eligible for income tax benefits of approximately $185 million, using a combined rate for federal and provincial income taxes of 45%.

Position of the Intervenors

FIRM Customers

The FIRM Customers argued that Subco would lose a tax shield of $411 million of UCC previously available to reduce revenue requirement and customer rates. They noted that, over time, Subco's taxable income would be higher by that amount and that UtiliCorp would want to calculate Subco's income taxes using the actual $500 million opening UCC rather than the $911 million suggested as the regulatory balance.[40]

The FIRM Customers also argued that the claim of a terminal loss by TransAlta, and the resulting loss of UCC to Subco, was contrary to the long-standing principle that customers are entitled to the income tax benefits of expenses paid by them. They further argued that, because UCC in TransAlta was greater than the related net book value of the assets, customers have paid for higher book depreciation in past years and to appropriate the related tax depreciation amounts to confiscation of customer value.[41]

CCA

The CCA submitted that the reduction of $411 million of UCC in Subco would take benefits that customers were receiving in TransAlta and turn them into additional costs because customers would lose the full amount of the tax write-off of the related assets.[42]

[40] Tr. p.923, 933, 935
[41] Tr. p.930, 933
[42] Tr. p.991

Calgary

Calgary argued that TransAlta acknowledged the benefit arising from a terminal loss. It submitted that TransAlta and its shareholders have received a return on capital and a return of capital and therefore the benefits arising from the disposition of property that would result in the terminal loss should flow to customers.[43]

IPCCAA

IPCCAA noted that UtiliCorp would make no commitment with respect to the opening balance of UCC that Subco would use to calculate its income taxes for rate making purposes. It submitted that customers should not have to face any risk that Subco would increase its revenue requirements to meet its tax obligations as a result of TransAlta's appropriation of UCC for its benefit.[44]

UtiliCorp

UtiliCorp submitted that the increase in taxes payable as a result of the reduced UCC in Subco is not an issue for the year 2000 as it accepted TransAlta/Subco's 2000 rates and those rates would not change as a result of the sale. It stated that it accepts the $911 million of UCC for 2000 in the context of the PBR that it anticipates negotiating with customers, but that it is unwilling to have the $911 million remain as the regulatory UCC base indefinitely because Subco must be able to recover future taxes payable through PBR or otherwise. It further stated that it could not accept UCC as being a fixed regulatory parameter while others are open to change.[45] UtiliCorp stated that it has not agreed in its contract with TransAlta to maintain the $911 million UCC value beyond 2000 for regulatory purposes.[46]

Position of TransAlta

TransAlta submitted that the opening balance of UCC for rate making purposes will not change as a result of the proposed sale of the distribution business to Subco,[47] even though the opening balance of UCC for purposes of calculating actual income taxes payable would be the elected amount. TransAlta stated that:

> Our proposal here is that the regulatory rates be set adopting those parameters from the prior proceeding. So the consumer rate still be [sic] set on the basis of the [Decision] U99099 which contains the $911 [million], even though Subco does not have that to their disposal.
>
> As for UtiliCorp, it confirmed that the difference given rise to by the continuity of the $911 million for regulatory tax calculation purposes, combined with the effect of the elected amount for purposes of the *Income Tax Act*, will give rise to tax obligations of Subco that are unrecoverable from customers. UtiliCorp also

[43] Tr. p.1002
[44] Tr. p1025
[45] Tr. p.881, 883
[46] Tr. p.1079
[47] Tr. pp.841-842

> acknowledged that in future, regulatory parameters will only change if this Board agrees.
>
> UtiliCorp knew of these regulatory parameters and that they meant that there would be taxes payable as a company by Subco that were beyond the amounts collectible in rates in respect of taxes. The price they paid for the business, of course, reflects this. The bottom line is that the no harm standard for customers is preserved. [48]

TransAlta stated under cross-examination that the terminal loss should be used solely for the benefit of shareholders.[49] It argued that it was the leaving of the business that would give rise to a terminal loss and that leaving a business is a shareholder matter.[50]

Board Findings

The Board acknowledges and accepts that the 2000 customer rates of Subco will not change as a result of the proposed transaction. However, UtiliCorp indicated that it was not prepared to accept, for traditional regulatory revenue requirement purposes, an opening UCC balance of $911 million because it will only have $500 million available for income tax purposes.

The Board notes that, were it not for the proposed transaction, the customers of TransAlta DISCO would continue to benefit from the full amount of the UCC by virtue of the lower income taxes that would be collected through revenue requirement. As a result of the transaction, Subco will be subject to higher income taxes, which it ultimately intends to recover in some manner. Therefore, it is manifest that customers are facing a real and substantial risk of higher rates that they would not face absent the transaction. The Board considers this risk to represent a harm to customers that, in accordance with the general principles set out in Section 4.1 of this Decision, must either be offset or mitigated for the Board to approve the transaction.

As noted above, UtiliCorp urged the Board not to isolate this regulatory parameter because the setting of rates, through PBR or otherwise, is a function of a number of other parameters as well. However, the Board does not accept UtiliCorp's premise that addressing this parameter alone will skew the rate-setting process in whatever form it ultimately takes. To the contrary, the Board considers it necessary to deal with this particular parameter because it is a significant source of potential harm to customers. Nor does the Board accept UtiliCorp's assertion that rates will be lower than they otherwise would have been if the Board places conditions on this parameter alone – in other words, that customers would be advantaged. Rather, the Board believes that attaching conditions relating to UCC will ensure that the customer is not disadvantaged by the transaction in accordance with the Board's duty under Section 91.1(2) of the PUB Act.

While there may be other ways that this risk could be mitigated, the Board concludes that the most effective mechanism would be to condition any approval of the transaction so as to maintain the current level of UCC for regulatory purposes. More specifically, any approval

[48] Tr. pp.846-847
[49] Tr. p.177
[50] Tr. p.1113

should be subject to the condition that Subco calculate income taxes for rate making purposes for 2000 and beyond using as opening balances the amounts of UCC determined by TransAlta for its distribution business in its Refiling pursuant to Decision U99099, including any adjustments for additions and disposals of assets made prior to the Transfer Date.

In reaching this conclusion, the Board notes that TransAlta acknowledged this risk when it said that the "no harm standard" for customers is preserved if the existing UCC opening balance is maintained for regulatory purposes.[51] The Board also notes that, beyond the five-year rate freeze suggested by UtiliCorp discussed earlier in this Decision, no one proposed any alternative mitigative measure that would address this significant risk to customers.

4.6 Recovery of the Premium

As previously noted, the Board considers that one of the three potential risks to customers as a result of the proposed sale is the risk that UtiliCorp will attempt to recover the premium it will pay to acquire TransAlta's distribution business. The premium from UtiliCorp's point of view is the excess that it will pay for TransAlta's distribution business over net book value.

Position of UtiliCorp

UtiliCorp requested that TransAlta's Application be approved as quickly as possible and in a manner that recognizes the public interest while being sufficiently flexible to allow for future developments and deregulation and to permit the Board to carry out its role in an appropriate manner in the future. UtiliCorp stated that, while it expects to bring benefits to all stakeholders, the test of public interest should be the assurance that the public is no worse off than it would have been had TransAlta carried on with the distribution business. UtiliCorp suggested that this was essentially the same as the no harm test. UtiliCorp added that rate payers and other stakeholders of the regulated business have a right to expect that they will not be injured by the transaction, but they have no right to expect a level of regulatory certainty that they would have had otherwise.

UtiliCorp stated its commitment that the transaction will not have a negative impact on rates. Nonetheless UtiliCorp indicated that it did wish to recover its full investment in TransAlta's distribution business, which would include the premium it will pay. UtiliCorp agreed, however, that it will not seek an increase in rate base for this purpose. Instead, UtiliCorp expressed confidence in being able to achieve a PBR mechanism with its customers and will recover its investment by realizing greater efficiencies in the PBR environment.[52]

Board Findings

The Board notes UtiliCorp's statement that it does not intend to increase rate base as a result of this sale. The Board considers that, in order to keep customers whole in this transaction, it is vital that the premium paid by UtiliCorp does not make its way into rate base. UtiliCorp has made this commitment in this proceeding and the Board appreciates UtiliCorp's enthusiasm for PBR.

[51] Tr. p.847
[52] Tr. pp.1078-1079

However, the Board considers it appropriate to formalize this commitment as part of the Board's determination in this Application. Accordingly, the Board will condition any approval of the Application so that the premium will not be added to Subco's rate base.

4.7 Conclusion

The Board concludes that it is reasonable to expect that the service customers receive following the sale will not deteriorate and may even be better given UtiliCorp's eagerness to enter this market. The Board also notes the less tangible, but no less possible, benefits that customers may realize if UtiliCorp is allowed to enter the market as part of the ongoing deregulation of the electricity industry in Alberta.

Of the three potential sources of financial harm to customers identified by the Board, the Board considered that only two were of any significance. The treatment of the pension surplus is a matter the Board believes may actually benefit customers, but in any event is an issue that will remain subject to Board regulation in future Subco rate proceedings. With respect to the impact of any attempt by UtiliCorp to recover the premium or additional income taxes as a result of lower UCC, the Board acknowledges these as significant risks to customers. However, the Board believes they can be mitigated by appropriate conditions attached to any approval of the Application.

Therefore, with such conditions, the Board concludes that customers will be, on balance, at least no worse off as a result of the transaction and may in fact be better off. Accordingly, the Board is prepared to approve the transfer of the distribution business to Subco subject to appropriate conditions as noted.

Having reached this conclusion on the impact of the sale on customers, the Board will now consider how the gain on sale should be treated as between TransAlta's shareholders and distribution customers.

5 GAIN ON SALE

In the preliminary issues list (Appendix 1) the Board set out the "Disposition of the gain from sale" as one of the issues to be considered in this proceeding. TransAlta contended that the gain on the sale should be allocated to shareholders. This position was supported by ATCO Electric Ltd. (AE) and EPCOR. The FIRM Customers, IPPSA/SPPA, Calgary, IPCCAA and the Aboriginal Communities all argued that the gain should be allocated to customers, although there were some distinctions amongst these groups on the definition of the gain on sale or benefit arising from the sale. UtiliCorp took no position on this issue.

Position of the Intervenors

AE

AE submitted that there was no reason to decline approval of TransAlta's Application as filed.[53] AE objected to parties attempting to use this Application to set general policy decisions or overriding guidelines with respect to sale applications. AE noted that when the Board established its issues list for the Application, it had a very narrow focus.[54]

EPCOR

EPCOR submitted that in circumstances where regulatory parameters remain intact and the business will continue under the Board's regulatory jurisdiction, customers are kept whole. Therefore there is no gain or loss with respect to customers and any gain or loss arising from the transaction is a matter between owners.[55] Consequently, the gain should be allocated to TransAlta's shareholders.

FIRM Customers

The FIRM Customers submitted that to award the gain on sale to shareholders is a breach of the so-called regulatory compact and would provide a return to TransAlta that exceeds that intended by the Board and legislation governing public utilities. The FIRM Customers suggested that, had the Board been aware of the possibility of a windfall gain such as this, it would likely have set a lower rate of return or a lower depreciation rate for TransAlta in past GRAs. The FIRM Customers stated that the loss of the gain on sale would impose significant harm on customers and therefore is not in the public interest.

Although the FIRM Customers opposed the Application, they also recommended that if the Board approves the sale, it should be conditional on the full gain being allocated to customers. The FIRM Customers noted that the gain based on net book value as at December 31, 1999, would be $236 million.[56] They then noted UtiliCorp's statement that it should be allowed to earn a total return commensurate with its investment. Although UtiliCorp, through Subco, intends to earn its return through the achievement of a five-year PBR agreement with customers, it cannot guarantee the success of negotiations. As a result, the FIRM Customers noted, UtiliCorp does not want to eliminate any options available to it in case a PBR agreement cannot be reached.

The FIRM Customers submitted that Subco should look identical to TransAlta DISCO before the transfer, as this is the only way that consumers will be kept harmless once Subco comes into operation. The FIRM Customers stated that, giving TransAlta the premium over book value would create a perverse incentive. If the gain on sale can be attributed to accelerated depreciation, it then provides an incentive to all utilities in Alberta to accelerate recovery of depreciation. Furthermore, if all a utility need do is incorporate a wholly owned subsidiary to transfer assets that the utility says is a separate business, then sell the shares of that subsidiary

[53] Tr. p.895
[54] Tr. pp.889-890
[55] Tr. p.904
[56] Tr. p.909

above book value in an attempt to pocket the gain, there would be an endless supply of applications of this sort.

The FIRM Customers submitted that approval of the Application could have a large impact on revenue requirement if UtiliCorp, for example, attempts to recoup the premium it has paid and the lost CCA as a result of the lesser available UCC. Although the effect may not be immediate based on UtiliCorp's evidence, an ongoing risk will be created which customers should not be required to assume especially when the only benefit identified by UtiliCorp was the promise of better service.

Furthermore, the FIRM Customers questioned the efficiencies that UtiliCorp will be able to realize to offset the risk that has been introduced. The FIRM Customers noted that there is little likelihood that depreciation, return or taxes can be changed materially, while operating and maintenance (O&M) represents an annual cost of only $98 million, much of it subject to little variability. For example, property taxes depend on land values and rates which are beyond the control of the company, labour cannot be easily reduced without reducing the staff complement, and maintenance affects the provision of safe and reliable service. The FIRM Customers noted their concern that a risk is being created with little room to improve, which can only result in the possibility of double counting and increased cost to customers with no identifiable benefit.

Absent some mitigating factor, the FIRM Customers submitted that the "no harm" criterion has not been met and the Application is not, accordingly, in the public interest. In the view of the FIRM Customers, the only reasonable way to mitigate this harm is to allocate the gain on sale and other financial benefits of the transaction to customers rather than shareholders.

Calgary

Calgary submitted that TransAlta has not discharged the onus that it bears to demonstrate that its proposed treatment of the gain on sale is in the public interest. Calgary also noted the difficulties in determining what the gain from the sale will be. In Calgary's view the gain on sale includes: the tax recovery on the unbilled revenue write-off and transaction costs of $29 million; the estimated tax recovery of $185 million from the terminal losses; an increase in common shareholder's equity of $361 million; and a $16 million pension surplus. Calgary stated that, despite the uncertainty regarding the exact amount of these benefits, there is no doubt that these benefits or gains are substantial.

Calgary submitted that, since TransAlta and its shareholders have received a return on capital and a return of capital, the benefits arising from the disposition of the property should flow to customers and not to TransAlta shareholders.

IPCCAA

IPCCAA noted that that there are no Board or court decisions that address who is entitled to the gain on sale arising from the sale of a regulated utility business, the assets of which were and will remain in rate base.

IPCCAA submitted that fairness and public interest dictate that any portion of the premium over book value that relates to the assets that have been included in TransAlta's rate base should accrue to the benefit of customers. The proposed transactions should not be approved on any other basis.

IPCCAA stated that, had intervenors had any idea that TransAlta would some day sell its distribution business, things might have been viewed differently in past GRAs. The approved rate of return could have accounted for the possibility of a sale at a premium and the process of determining depreciation expense could have rejected the assumption of negative net salvage when utility assets are sold at the end of their useful life.

IPPSA/SPPA

IPPSA/SPPA submitted that the gain on sale in this transaction belongs to customers and any approval of the Application should be conditioned appropriately. IPPSA/SPPA stated that TransAlta's Application disregards the spirit and intent behind the EU Act and the principles upon which the PUB Act was founded. TransAlta has ignored the regulatory compact and the Board's practice with which the Board deals with the sale or disposition of utility assets. IPPSA/SPPA stated that the requirement for Board approval in Sections 91.1 and 92 of the PUB Act suggest that customers' and shareholders' interests should be considered.

IPPSA/SPPA submitted that TransAlta has not established that the proposed transaction is in the public interest, nor does it address the principle of equity that he who bears the risk of loss ought to enjoy the benefit of any gain. TransAlta has not provided evidence that it has borne the risk of loss in respect of the distribution and retail business. TransAlta has not proven in evidence that it has done something that would create a risk on the part of its shareholders to create the value that gives rise to the gain on sale in respect of the distribution and retail assets or the business as a going concern. IPPSA/SPPA suggested that the value that exists and has led to the gain on sale is due to the restructuring of the industry and the opportunity this may create in the future, unregulated retail business. IPPSA/SPPA argued that TransAlta has not demonstrated any conduct on its part that would justify its entitlement to the gain based on any legal or equitable principles.

IPPSA/SPPA further submitted that TransAlta's Application disregarded the spirit of the restructuring taking place in the industry. IPPSA/SPPA noted that that the EU Act establishes that all consumers of electricity in Alberta are to share in the benefits and be responsible for the cost associated with electricity produced by regulated generating units. Also, the determination of the PPAs and the upcoming PPA auction are intended to keep the utilities whole, in the sense that stranded costs in respect of the uneconomic plant and residual value in respect of economic plant are together to form the balancing pool that will be funded by customers. IPPSA/SPPA submitted that this is part of the regulatory compact that has been expressly recognized by the Government of Alberta. This is indicated in the manner in which generation has been dealt with under the EU Act, specifically that customers are required to bear the loss associated with uneconomic plant. Conversely, customers are entitled to receive the value associated with economic plant. IPPSA/SPPA submitted that the regulatory compact must also apply to the regulated distribution and retail assets and business that are the subject of the Application.

Position of TransAlta

TransAlta submitted that the gain on sale belongs exclusively to shareholders. TransAlta noted that the sale will not harm customers in terms of rates, ongoing regulatory values that surround the setting of rates, or the continuity of safe and reliable service. TransAlta further noted that the transaction caused neither the business nor the assets of the business to exit from service or from regulation by the Board. Rather, it is a change in ownership of an ongoing EUB-regulated business.

TransAlta disagreed with the characterization of the gain on sale as a windfall to TransAlta shareholders. TransAlta stated that the value of a business, which includes its tangible and intangible assets, is determined by what the market will pay for it.

TransAlta suggested that the inherent value of a business is the reason that shares generally trade at levels greater than the accounting book value of the assets. TransAlta submitted that, just as there is no requirement for an owner to share that premium with customers, the premium on the sale of the business should be treated the same. Additionally, TransAlta submitted that it is against the public interest to treat shareholders as though they had what amounts to subordinate interest.

TransAlta stated that customers are entitled to a level of service commensurate with the rate they pay. TransAlta noted that the Board will continue to have the same jurisdiction over both service levels and rates after the sale has been completed as before.

In response to the FIRM Customers submission that the potential sale of businesses be taken into account in establishing a fair rate of return, TransAlta suggested that this was tantamount to regulating the utility's share price. In other words, TransAlta stated this would suggest that, if the share price were greater than book value, rates would have to be reduced and if the share price were less than book value, rates would have to be increased.

Board Findings

General Principles

In previous decisions, the Board has been careful to emphasize that the treatment of a gain or loss on sale of utility assets will depend on the merits of the particular case. However, prior to the decision of the Alberta Court of Appeal in *TransAlta Utilities Corporation v. Alberta (Public Utilities Board)*,[57] the Board adopted a general rule that any difference between the net book value of utility rate base assets and the sale proceeds of those assets (whether positive or negative) should accrue to customers of the utility. Typical of the Board's reasoning is the following:

> In Alberta, under the provisions of the *Public Utilities Board Act*, all utility assets that are used or required to be used to provide service to utility customers are permitted to be included in the rate base of the utility at the original cost of those

[57] (1986) 68 A.R. 171 (the "TransAlta Appeal")

> assets (assuming the original cost is prudent). In fixing and approving customer rates, the Board is required to fix a fair return on the rate base. The fair return forms part of the revenue requirement of the utility. The Board also fixes the depreciation rate to be applied to the assets which form the rate base and the resulting depreciation expense also forms part of the revenue requirement of the utility. The revenue requirement is funded through customer rates which are approved as just and reasonable by the Board.
>
> Through this process or mechanism, the Board is required to be satisfied that the owner of the utility is given the opportunity to earn a return ***of*** his investment in the utility assets and a fair return ***on*** his investment in those assets. At the same time the Board is required to be satisfied that the customers are paying just and reasonable rates for the utility service they receive.
>
> The Board generally takes into account, *inter alia*, any relevant evidence with respect to inflation or deflation in the test year or test years in fixing the fair return on rate base.
>
> Therefore, as a general rule, the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the benefit of the customers of the utility and not to the shareholders of the utility.[58]

In the TransAlta Appeal, the Court of Appeal modified the Board's general rule. The Court held that where the proceeds of sale received by a utility represent compensation for a partial loss of franchise (i.e. loss of opportunity to serve customers, which in that case was due to annexation of part of TransAlta's service area), shareholders were entitled to the return of net book value in current dollars and customers were entitled to recover, as a charge back to revenue, the depreciation expense (again, in current dollars) they had paid through their rates. The Board agrees with TransAlta that this decision is something of a hybrid in that the assets were leaving regulated service, but the utility was also losing customers with the assets. The Court, therefore, held that both shareholders and customers remaining with the utility should share in the gain.

In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers).[59]

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[58] Order E84115, *Re TransAlta Utilities Corporation* (October 12, 1984), pp.10-12

[59] See Order E86073, *ICG Utilities (Alberta) Ltd., Sale of Assets - City of Wetaskiwin* (November 19, 1986), pp.14-16; Order E86078, *ICG Utilities (Alberta) Ltd., Sale of Assets – Town of Morinville* (November 19, 1986), pp.12-14; Order E87036, *Re TransAlta Utilities Corporation* (May 7, 1987), p.21; Order E92001, *Re Centra Gas Alberta Inc.* (February 5, 1992), pp.8-9

However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale.[60]

As TransAlta has noted, in all of these cases, the assets being sold are leaving regulated rate base. And with one exception, they were instances of specific utility assets being disposed of as opposed to an entire utility business. In other words, while certain assets were being sold out of regulated rate base, at least some of the customers of the utility remained with the regulated utility.

The exception is the case of TransAlta's sale of its water utility assets to the County of Strathcona where the Board noted that, as a result of the sale, TransAlta would no longer have any water utility customers to whom the gain or loss on sale (it was a loss in that case) could be allocated. Since the assets sold were never part of TransAlta's regulated electric utility rate base, the loss could also not be allocated to its electric utility customers. Therefore, the Board allocated 100% of the loss to TransAlta's shareholders.[61]

In support of its proposed treatment of the gain, TransAlta also relied on the Board's previous decisions involving corporate reorganizations and transfers under the GU Act, in which the Board remarked that the reorganized entities remained subject to regulation by the Board.[62] However, the Board notes that in none of these cases was the issue of the gain on sale considered. Accordingly, the Board does not find them to be of material assistance in determining allocation of the gain on sale in this Application.

The Board also acknowledges the decisions of some U.S. regulators and courts referred to particularly by the FIRM Customers, IPCCAA and Calgary. First, the Board notes again that all of these decisions involved assets leaving regulated rate base. Second, each of them involved the sale of particular utility assets rather than the sale of an entire utility business to another owner who would continue to operate the business as a regulated utility. Third, as has been previously recognized by the Board, the approach of U.S. regulators to disposition of gains on sales of utility assets has been far from consistent.[63] On this latter point, the Board notes in particular that in the U.S. decisions to which it was referred, as little as 50% of the gain and as much as 100% was allocated to customers, with several allocating the gain on a 90/10% or 95/5% basis. In one case, while the regulator originally allocated 100% of the gain to customers, it was subsequently determined that the customers had benefited by a lower rate of return as a result of the assets remaining in rate base at a low book value, which completely offset the gain on sale. Customers, therefore, got nothing.[64]

As a result of these factors, the Board does not believe that the decisions from the U.S. jurisdictions provide it with any meaningful guidance in this case.

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[60] Order 93023, *Re Northwestern Utilities Limited* (March 17, 1993), pp.14-17
[61] Order E84115, p.12. See also Order E84116, p.18
[62] Decision U98084; Decision U98097; Decision U99102
[63] Order E84113, pp.15-17; Order E84116, pp.13-15
[64] *Re PacifiCorp*, Idaho Public Utilities Commission Order Nos. 25753 and 25844

The Board accepts that where particular rate base assets are being sold so that they are no longer part of the regulated rate base, the disposition of the gain on sale should, as a general rule, be treated according to the principle set out by the Court of Appeal in the TransAlta Appeal and subsequently applied by the Board. In a case such as this one, however, where the entire utility business is being sold as a going concern from one regulated entity to another, different considerations apply.

Recognizing that each such case must be decided according to its own merits, as a general rule and where, on balance the Board is satisfied that customers will be at least no worse off after the sale, the Board is of the view that shareholders are entitled to the gain on sale (or must bear the loss, as the case may be). There are a number of considerations leading the Board to this general conclusion. For example, if the assets continue to be subject to regulation, the new owner will still be entitled to earn a return on those assets and a return of his investment in them. If the assets are later sold out of rate base for an amount in excess of net book value, customers will ordinarily be entitled to the gain on sale in accordance with the TransAlta Appeal principle. To award a gain to customers in the circumstances of this Application would set customers up for a potential windfall in the future if the assets were again sold at a premium over net book value. As well, because the assets remain in rate base, customers continue to receive regulated service from those assets at regulated rates. They also benefit from the lower rate of return the owner will be entitled to earn on the lower net book value of the assets.[65]

The Board believes that these principles are consistent with the regulatory compact referred to by many of the participants.

The Board considers that a fundamental principle of the regulatory compact is that the distribution of a gain or loss on the sale of a utility asset should be allocated based on who took the financial risk associated with the asset. In a free market all financial risk rests with the owner and as a consequence the owner will gain or lose according to market value fluctuations. Mr. Bourne made the point in the following way:

> The value of a business which is the aggregate of tangible and intangible assets is set by what the market will pay for it. Whether it be investors in the stock market or competing bidders for the business as a whole, that is the value of the enterprise and that value belongs to existing shareholders.[66]

Mr. Bourne further stated:

> I believe it is important to reinforce the principle that this transaction crystallizes the value already inherent in the business. The inherent value of a business is the reason shares generally trade at levels greater than the accounting book value of the assets.[67]

[65] Tr. pp.863-864
[66] Tr. p.437
[67] Tr. p.438

Of course TransAlta is rate regulated and under the regulatory compact some of the risks normally borne by the free market owner are borne by customers.

In the case of a sale of an operating utility business, one of the risks is that the purchase price will exceed or be less than the value of the system on the vendor's books, thus creating an accounting gain or loss. In jurisdictions such as Alberta where rate making is based on the original cost of the assets (less accumulated depreciation) rather than market value, the risk of a loss consequent upon the sale of the business falls on shareholders. In contrast, ratepayers are shielded from fluctuations in market value because rates are based on original cost less accumulated depreciation. Viewed another way, if customers are to receive the benefit of the difference between fair market value and original cost in these circumstances, they should also bear the concomitant risk of paying rates based on the fair market value of the assets. Moreover, as the Board will require in this case, customers are shielded from increases in the rate base because the new owner is prevented from including the premium over book value in rate base. Finally, relative risk as between shareholders and customers is maintained in a case such as this one because customers continue to receive the same service from the same assets which remain in rate base at the same value as prior to the sale of the business.

In these circumstances, therefore, where the entire utility business is being sold as a going concern from one regulated utility to another, the Board considers that the regulatory compact is preserved and gains or losses on sale should, as a general rule, accrue to shareholders.

Amount and Treatment of Gain

Several parties had different views of what constituted the gain on sale. Generally, the positions taken were that the gain included some combination of the premium on the sale price (sale price over net book value), the benefit gained from the terminal loss generated by the difference between UCC and the elected value of depreciable property, the pension fund surplus and tax recovery on unbilled revenue write-off.

As already discussed, however, while the Board accepts that there are risks to customers created as a result of the premium and the smaller UCC pool available to Subco as a result of the sale, these are factors which the Board has already considered and will require to be mitigated in some fashion. For the purposes of this discussion, therefore, the Board considers that the gain is only the difference between the sale price and the net book value of the assets being sold.

The Board also heard some discussion on the level of the gain. The Application was filed based on the net book value of the distribution assets as at December 31, 1999. TransAlta then updated this value at the time of the hearing. The actual premium will be determined on the Transfer Date. The rate base (or book) value of the distribution assets to be transferred was $472 million on December 31, 1999 but will be altered to reflect the continued operation of the business by TransAlta between December 31, 1999 and the Transfer Date. Since the actual premium will be determined on the Transfer Date, the Board considers that there is no need to determine the dollar value of the gain now. The gain will be considered to be the amount determined as at the Transfer Date.

In its consideration of general principles, the Board concluded that if assets sold as part of a going concern continue to be subject to regulation, shareholders are entitled to the gain on sale. Implicit in this finding is that the rate base value of the assets sold must stay the same. Otherwise customers would bear an additional cost on the assets that were previously used to serve them. The Board considers that this would be inherently unfair. If for some reason it would be necessary to increase the rate base value of assets due to a sale then it would be necessary to consider whether a portion of the gain on sale should be allocated to customers.

The FIRM Customers suggested that the gain on the sale indicated that customers have paid excessive depreciation on these assets. The Board notes that had the depreciation rates been lower in the past, TransAlta's rate base would have been higher and lower depreciation rates in past years would have been counteracted by higher return earnings. Additionally, the Board approved the depreciation rates that have been used by TransAlta. Although depreciation rates are routinely reviewed and revised, they are done on a going forward basis, to either slow down or speed up the rate at which an asset is being depreciated. Depreciation rates are revised to more accurately reflect the expected rate at which an asset is being "used up." This includes updating the expected life of an asset. Depreciation rates have not been revised to reflect current market values of assets.

Also, the submission by the FIRM Customers and their witness, Mr. Pous, disregards the likelihood that the premium relates to factors other than just the value of the assets. IPPSA/SPPA submitted that the value of TransAlta's distribution business is due to the restructuring of the electric industry and the opportunities created in the future retail business. The Board considers that some portion of the premium is likely attributable to restructuring and the market opportunities that arise as a result. This however suggests that the level of the premium would vary depending on the timing of the sale and is related to intangibles as well as the tangible value of the assets. The Board notes that there is no accurate means to attribute the portion of the premium to the specific factor that contributes to the premium.

IPPSA/SPPA submitted that the Application was not in the spirit of the EU Act as the EU Act allows for customers to share in the benefits of the formerly regulated generation over the period that the PPAs will be in place. The Board notes however that the PPAs were introduced to ensure that customers continue to receive the benefits of low cost generation once deregulation of the generation markets is introduced. However, at the end of the PPA period, when there is no longer any form of regulation over costs, the residual value of the generating units will accrue to shareholders.

In accordance with the principles discussed above, the Board considers that, as long as customers are, on balance, no worse off and the assets involved are remaining in regulated service, then the sale of a utility can be treated (as suggested by TransAlta) as a transaction by shareholders that does not affect customers. The Board considers that in this instance, the Board has ensured that customers will be protected so that customers experience no disadvantage as a result of the sale. As well, customers have the potential to benefit from the introduction of UtiliCorp to the market. Therefore, the Board finds that the gain or premium on the sale should be allocated to shareholders.

6 OTHER

6.1 Service Area

Contingent upon the Board approving the transactions, TransAlta asked the Board to approve the transfer of TransAlta's service area to Subco pursuant to Section 25 of the HEE Act.

The Board does not, however, believe this section of the HEE Act to be applicable in these circumstances, as it simply required the Board to confirm as the service areas of electric distribution systems under the HEE Act what they historically had been up to June 1, 1971. The service area so determined by the Board for the electric distribution system was then deemed to be approved by the Board for that electric distribution system under Section 23 of the HEE Act.

Section 23 of the HEE Act prohibits anyone from operating an electric distribution system without the approval of the Board, but by its terms does not specifically apply in the circumstances of the Application. However, having regard to Sections 23 and 25 of the HEE Act, the Board believes it appropriate to confirm that the service area of the electric distribution system being transferred is in the name of Subco as operator. Therefore, the Board believes that it would be appropriate to approve the transfer of the service area to Subco pursuant to Section 23 in conjunction with its ancillary power under Section 15 of the *Energy Resources Conservation Act* and Section 28 of the PUB Act.

Accordingly, the Board approves the transfer of the service area from TransAlta to Subco and approves Subco's operation of the electric distribution system in that service area.

6.2 Designation of Subco and UtiliCorp as Public Utilities to Which Section 91.1 of the PUB Act Applies

On behalf of IPCCAA, Mr. Crowther noted that neither Subco nor UtiliCorp are public utilities designated by the Lieutenant-Governor in Council as being subject to Section 91.1 of the PUB Act. He expressed the concern that, until they are so designated, both Subco and UtiliCorp should be treated as if they are designated to prevent either of them from further selling the assets or shares being acquired from TransAlta.

The Board expects that, shortly after the Transfer Date, both Subco and UtiliCorp will be designated as public utilities to which Section 91.1 of the PUB Act will apply. However, the Board recognizes that there may be a lag between the Transfer Date and the designation. Therefore, the Board will condition its approval of the Application such that neither Subco nor UtiliCorp shall dispose of the assets and/or shares which are the subject of the Application without Board approval, as if they were both designated public utilities.

6.3 Use of Customer Information by TransAlta

One other issue raised by IPCCAA was that TransAlta should not be permitted to retain or use customer information obtained through its ownership of the distribution business, except to the extent that information is required to discharge TransAlta's obligations as a transmission facilities owner.

TransAlta stated that it did not intend to keep any customer specific information except as specifically required for transmission matters. TransAlta noted that it has certain rights included in the agreement with the new owner to access some customer information. However, TransAlta stated that it would only exercise its right to access the information if there was a specific requirement at law, where the access to the information was required. In response to a question from IPPSA/SPPA, TransAlta stated that it would not oppose a condition being implemented on the approval of the sale that would limit TransAlta's ability to access customer information. [68]

The Board notes TransAlta's intention that it does not intend to keep any customer specific information unless required for operational matters. The Board further notes that UtiliCorp will be operating at arm's length from TransAlta and that UtiliCorp should have no reason to share customer information with TransAlta except for operational considerations. Additionally, there are Codes of Conduct being developed that restrict the ability of affiliates to share information inappropriately. Therefore TransAlta's transmission company will not be able to inappropriately share any customer information that it may possess with other TransAlta affiliates.

The Board expects that TransAlta will honour all of its commitments with respect to the use of customer information.

7 BOARD ORDER

Having regard to the evidence and argument presented and considered and having regard to its own knowledge and findings herein, the Board hereby orders:

(1) The Board approves the transfer of TransAlta Utilities Corporation's (TransAlta) distribution business to 860023 Alberta Ltd. (Subco).

(2) The Board approves the sale of Subco's shares to TransAlta Energy Corporation.

(3) The distribution rates and terms and conditions of service of TransAlta as at the Transfer Date shall be the rates and terms and conditions of service of Subco effective that date.

(4) Subco is directed that the closing rate base balance of TransAlta's distribution business on the Transfer Date shall be the opening rate base balance for Subco and the premium paid shall not be included in the future rate base of Subco.

[68] Tr. pp.353-354

(5) Approval of these transactions is subject to the condition that Subco calculate income taxes for rate making purposes for 2000 and beyond using as opening balances the amounts of UCC determined by TransAlta for its distribution business in its Refiling pursuant to Decision U99099, including any adjustments for additions and disposals of assets made from December 31, 1999 until the Transfer Date.

(6) The Board approves the transfer of the service area from TransAlta to Subco and approves Subco's operation of the electric distribution system in that service area.

(7) Neither Subco nor UtiliCorp shall dispose of the assets or shares of Subco without further approval of the Board pending their designation as public utilities for purposes of Section 91.1 of the PUB Act.

Dated in Calgary, Alberta on July 5, 2000

ALBERTA ENERGY AND UTILITIES BOARD

N. McCrank, Q.C.
Presiding Member

B. T. McManus, Q.C.
Member

B. Torrance
Acting Member

APPENDIX 1

TRANSALTA UTILITIES CORPORATION
SALE OF ELECTRIC DISTRIBUTION ASSETS

BOARD'S PRELIMINARY ISSUES LIST
(Revised April 14, 2000)

ISSUE

1.0 Disposition of the gain from the sale

2.0 Impact on customers

- 2.1 Consequences of structure of sale, including income tax consequences
- 2.2 Continuity of safe and reliable service
- 2.3 Continuity of current rates for the year 2000

File No. 6404-3 / Application No. 2000051

TRANSALTA UTILITIES CORPORATION (TRANSALTA)
APPLICATION FOR SALE OF ELECTRIC DISTRIBUTION ASSETS

PRE-HEARING CONFERENCE
APRIL 14, 2000
RULING ON ISSUES LIST

The Board notes that a number of the issues and concerns raised by the Intervenors relate to potential future impacts. However, these issues and concerns are, by their nature, largely speculative at this time and the Board is confident that the existing regulatory framework provides recourse for any affected customer should there be some inequity or adverse impact in the future. A number of the other issues raised are either currently being dealt with or could potentially be dealt with in other forums.

We will deal with each of the items requested to be added to the issue list and state our determination.

Mr. MacWilliam has raised a valid issue with respect to possible consequences on related businesses of TransAlta such as the TRANSCO. However, this matter can and is more appropriately dealt with in the context of other applications such as future rate applications for TransAlta's TFO.

Mr. Sisson raised the issue of ownership of assets between TransAlta and the REAs. The Board notes the assurance of Mr. Dalgleish that there are mechanisms in place that will ensure that there is no prejudice to the claims of the REAs or to the viability of the transaction. The Board considers that this issue is a contractual matter and is more appropriately dealt with in another forum

Mr. Bryan referenced commitment to service levels, terms and conditions of service, unbilled revenues, deferral and reserve accounts, and customer contributions. Mr. Dalgleish noted that the purchaser will be bound by all of these obligations and Board directions. The Board expects a similar commitment directly from UtiliCorp. The Board considers that any directions provided to TransAlta will continue to apply to UtiliCorp. Therefore the Board does not see a need to include these matters on the issues list.

The next item is the impact of service agreements and the cost allocations to UtiliCorp and to TransAlta's generation and transmission functions. This item falls within the previously stated category of items that can be dealt with in future regulatory proceedings and will not therefore be included in the issues list.

The matter of stranded costs appears to be speculative in nature and therefore need not be dealt with in the context of this application. Should this issue arise there is recourse in future regulatory proceedings.

Lastly Mr. Bryan raised the issue of assignment of franchise agreements. This appears to be a contractual matter between TransAlta or UtiliCorp and the municipalities and should be pursued in other forums.

Mr. Graves' raised two issues: the assignment of franchises and ownership of assets. These issues have already been discussed in relation to issues raised by Mr. Sisson and Mr. Bryan. With respect to the issue raised on behalf of the Peigan Nation, the Board notes that this is an ownership question as referenced in Mr. Ackroyd's letter of April 12, 2000 and as previously indicated the Board considers this is more appropriately dealt with in another forum.

This brings us to Mr. Crowther's concerns. The question of impacts on other regulated activities of TransAlta, has already been covered in our comments to Mr. MacWilliam and the City of Calgary.

The issue with respect to the impact of the sale on the 1999/2000 revenue requirements is the subject of an R&V application by IPCCAA and the Board considers this to be the appropriate avenue in which to pursue this matter. The Board considers that it will have continuing jurisdiction over TransAlta to deal with this matter.

Lastly this brings us to the concern regarding the impact on rates beyond 2000 and specifically how UtiliCorp intends to recover the excess over book value paid on purchase, "the premium". The Board notes that this issue may relate to the Board's issue number 1, the gain from the sale. It is recognized that this issue of possible recovery of the premium could be dealt with in detail in future regulatory proceedings however, we believe that given the magnitude of the premium that it requires some exploration during this proceeding.

For example,
- In the year 2000 – and beyond – the Board needs an understanding of what UtiliCorp's intentions are with respect to the "premium".
- However, we agree with Mr. Wallace's caution that this is not intended to result in a full examination of UtiliCorp's rates for future years – I repeat, this is a matter that will be dealt with in detail in future regulatory proceedings.

Mr. Crowther raised a question of whether the Board would be following its previous practice of dealing with new issues as they arise during the course of these proceedings. The Board will continue with this practice – as new issues arise, they will be dealt with.

It is our hope, that this clarification on the issues list will now make it obvious for parties to determine which information requests need to be responded to. If there is any uncertainty with respect to any remaining info requests please forward them to the Board. Hopefully they will be very few in number and the Board will be able to make any determinations required on the basis of the submissions already provided to the Board.

APPENDIX 2
APPEARANCES AND INTERESTED PARTIES

TransAlta Utilities Corporation (TransAlta)	Mr. T. Dalgleish Mr. D. Maxwell
UtiliCorp Canada Corp. (UtiliCorp)	Mr. R. B. Wallace
Alberta Urban Municipalities Association (AUMA)*	Mr. J. A. Bryan
Alberta Association of Municipal Districts and Counties (AAMDC)*	Mr. L. J. Burgess
Alberta Federation of REAs Ltd. (REAs)*	Mr. K. L. Sisson
ATCO Electric Ltd. (AE)	Mr. L. G. Keough
City of Calgary (Calgary)	Mr. A. G. MacWilliam
Consumers Coalition of Alberta (CCA)*	Mr. J. A. Wachowich
Public Institutional Consumers of Alberta (PICA)*	Ms. N. J. McKenzie
Cities of Lethbridge and Red Deer	Ms. P. A. L. Smith
EPCOR Utilities Inc. (EPCOR)	Mr. D. R. Wright Mr. J. M. Liteplo
Alberta Department of Resource Development (DRD)	Mr. M. Huk
Industrial Power Consumers and Cogenerators Association of Alberta (IPCCAA)	Mr. D. E. Crowther
Independent Power Producers Society of Alberta and Senior Petroleum Producers Association (IPPSA/SPPA)	Mr. L. L. Manning
First Nations, Aboriginal Communities, and Metis Settlements (Aboriginal Communities)*	Mr. J. Graves
Peigan Nation and the Peigan REA	Mr. A. O. Ackroyd

* Members of the FIRM Customers Group

WITNESSES

TransAlta Utilities Corporation	Mr. R. Hallett Mr. R. Way Mr. B. Woo Mr. K. Parker Mr. I. Bourne
UtiliCorp Canada Corp.	Mr. R. Holzwarth Mr. R. Hobbs
Industrial Power Consumers and Cogenerators Association of Alberta	Mr. D. B. Macnamara
FIRM Customers	Mr. J. Pous

ATCO GAS AND PIPELINES LTD.
DISPOSITION OF CALGARY STORES BLOCK
AND DISTRIBUTION OF NET PROCEEDS – PART 2

Decision 2002-037
Application No. 1247130
File No. 6405-17-2

1 BACKGROUND

1.1 The Application

By letter dated August 28, 2001, ATCO Gas – South (AGS or the Company), a division of ATCO Gas and Pipelines Ltd., filed an application (the Application) with the Alberta Energy and Utilities Board (the Board) for approval of the sale of the AGS properties located in the City of Calgary, known as the Calgary Stores Block (the Stores Block) and further described as:

North Parcels:	Plan A1, Block 63, Lots 1-20
South Parcels:	Plan A1, Block 63, Lots 21-40, and the buildings located thereon.

The Company submitted that the assets comprising the Stores Block were no longer used and useful in the provision of utility service and requested the Board's approval of the following:

1. The sale transaction (the Sale) to Calgary Co-Operative Association Limited (Co-Op), summarized on Attachment 1 to the Application, pursuant to section 25.1 (now section 26) of the *Gas Utilities Act* (GU Act), and
2. Disposition of the proceeds of sale as outlined in Attachment 1 to the Application. The Company submitted that the land proceeds net of the remaining net book value of the assets sold and disposition costs should be recognized as 'Profit from Sale of Plant' by AGS, and accrue to the benefit of shareholders.

Further, the Company requested the Board's approval of the Sale prior to October 31, 2001 so that parties to the Land Sale Agreement between the Company and Co-Op dated August 13, 2001 could waive or satisfy certain conditions precedent by that date.

1.2 The Withdrawn Application

The Application was substantially similar to AGS's earlier application #2000366 that was withdrawn (the Withdrawn Application). The Board noted from the record of the proceeding from the Withdrawn Application, that parties did not generally object to the proposed sale of the Stores Block, but did object to the allocation of the proceeds from the disposition.

The Withdrawn Application was filed with the Board by letter dated December 21, 2000. A written proceeding was conducted that consisted of an interrogatory process, followed by argument and reply. The Board received reply submissions on or around March 13, 2001. By

letter dated May 16, 2001 AGS advised the Board that due to the passage of time the sale of the Stores Block would not be completed. The Company subsequently withdrew the Withdrawn Application.

The parties that participated in the written proceeding with respect to the Withdrawn Application included City of Calgary (Calgary), Consumers Coalition of Alberta, Federation of Alberta Gas Co-ops Ltd. and Gas Alberta Inc. (FGA), and Municipal Interveners (MI).

1.3 Notice

The Board by letter dated September 14, 2001 provided notice (the Notice) that a proceeding would be held to consider the Application. Parties were advised in the Notice that the Board would use a two-part process with respect to the Application. The first part would consider whether or not the sale of the Stores Block should be approved. This first part was conducted by way of a written proceeding. Secondly, if the Board decided to approve the Sale, the Board would conduct a further proceeding to deal with the allocation of the proceeds from the disposition, and any other relevant issues related to the sale of the Stores Block.

1.4 Decision 2001-78 (Part 1)

The Board approved the Sale in Decision 2001-78 dated October 24, 2001 (Part 1) pursuant to section 25.1 of the GU Act. In approving the Sale in advance of the consideration of the remainder of the Application, the Board stipulated that it was not making a finding with respect to the specific impact on future operating costs, including the proposed lease arrangement being entered into by the Company. The Board also established a written proceeding wherein parties were provided the opportunity to argue as to the appropriate allocation of the proceeds from the disposition of the Stores Block, and any other relevant issues related to the Sale. The written process (Part 2) was completed on December 21, 2001.

The Board considers that the record for Part 2 of this proceeding closed on December 21, 2001.

Members of the Board assigned to consider the Application were B. T. McManus Q.C., Presiding Member, T. McGee, Member, and G. J. Miller, Member.

2 DETAILS OF THE APPLICATION

The details of the Application, previously summarized in Decision 2001-78, are as follows:

> The Company submitted that in 1999 it undertook a review of its operations at the Calgary Service Centre Complex, which included the Stores Block. The review had identified several issues with respect to the continued use of the Stores Block in the provision of utility service. Those issues were related to physical deficiencies of the Calgary Stores building, and to the location of the facilities. The major deficiencies of the Calgary Stores building related to its physical layout, age, condition and location. The location was problematic due to its

proximity to a high-density residential community, retail commercial developments, and the downtown core.

Alternatives to address those issues were identified and reviewed. The Company considered renovations to the existing buildings, as well as relocation to a leased facility. The Company decided to relocate to new facilities, and advised that it had entered into a lease arrangement for the relocation of the stores function. That decision was expected to lower costs to customers by at least $625,000 over a ten-year period on a net present value basis, when compared to the alternative of remaining at the current site and renovating existing facilities. The Company submitted that the decision to relocate would best meet the needs of both customers and the Company.

The Company also submitted that the decision to relocate to the new leased facility resulted in assets included in rate base that would no longer be required for the provision of utility service. Therefore, the Company had executed a conditional purchase and sale agreement with Co-Op. AGS suggested that the Stores Block would provide no on-going benefit or service to customers, and that the Sale would result in no harm to customers. Rather, the Company submitted that the Sale mitigated any stranded cost issues.

AGS requested that the Sale be approved and that the treatment of the proceeds of sale be consistent with the removal of an asset from the provision of regulatory service. AGS submitted that the proceeds of sale should first be used to retire the remaining net book value of the assets and to cover the costs of disposition, with the balance to accrue to shareholders as a gain on sale.

3 REGULATORY POLICY AND GENERAL PRINCIPLES

The Board considers it would be helpful to set out a description of certain policy and general principles that impact the Application.

3.1 Regulatory Policy

Pursuant to section 25.1 of the GU Act, the Board's approval is required for the sale of property by a designated utility that is considered to be outside the ordinary course of business. The utility is expected to seek Board approval of an actual sale transaction, be it conditional or final. The Board's responsibility under section 25.1 (and similarly under section 91.1 (now section 101) of the *Public Utilities Act* (PUB Act)) does not generally apply to proposed or potential transactions, which are typically dealt with in the context of a GRA. The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding. On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed.

The Board employs a "no-harm" test when evaluating applications to dispose of rate base assets pursuant to section 25.1 of the GU Act. The Board's no-harm test addresses the potential impact on both rates and the level of service to customers. The Board also assesses the prudence of the sale transaction, taking into account the purchaser (for example, any relationship to the vendor), and the tender or sale process followed. As well, the Board considers whether the availability of future regulatory processes might be able to address any potential adverse impacts that could arise from a transaction.[1]

In conjunction with the no-harm test, the Board also addresses the treatment of gains or losses on the disposition of utility assets. The Board acknowledges that the treatment employed is not formulaic or mechanical. In previous decisions[2] referred to by the Board in Decision E86073 "the Board pointed out that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. In each of those decisions the Board went on to state, "The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case."[3]

The Board also stated in Decision E86073 that a reading of the Alberta Court of Appeal in *TransAlta Utilities Corporation v. Alberta (Public Utilities Board)*, (1986) 68 A.R. 171 (TransAlta Appeal) "would tend to support the view that the treatment of the proceeds of the disposition of utility assets is a question to be resolved having regard to the circumstances peculiar to each given case that comes before the Board for decision."[4]

However, notwithstanding the Board's consideration of the circumstances peculiar to each case, the Board also recognized in Decision E86073 that "certain statements made during the course of the decision in the TransAlta Appeal are matters of general application and are relevant to the matter before the Board."[5] In other words, the Board will endeavor to be consistent in its general approach to determining what is fair and reasonable.

3.2 The No-Harm Test

The Application before the Board was made by AGS pursuant to section 25.1 of the GU Act. As previously noted, this section requires a designated owner of a gas utility to obtain Board approval before disposing of its property outside the ordinary course of its business.

While the section does not detail the matters to be considered by the Board in determining whether to approve a disposition of property, the Board has in various cases developed a no-harm test to review the impact of the disposition on customers.

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[1] The Board summarized the general principles of the "no-harm" test in Decision 2000-41, *TransAlta Utilities Corporation, Sale of Distribution Business* (July 5, 2000), and more recently in Decision 2001-65, *ATCO Gas – North (A Division of ATCO Gas and Pipelines Ltd.), Sale of Certain Petroleum and Natural Gas Rights, Production and Gathering Assets, Storage Assets and Inventory: Reasons for Decision 2001-46* (July 31, 2001).

[2] Decision E84116 at page 13 and Decision E84081 at page 12.

[3] Decision E86073, page 10

[4] Decision E86073, page 11

[5] Decision E86073, page 11

The rationale for and description of the no-harm test that follows was summarized by the Board in Decision 2001-65 wherein the Board stated:

> *The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest. This mandate has been recognized by the Alberta Court of Appeal[6] and the Supreme Court of Canada.[7] It has also been referred to recently on a number of occasions by the Board.[8] In keeping with this broad mandate, section 10(3)(d) of the Alberta Energy and Utilities Board Act[9] authorizes the Board to attach conditions to any order that the Board considers to be in the public interest. In the Board's view, conditions allocating sale proceeds to customers in order to mitigate harm caused by proposed asset dispositions are fully within its jurisdiction as characterized by the courts and reflected in the Board's governing legislation.[10]*

In describing the no harm test in Decision 2000-41 the Board stated, "...the Board is of the view that, subject to those issues which can be dealt with in future regulatory proceedings..., it must consider whether the disposition will adversely impact the rates customers would otherwise pay and whether it would disrupt safe and reliable service to customers."[11]

The Board also stated in Decision 2001-65 that:

> *In Decision 2000-41, the Board held that it must be satisfied that the proposed transaction will either not harm customers or, on balance, leave them at least no worse off than before the transaction in terms of financial impact and reliability of service.*
>
> *The Board distilled this principle from several decisions made by it pursuant to section 25.1 of the GU Act.[12] In those decisions, the Board developed what has come to be known as the no-harm test, but in Decision 2000-41 the Board recognized that it should conduct a balancing of both the potential positive and negative impacts of the transaction to determine whether it is in the overall public interest. Specifically, the Board held:*
>
> > *As a result, rather than simply asking whether customers will be adversely impacted by some aspect of the transactions, the Board concludes that it should weigh the potential positive and negative impacts of the transactions to*

[6] *Dome Petroleum Ltd. v. Alberta (Public Utilities Board)* (1976) 2 A.R. 453, *affd.* [1977] 2 S.C.R. 822.

[7] *ATCO Ltd. v. Calgary Power Ltd.* [1982] 2 S.C.R. 557, at 576 (per Estey J.).

[8] For example, Decision 2000-41, page 7; and Decision 2000-46, *ESBI Alberta Ltd., 2001General Tariff Application, Phase I & II, Part A: System Support Services – Thermal Power Purchase Arrangements (Appendix E)* (July 11, 2000), page 9.

[9] S.A. 1994, c. A-19.5, as amended

[10] Decision 2001-65, page 16

[11] Decision 2000-41, *TransAlta Utilities Corporation, Sale of Distribution Business* (July 5, 2000), in which the Board approved the sale by TransAlta Utilities Corp. (TransAlta) of its electric distribution business to UtiliCorp Networks Canada (Alberta) Ltd. (UtiliCorp). Page 8

[12] Decision 2000-41, page 8

determine whether the balance favors customers or at least leaves them no worse off, having regard to all of the circumstances of the case. If so, then the Board considers that the transactions should be approved.[13]

... Of particular importance to the Applications is the Board's statement in Decision 2000-41 with respect to the financial mitigation of potential harm to customers: In appropriate circumstances, it might be open to the Board to mitigate or offset any of these potential risks by apportioning some of the gain on sale to customers.[14]

3.3 Allocation Of Net Sale Proceeds Upon Disposition of Utility Assets

As noted in the previous quote from Decision 2001-65, the gain on sale of a regulated asset is potentially available to mitigate harm to customers determined through the application of the no-harm test. In general however, depending on the circumstances of each case, the allocation of a gain on sale of a regulated asset between the utility's shareholders and its customers will be determined through application of what has come to be known as the TransAlta Formula. As was stated at page 10 of Decision 2001-65:

Otherwise, the Board concluded, the treatment (i.e. allocation) of any gain or loss on the disposition of the assets is to be determined according to a somewhat different set of principles. Particularly for purposes of the jurisdictional question discussed hereafter, the Board emphasizes the difference between the no-harm test and the principles otherwise applied to the allocation of sale proceeds among shareholders and customers.

The no-harm test determines whether a proposed sale can proceed in a fashion that ensures customers are left at least no worse off. Some form of mitigation may be necessary to ensure this occurs. The allocation principles are applied to allocate the proceeds of a sale between customers and shareholders, whether or not some potential harm to customers must be mitigated."[15]

The Board notes that there is a pronounced difference of opinion in this case with respect to the allocation of sale proceeds. This is not surprising; the views of shareholders and customers have consistently differed in cases involving a gain on the sale of utility assets.

The Board acknowledges, as previously stated, that each case may have its own specific circumstances. However, as also stated, the Board endeavors to be consistent in its general approach.

Recent decisions, subsequent to the TransAlta Appeal, have been consistent in their use of the TransAlta Formula. This is not to suggest that the circumstances of each case have been identical. Rather it is more of an indication that the Board has not been persuaded that the circumstances of these cases have been sufficiently different to justify a departure from that

[13] Decision 2000-41, page 8
[14] Decision 2000-41, page 9
[15] Decision 2001-65, pages 9-10 – selected paragraphs

approach. For example[16], the Board's findings in Decisions E86073, E87036, E92001, E93023, and 2001-65 have all referenced the TransAlta Appeal and have incorporated the Board's interpretation of the TransAlta Formula.

The Board's views with respect to the allocation of utility asset sale proceeds were set out in Decision 2000-41 and summarized extensively in Decision 2001-65 as follows:

> *The Board emphasized in that Decision [2000-41] that the treatment of any gain or loss on sale of utility assets would depend on the merits of a particular case. It was noted, however, that prior to the decision of the Alberta Court of Appeal in TransAlta Utilities Corporation v. Alberta (Public Utilities Board),[17] the Board had adopted a general rule that any difference between the NBV of utility assets included in rate base and the sale proceeds of those assets should accrue to customers, whether the difference was positive or negative. As an example, the Board noted the following passage from Order E84115:*
>
> > *In Alberta, under the provisions of the Public Utilities Board Act, all utility assets that are used or required to be used to provide service to utility customers are permitted to be included in the rate base of the utility at the original cost of those assets (assuming the original cost is prudent).*
> >
> > *In fixing and approving customer rates, the Board is required to fix a fair return on the rate base. The fair return forms part of the revenue requirement of the utility.*
> >
> > *The Board also fixes the depreciation rate to be applied to the assets which form the rate base and the resulting depreciation expense also forms part of the revenue requirement of the utility. The revenue requirement is funded through customer rates which are approved as just and reasonable by the Board.*
> >
> > *Through this process or mechanism, the Board is required to be satisfied that the owner of the utility is given the opportunity to earn a return **of** his investment in the utility assets and a fair return **on** his investment in those assets. At the same time the Board is required to be satisfied that the customers are paying just and reasonable rates for the utility service they receive.*
> >
> > *The Board generally takes into account, inter alia, any relevant evidence with respect to inflation or deflation in the test year or test years in fixing the fair return on rate base.*
> > *Therefore, as a general rule, the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale*

[16] The Decisions listed are for illustration only; the list is not exhaustive.
[17] (1986) 68 A.R. 171 (TransAlta Appeal).

> *price of those assets) resulting from the disposal of utility assets should accrue to the benefit of the customers of the utility and not to the shareholders of the utility.*[18]

In the TransAlta Appeal, the Court of Appeal held that the Board had erred in that case in allocating all of the gain on disposition of assets to customers. The Court agreed, in principle that shareholders were entitled to a return of the NBV and customers were entitled to a return of depreciation expense paid through their rates. However, the Court held that compensation should be in terms of current dollars, with current dollars being measured by the ratio of the actual sale price to original cost of the assets.

In Decision 2000-41, the Board summarized its interpretation and subsequent application of the TransAlta Appeal as follows:

> *In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale.*[19]

This approach to the allocation of sale proceeds has been referred to by several parties ... as the "TransAlta Formula". The Board will use this phrase for ease of reference.

In Decision 2000-41, the Board summarized what it considers to be the general rule with respect to allocation of gains or losses on sales of utility assets:

> *The Board accepts that where particular rate base assets are being sold so that they are no longer part of the regulated rate base, the disposition of the gain on sale should, as a general rule, be treated according to the principle set out by the Court of Appeal in the TransAlta Appeal and subsequently applied by the Board.*[20], [21]

The difference between the no-harm test and the Board's approach to allocating sale proceeds was further described in Decision 2001-65 as follows:

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[18] Order E84115, *Re TransAlta Utilities Corporation* (October 12, 1984), pages 10-12.
[19] Decision 2000-41, pages 26-27
[20] Decision 2000-41, page 28
[21] EUB Decision 2001-65 pages 11-13

In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the TransAlta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula.[22]

The Board confirms the applicability of this general rule, but notes once again that it will be subject to the particular circumstances of this case.

4 JURISDICTION

The Board received argument regarding the Board's jurisdiction to utilize proceeds of the sale to satisfy the no-harm test and to otherwise allocate the proceeds of sale.

Positions of the Parties

AGS

AGS argued that the Board, as a creature of the Legislature, did not have any powers other than those conferred by statute. Any determination regarding the jurisdiction of the Board to allocate the proceeds of sale in the present case would therefore, be a matter of statutory interpretation. AGS stated that it was clear the legislation did not allow the unfettered disposition of property used for utility purposes. The Board's approval was required unless the sale was made "in the ordinary course of business". AGS noted that the Sale was clearly outside the ordinary course of business.

AGS stated that neither the GU Act nor the PUB Act provided statutory authority for the allocation of any portion of the proceeds of the sale of a utility's asset no longer required in regulated service. AGS argued that the Board's approval of the Sale in Decision 2001-78 confirmed that the Stores Block was no longer used and useful and could be considered "non-utility". AGS recommended that the proceeds from the Sale should be used first to retire the remaining "non-utility" net book value of the assets and cover the costs of disposition. The remaining proceeds would then be recognized as "Profit from the Sale of Plant" consistent with section 8(B) of the Uniform Classification of Accounts in Alberta Regulation 546/63 regarding the sale of non-depreciable plant no longer required for gas utility purposes.

AGS submitted that their review of the GU Act and the PUB Act revealed that they restricted an owner's use and enjoyment of property only in limited ways. For example, AGS noted that the legislative regime provided the Board with supervisory powers intended to ensure that consumer rates were just and reasonable and that the service provided was safe and adequate. However, AGS contended that the Board's jurisdiction in connection with the costs and revenues of regulated utilities only related to the setting of just and reasonable rates.

[22] EUB Decision 2001-65 pages 10-11 and pages 41-44

AGS argued that an application under section 25.1 of the GU Act did not invoke the exercise of ratemaking which fell under other sections. Accordingly, AGS submitted that the governing legislation did not authorize the Board to direct that any proceeds of the sale be allocated to customers in this case. AGS emphasized that since shareholders had a legal entitlement to their assets, conditioning an approval under section 25.1 of the GU Act stating proceeds must be yielded to customers, would be tantamount to confiscation.

AGS submitted the principles of statutory interpretation were absolutely clear that such power should not be implied. AGS submitted that if the Company were to be deprived of the ownership or full benefit of its own assets, the statutes would require clear and unambiguous language. In the absence of clear statutory language to this effect, any allocation of proceeds would represent an "arbitrary" taking and an improper exercise of the Board's authority. Accordingly, AGS maintained that the lack of express power in the GU Act or the PUB Act, in relation to allocating to customers the proceeds of sale of assets no longer required to provide utility service, should be determinative in this case.

In reference to Decision 2001-65, AGS stated that it did not concur with the Board's reasoning. AGS argued that i) there is no harm to mitigate and the TransAlta Appeal is not determinative, and ii) even if the TransAlta Appeal were applied, the same result would follow given that the proceeds do not relate to depreciable property. AGS also argued that if the Board was correct in relying on the TransAlta Appeal it was limited to including only an amount equal to accumulated depreciation as a revenue offset. AGS stated that the return of any other component of past tolls would constitute retroactive ratemaking and be contrary to the law.

Calgary

Calgary considered that the Company's argument in this case was the same argument that was rejected by the Board in Decision 2001-65. Calgary replied that the cases cited by the Company's argument in this case were again all distinguishable from the facts of this case.

Calgary argued that the allocation of proceeds to customers did not constitute expropriation. Calgary stated that section 83(1)(a) (now section 91) of the PUB Act gave the Board the power to consider all revenues of the utilities under its jurisdiction and suggested no expropriation was involved. Calgary argued that AGS would receive back its full investment in the assets and had been compensated for the purchasing power tied up in those assets. Furthermore, Calgary argued that the legislation gave the Board the authority to interfere in the right to property if a public utility or gas utility was the owner of that property. Calgary noted that, based on sections 91.1 of the PUB Act and 25.1 of the GU Act, AGS must seek the approval of the Board in order to sell these assets.

Calgary also argued that the allocation of proceeds to customers did not constitute retroactive ratemaking. Calgary suggested that giving customers the benefit of the proceeds, now in their rates, did not have the effect of changing rates already collected.
Calgary did not agree that either the TransAlta Appeal or the Yukon Energy Corp. v. Yukon Utilities Board (1996) 74 B.C.A.C 58 (Yukon Energy) decisions were determinative. The

TransAlta Appeal involved a partial loss of franchise and the Yukon Energy case involved land that was non-rate base property.

FGA

The FGA argued that none of the authorities cited by AGS with respect to jurisdiction dealt with the distribution of proceeds of sale of regulated assets used by a regulated utility. The FGA submitted that the Board's findings in Decision 2001-65 were consistent with several previous decisions that applied the TransAlta Formula (E86073, E86078, E92001, the Centra Decisions).

MI

MI quoted Decision 2001-65 wherein the Board referred to the Supreme Court of Canada and the Alberta Court of Appeal. MI submitted that Decision 2001-65 confirmed the Board's jurisdiction to make provision for the allocation of sale proceeds. The TransAlta Formula specifically provided for the sharing of sale proceeds between customers and shareholders, and had been employed by the Board in many decisions. The MI submitted that the Company had in the past acknowledged the Board's authority to share sale proceeds between customers and shareholders.

The MI disagreed with the Company's use of the term "non-utility" in reference to the Stores Block. The MI argued that the Stores Block was used and useful in the provision of utility service. The MI also submitted that the Board's approval of the Sale was based on the understanding that the disposition of the proceeds would be dealt with in Part 2 of the proceeding.

Views of the Board

The Board's jurisdiction to allocate proceeds according to the TransAlta Formula was similarly questioned by ATCO Gas – North (AGN) and addressed by the Board in Decision 2001-65. The Board stated that its historical approach is based on equitable principles rooted in the regulatory compact. The Board also stated its view that this general rule received more than tacit approval in the TransAlta Appeal. The Board considers that the Court of Appeal has accepted the Board's jurisdiction to include, as a revenue offset, an amount equal to accumulated depreciation to be returned to customers (even in circumstances where the no-harm test is not an issue).[23]

AGS has contended that in those cases where an amount greater than the no-harm amount is allocated to customers, the Board is unlawfully expropriating a utility's property. The Board notes, however, that none of the expropriation cases cited by AGS deal with an allocation of proceeds of the sale of regulated assets of a regulated utility. Therefore, the Board does not find them particularly helpful. In fact, the majority of the Board's decisions, both preceding and following the TransAlta Appeal, would support the Board's allocation of an amount greater than the no-harm amount to customers.

Prior to the TransAlta Appeal, which directed the allocation of a portion of the gain to shareholders, the Board generally allocated all of the gain or loss on sale to customers. For example, the Board in Decision E84113 concluded that "as a general rule, the Board considers

[23] TransAlta Appeal, at 181-182

that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the benefit of the customers of the utility and not to the shareholders of the utility."[24] The Board added in Decision E84113 that no exception to the general rule should be made whether or not the asset was depreciable or non-depreciable, or whether or not the sale was in the ordinary course of business.[25]

The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.

The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset.

5 APPLICATION OF THE NO-HARM TEST

As discussed in Section 3 of this Decision, the no-harm test and the allocation of sale proceeds are separate steps in the Board's consideration of an application for approval pursuant to section 25.1 of the GU Act. The Board previously found in Decision 2001-78 that it considered the no-harm test to be satisfied. The Board was persuaded that customers would not be harmed by the Sale, with a prudent lease arrangement to replace the sold facility. In approving the Sale, the Board did not make a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by the Company. Furthermore, the Board noted that the costs associated with the relocation, and the terms and conditions of the lease, including rent and operating costs, were matters that could be reviewed by the Board and interested parties in a future General Rate Application.

[24] E84113, page 19
[25] E84113, page 20

However, the Board provided interested parties an opportunity in Part 2 of the proceeding to raise "any other relevant issues related to the sale of the Stores Block."[26] Some parties used that opportunity to make submissions regarding the potential harm as a result of the Sale. The Board does not view the submissions regarding no-harm as being in the nature of a review and variance; nor does the Board consider itself obligated to consider the submissions. Nevertheless, out of an abundance of caution, the Board will evaluate the submissions, noting that AGS responded to them in a detailed fashion.

5.1 Impact on Service Levels

AGS

In the Withdrawn Application, AGS confirmed that the functions provided within the Stores Block would continue to be required but could be more efficiently provided by moving to different facilities.[27] In the Application, the Company confirmed that it would continue to provide the affected services to its customers from existing and newly leased facilities. No reduction in the level of service was expected.

Positions of Parties

Customers did not specifically object to the relocation of services to other locations.

Views of the Board

With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.

5.2 Risk of Financial Harm

Positions of the Parties

AGS

AGS submitted that no further process was required to ensure that a proper no-harm calculation was done since the Board had already determined that customers would suffer no harm as a result of the Sale pursuant to Decision 2001-78. AGS argued that Part 2 of the proceeding should be considered without rearguing the no-harm test.

AGS also pointed out that the submission of FGA regarding the analysis or calculation of no-harm was not appropriate since it was first introduced in argument. However, to clarify the record, AGS addressed the issues argued by FGA in AGS' Reply Argument Appendix A. The Company in Appendix A submitted that it was concerned the FGA's analysis provided by way of

[26] Decision 2001-78, page 2
[27] Withdrawn Application BR-ATCO GAS.4

argument could influence the Board's decision. The Company therefore was quite detailed in its response to the FGA's analysis.

AGS submitted that any sharing of the proceeds of sale would be inequitable and unfair as it would result in customers benefiting twice from the decision to relocate the facilities; first, as a result of the avoided costs associated with the renovation of the current facilities and, second through the sharing of proceeds as a result of the sale. AGS submitted that since no depreciation had been booked in respect of the land, any "risk", had been limited to the original cost of the asset. AGS submitted that it was the customers who faced no risks. They simply paid for a service offered by the utility that they had already consumed. AGS submitted that entitlement to appreciation in an asset's value was clearly a benefit of ownership.

AGS submitted that the sale of the Stores Block assets would actually benefit customers. AGS suggested that the Board, in Decision 2001-78, specifically recognized that replacing the Stores Block with a prudent lease arrangement would result in cost savings to customers. Furthermore, AGS submitted that matters relating to the prudence of the lease would be more appropriately dealt with in the next AGS General Rate Application.

AGS considered two options to address the issues related to the building deficiencies, one, to renovate the existing facility and two, to relocate to a leased facility.[28] AGS identified the option of building a new facility. The alternative was not pursued because of the amount of time required to complete the project, and the exercise of finding a new property for the facility, given current location issues. Leased facilities were available and could readily meet the Company's requirements. In AGS' view, the Relocation Option best met the needs of both customers and the Company. AGS selected a facility from amongst competitive facilities available for lease.

Calgary

Calgary submitted that the proceeds of the disposition should be paid out to the customers to ensure that the customers would not be harmed by the sale. Calgary noted that if the property had been retained as a rental income producing property, customers could have received a significant benefit (a net present value (NPV) income stream of $2 million). Furthermore, Calgary argued that customer costs could be lower than AGS' proposal if AGS had kept the building, leased it out at the rates estimated by jj Barnicke and customers continued to pay the return and depreciation on the facility.

Calgary stated that the customers of a utility were responsible for all costs incurred so long as the utility's services were in demand. Therefore, it was the customers who bore the risk of such things as prematurely obsolescent assets, market costs, and changes in the economic atmosphere. Calgary stated that it was just and reasonable that the customers should share in the benefits that may accrue as a result of those risks.

Calgary stated that the regulatory compact was such that the utility acquired assets that were required to be used in the provision of utility service, and that customers paid rates that allowed

[28] AGS Application Attachment 2 page 8/11

the utility to earn a fair return on its investment. Calgary argued that if AGS retained the gain on sale it would effectively result in the shareholders being paid twice.

FGA

The FGA submitted that on application to sell an asset that was in rate base the Board may elect to consider the application in two stages. The first was a determination of whether the sale of the asset could be approved on the basis that the net proceeds of the sale would be sufficient to mitigate any harm to customers flowing from the sale. The second was where the Board was free to again consider the matter of no-harm in the distribution of proceeds stage, particularly where there was more complete and accurate information available. The FGA concluded that the Board did not make a final determination on the issue of no-harm in Decision 2001-78.

FGA submitted that AGS had not examined all alternative arrangements and proposed that a proper no-harm test should proceed from the existing situation to compare costs under the proposed situation. The NPV of the difference in costs would then allow the Board to determine whether customers required a share of the proceeds in order to keep them whole (i.e. to ensure that there was no increased cost of service). The FGA prepared a no-harm test attached as Appendix A to its argument. The FGA concluded that customers were worse off due to the Sale. The FGA determined that customers required $2,028,266 from the Sale proceeds to keep them whole, based on their estimation of the harm to customers.

The FGA was critical of the Company's analysis and the alternatives shown in Appendix C of the Application. FGA claimed that AGS did not perform a no-harm test, since in its opinion Appendix C was not a properly prepared comparison of alternatives. FGA noted that the alternative of building a suitable facility and owning the facility was not one of the alternatives considered. FGA rejected AGS reasoning that leasing an already constructed facility provided a solution in a shorter time frame than construction of a new facility. Furthermore, FGA believed insufficient information was provided concerning the costs and benefits of the alternative lease sites to determine if even the best generic warehouse bay was chosen.

FGA argued that AGS had a regulatory duty to demonstrate that its decisions were in the customers' best interests. FGA cited Decision E93004, wherein the Board stated:

> *However, the Board is concerned that CWNG has not provided evidence to indicate other alternatives, such as leasing custom built office space in Cochrane, have been investigated and evaluated. The Board considers that the company should provide evidence of this nature in future applications with respect to such facilities.*

Furthermore, FGA cited Decision 2000-9, which stated:

> *The Board reiterates its concern over the manner in which CWNG provided information to both customers and the Board in this proceeding. Stakeholders of CWNG require sufficient detail in their analyses of projects and expenditures. The Board has always required, and continues to require, the following information for all major capital projects:*

- *A detailed justification including demand, energy and supply information*
- *A breakdown of the proposed costs*
- *The options considered and their economics; and*
- *The need for the project.*[29]

FGA stated that it appeared AGS had ignored the Board's explicit directions to provide complete information and the options considered for its projects.

Furthermore, FGA was critical of the assumptions used by AGS. FGA noted that the lease agreement fixed the rate of $6.85/square foot for five years and proposed that it would be unlikely that that rate would be maintained. FGA further considered that the assumption of rent for ten years at a fixed rate was flawed and unsupportable. FGA submitted that the operating costs of $1.60/square foot could be annually adjusted in an upward direction. FGA noted that comparable information on rent and operating costs was not provided for the six other properties referenced and questioned the assumptions used by AGS regarding utility costs, income tax and depreciation rates. FGA noted that capital costs were omitted from the AGS analysis such as security deposits, new furniture and office equipment. FGA submitted that the AGS analysis was invalid due to flawed assumptions and optimistic forecasts.

FGA noted that the Stantec report rated the structural elements of the current facility as "good", "sound", and "fair", with no suggestion by either Stantec or AGS that the current facility could not provide service for another ten years. Therefore, FGA prepared a no-harm test in argument on the basis that the current facility would serve for another ten years as a base case to compare the cost of the current option to lease. FGA claimed its no-harm test demonstrated that customers were far worse off due to the AGS proposal and claimed that a properly prepared no-harm test must examine the costs of the leased facility against the base case of the cost of operating the existing facility. FGA stated that the leased facility was a more costly proposition to customers on an on-going basis than the current base case without renovation.

Views of the Board

As previously noted, the Board's no-harm test was developed to provide some structure to the exercise of its discretion pursuant to sections 25.1 of the GU Act and 91.1 of the PUB Act. In Decision 2000-41, the Board established that, in appropriate cases, it could allocate proceeds to customers that might otherwise flow to shareholders. Over the years, the Board has approved a number of utility asset dispositions in relation to which the Board was satisfied that either customers would not, on balance, be harmed or, if they faced some risk of harm, appropriate conditions could be attached to the Board's approval to mitigate the harm, or a share of the sale proceeds could be used to offset or mitigate the harm.

In Decision 2001-78[30], the Board accepted the premise that there would not be a negative impact on the customer rates, at least during the five-year initial term of the lease. In fact, on the basis of the evidence filed in Part 1, there appeared to be a cost savings to the customers. The Board also

[29] Decision 2000-9, page 26
[30] EUB Decision 2001-78 page 3

stated that in approving the Sale, the Board did not make a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by the Company. Furthermore, the Board noted that the costs associated with the relocation, and the terms and conditions of the lease, including rent and operating costs, were matters that could be reviewed by the Board and interested parties in a future General Rate Application.

The Board notes the FGA's argument that a proper "no-harm" test must be measured against the current operation. The Board also notes the FGA's suggestion that the Board is free to consider the matter of "no-harm" again in the second stage of this proceeding since there is new and more accurate information available. However, the Board notes that the FGA filed its no-harm evaluation (Appendix A) in argument. Section 41(5) of the Board Rules of Practice states, "No argument may be received by the Board unless it is based on the evidence before the Board." In accordance with this practice, the Board is unable to accept the FGA's evaluation on the basis that its initial presentation was made in Argument and therefore, not appropriately presented to the parties for examination.

The Board will, however, consider other aspects of the FGA's argument. While AGS submitted that the current operation of the Stores Block could not be continued without extensive renovation to the existing buildings, the FGA referenced the Stantec report. The report evaluated the current condition of the buildings as "adequate, fair and good" and stated that none of the existing buildings required extensive renovation to bring them up to minimum standards of safety. The significant deficiency of the buildings was their energy inefficiency as compared to current day standards, their physical layout, and their proximity to a high-density residential community, retail commercial developments, and the downtown core.

The Board recognizes that the existing buildings are old and not near current standards for similar operations. There does not appear at this time to be compelling reasons for discontinuing operations solely based on safety or cost effectiveness. However, the Board is persuaded that relocation to a smaller new facility can be justified. The Board considers that the decision to relocate might have been somewhat premature, however the Board believes the optimum time for such relocation is difficult to determine with certainty. In this case, the Board accepts AGS's submission that relocation was imminent and was the preferred option. The Board is not persuaded, based on the evidence, as to the likelihood that customers would be harmed by the relocation.

The Board also notes Calgary's argument that costs to customers could have been lower in the future than the AGS proposal if AGS had kept the property, leased it out at the rates estimated by jj Barnicke, and if customers continued to pay the return on the facility. The Board considers Calgary's argument to have some merit in terms of reducing the cost of service. However, the Board considers that the Sale is preferable to the lease or rental of the Stores Block in the present circumstances.

The Board has considered the additional submissions on no-harm and maintains its view that, as originally stated in Decision 2001-78, there appears to be no negative impact on the customer rates, at least during the five-year initial term of the lease. The Board agrees with parties that

matters relating to the prudence of the lease, relocation costs, and future operating costs can be dealt with in future GRA's.

6 ALLOCATION OF NET GAIN

6.1 Allocation Between Land and Buildings

Positions of the Parties

AGS

AGS submitted that the previous prospective purchasers and the current purchaser, CO-OP, have indicated their intentions to demolish the buildings and redevelop the land. Therefore, AGS evaluated the buildings as having zero or even negative value to the purchasers.

In this case, AGS considered that the application of the TransAlta Formula would result in no proceeds to customers. AGS argued that the proceeds of the sale clearly related only to the land purchased, not the buildings, and land was a non-depreciable asset. AGS emphasized that should the Board apply the TransAlta formula, no value should be assigned to buildings since the purchaser indicated that the buildings will be removed and land redeveloped. Therefore, the result would follow that no proceeds would be allocated to customers.

Calgary

Calgary submitted that no weight should be given to the speculation by AGS that the purchaser intended to remove the buildings and develop the land. Calgary referred to jj Barnicke's valuation of the property worth between $2.4 and $3.2 million on a revenue stream basis. If the buildings were worthless, the South portion of the property would have been valued on the basis of land only, similar to that used for the North portion of the property.

MI

MI noted that simply because the purchaser had another use for the Stores Block, did not mean that the buildings, which had been in active use for many years, had no value. MI suggested that 26,000 square feet of warehouse property in Calgary core had some identifiable value.

The MI argued that an allocation of the Sale price between land and buildings was not required as part of the TransAlta Formula as expressed by the Court of Appeal and in subsequent decisions of the Board. The MI suggested that the Board, in its application of the TransAlta Formula, has consistently treated the sale of utility property as a composite package generically referring to it as "the property" or "the assets". In summary, the MI concluded that the Company misapplied the TransAlta Formula.

Views of the Board

The Board notes that AGS has evaluated the land and buildings based upon changing future uses. AGS further contended that the future intended use of the prospective new owner established the current market value which is vested in redeveloping the land for a higher and better business

activity than the current business activity of AGS. The marketing of property for a higher and better use to maximize the proceeds from the sale is prudent. However, the redesignated use of the property for the business objectives of a new owner is not related to the provision of service to natural gas customers. The Board considers that evaluations based on redesignated non-utility use verses the historical utility use of rate base assets does not necessarily result in an appropriate allocation of the net proceeds of the Sale. The Board notes that the evidence of jj Barnicke considered the existing use and improvements of the Stores Block, and determined the value of the southern half to be higher than the value of the northern half as vacant land. The Board also notes suggestions by Calgary and the MI that warehouse property in the Calgary core had some identifiable value. The Board is persuaded by the evidence and agrees that the buildings in their present state have some value. However, for reasons that follow the Board does not consider it necessary to fix a specific value on the buildings.

The Board notes that AGS has separated the net proceeds between land and buildings prior to the application of the TransAlta Formula. The Board considers this a departure from the application of the procedure used by the Board in several decisions since the TransAlta Appeal. The Board considers the TransAlta Formula is a method whereby the 'windfall' realized from a utility asset transaction, when the proceeds of sale exceed the original cost of the subject asset, can be shared between customers and shareholders and has been used by the Board to do so. In the circumstances of this case the Board considers it appropriate to apply the TransAlta Formula consistently with past decisions and will consider the gain on the transaction as a whole and will not distinguish between the proceeds allocated to land separately from the proceeds allocated to buildings. The Board believes the TransAlta Formula shares the net gain (above original cost) between customers and the Company. Prior to the TransAlta Appeal, gains from the sale of utility asset would almost always be allocated to the customers.

The Board accepts that the amounts allocated to land and buildings using the TransAlta Formula may not necessarily reflect their individual "market value" at the time of sale, for either the seller or the purchaser. However, the TransAlta Formula is a method that has been used by the Board to allocate the net gain on both NBV and Accumulated Depreciation based upon the appreciation of the assets sold without initially distinguishing between land and buildings.

The Board believes that the methodology developed in the TransAlta Appeal and subsequently applied by the Board will yield a result that is reasonable in the circumstances of this case. The TransAlta Formula does not separate the gain to land and buildings as shown in the AGS evidence nor does it use a determinant for building value such as suggested by Calgary. Instead the TransAlta Formula considers utility property to be sold as a package. As allocation determinants for the proceeds above original cost, the TransAlta Formula focuses on the NBV as the shareholder fraction and the accumulated depreciation charge as the customer fraction.

Alternative methods of allocation could be developed based upon the submission of the parties; however, the Board is not persuaded that departure from the TransAlta Formula is justified in this case.

6.2 Allocation of Gain Between Customers and Shareholders

Positions of the Parties

AGS

AGS maintained the position that the proceeds of sale should be allocated in their entirety to shareholders. Where a determination is made that the assets are no longer required for utility service and that customers are at a minimum no worse off as a result of the sale, the Company must be permitted to enjoy the full benefit of its assets. The AGS position recognizes that the entitlement to the proceeds of sale is a necessary incident of ownership and that it is the shareholders of the Company, not the customers, who own the utility assets.

AGS submitted that a sharing of proceeds would be inequitable and would result in the customers benefiting twice from the decision to relocate. First the customers would benefit as a result of the avoided costs associated with the renovation of the current facilities and second, through the sharing of proceeds as a result of the sale.

AGS emphasized that it did not believe that the TransAlta and Yukon Energy[31] decisions were determinative in this case. Nor were various U.S authorities, as such decisions dealt with different facts and different statutes and thus were distinguishable from the case at hand and should be found to be inapplicable. Furthermore, AGS maintained that the TransAlta Appeal was distinguishable and therefore, not determinative in this case. The Hydro and Electric Energy Act dealt with in the TransAlta Appeal specifically and in detail outlined the rights of a company whose franchise and assets were being forcibly taken by virtue of municipal annexation. The absence of similar language in the relevant statues in relation to the "taking" of the proceeds of sale makes it clear that the power to take has not been conferred.

Other than allocating proceeds in an amount to ensure no harm, AGS submitted that any allocation to recoup the depreciation component of past tolls was beyond the ratemaking jurisdiction of the Board. Any such allocation would represent a windfall in the hands of customers who have already consumed service they paid for and who would benefit from lower costs as a result of the sale.

AGS argued that the notion of "benefit should follow risk" put forth by interveners actually supported the Company's position. Since no depreciation had been booked in respect of the land, the "risk" to customers had been limited to, at most, the original cost of the asset. AGS claimed it was the customers who faced no risks.
AGS disagreed with arguments made by Calgary and the MI with respect to the TransAlta Formula and its application in this case. AGS stated that the buildings had no value and that it was incorrect to apply the TransAlta Formula when the buildings had no value.

Calgary

Calgary argued that AGS had been given the opportunity to earn a return on its investment at a rate deemed by the Board to be just and reasonable. Calgary submitted that any gain on the sale

[31] [1996] DRS 96-10160 Yukon Territory Court of Appeal

of land should flow to the benefit of the customers. Customers paid rates over the years, which allowed AGS to retain the Stores Block, and therefore, the customers should benefit from the increased value of the land that was reflected in the proceeds of sale. Furthermore, Calgary argued that allocating any gain from the sale of utility assets would represent a recovery in addition to the fair rate of return as determined by the Board in setting the rates payable to the utility. Calgary cited Decision No. E77125 wherein the Board held that "investors in a regulated utility should not expect compensation beyond a return on and of capital. Conversely, they should not be expected to suffer a loss, notwithstanding resistance from customers". As this regime made the investment of shareholders entirely secure, it was not appropriate that customers bore the expenses, without sharing in the gains.

Calgary cited the Massachussets Department of Public Utilities decision re: Boston Gas Co. which stated: "the Company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in non-depreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale."[32] Also, Calgary cited the Michigan Public Service Commission in the Detroit Edison Co. decision which stated: "since applicant's customers were charged for the property while it was in the rate base, they should receive the benefit of the gain on the sale."[33] For these reasons, Calgary submitted that to allow AGS to retain the gain on disposition of the Stores Block would effectively result in the customers paying the shareholder twice, once through the rates and again through the proceeds of disposition of the asset.

Calgary submitted that the customers are entitled firstly, to the difference between net book value and original cost of the buildings, and secondly, to a percentage of the proceeds attributable to the buildings in accordance with the TransAlta Formula. Calgary utilized the value for the buildings in the formula as being in the range of $1,803,409 to $2,603,409. Thirdly, Calgary submitted that the customers were entitled to a return of depreciation allowance that has been charged to them over the years accounted for in 2001 dollars. Calgary proposed that two potential treatments were acceptable for the customer proceeds; the Board may direct a credit to the revenue requirement on behalf of the customers, or may defer the issue so as to be dealt with in the AGS GRA. Calgary submitted that based on its application of the TransAlta Formula, customers were entitled to between $1,830,731 and $2,440,974.

Calgary also argued that consideration should be given to the rental value of the property to the customers. Calgary stated that the NPV of the rental income stream from the existing facility would be over $2 million before deducting the owning costs and depreciation.

Calgary argued that the Company had not acknowledged the role that customers played in financing the assets, beyond merely using the assets. Furthermore, Calgary noted that in Decision 2001-108, both the distribution and transmission customers were required to bear the loss on the disposal of the High River facility and, therefore, if customers were responsible for

[32] 49 P.U.R. (4th) 1 at 26
[33] 20 P.U.R (4th) 1 at 28

the loss in that case they must also be entitled to the gain on the disposal of facilities such as the Stores Block.

Calgary argued that in the case where regulated assets were being sold, not an entire business, it was open to the Board to allocate a portion of the sale proceeds to customers and this would not be inconsistent with Decision 2000-41.

FGA

FGA affirmed in argument its position, rationale and precedents proposed in the Withdrawn Application and submitted that this was an appropriate case to depart from the TransAlta Formula, favoring 100% allocation of net proceeds to customers who have borne all of the risk with respect to these assets. FGA was satisfied that if customers received 100% of the net proceeds, such proceeds would exceed the no-harm amount of $2 million conservatively calculated by FGA.

However, the FGA noted the Board's views with respect to the TransAlta Formula and the no-harm test provided in Decision 2001-65. In applying the TransAlta Formula to this case, consistent with the Centra Decisions, the FGA determined the shareholder portion of the net proceeds was $2,080,908, and the customer portion was $4,204,092. The FGA replied that an expeditious way of handling the allocation of the proceeds from the Sale would be to use the TransAlta Formula.

The FGA also argued that the $200,000 provision for environmental remediation should be deferred to a future GRA.

MI

MI stated that it was inappropriate to suggest that shareholders should be entitled to windfall profits arising from the sale of a utility asset simply because it was treated, for accounting purposes, as a non-depreciable asset. MI believed this was a distinction without a difference and certainly one that was not recognized in the TransAlta Appeal. In summary, MI's position was that the shareholders have received everything to which they are entitled. In regard to the "regulatory compact", anything further would artificially and improperly increase the Company's return above that which the Board has previously determined to be fair and reasonable. MI did not question the legal ownership of the assets, but like the proceeds of their sale, considered they were encumbered by the regulatory compact. The MI argued this limited the return to which the utility was entitled. MI stated that the TransAlta Formula contemplated both the customers and shareholders "benefiting twice" when the gain exceeds the original cost.

MI suggested that in considering this decision and the application of the TransAlta Formula, the following should be considered regarding the TransAlta Appeal:

(a) The compensation paid to TransAlta resulted from a forced taking and in consequence of the reduction in service area;

(b) The application was made pursuant to the Hydro and Electric Energy Act and there were no similar positions with regard to gas utilities;

(c) Compensation was found to be more than payment for the physical asset (i.e. loss of a portion of the franchise interest and the right to customers), and;
(d) The decision was not intended to apply to every disposition of utility assets.

The MI also noted that the TransAlta Appeal did not reference non-depreciable assets.

MI submitted that the Court of Appeal was attempting to arrive at a method of fairly allocating the sale proceeds as between customers and shareholders. This sharing was based upon its perception of the relative contribution of the two parties as reflected in the ratio of net book value to accumulated depreciation. MI suggested that customers' contribution could come from a number of sources including the annual depreciation allowance. The MI submitted that customers had paid approximately two-thirds of the total cost of the Stores Block.

MI stated its position that there was an over-arching principle that "benefit follows risk" and that customers have borne 100% of the risk associated with the acquisition of the subject land. The elements of risk which were assumed by the customers were:

(a) The Company's decision to purchase (using customer supported funds) was prudent;
(b) The property would continue to be "used and useful";
(c) The commitment to pay 100% of acquisition costs, carrying costs and other collateral costs of ownership; and
(d) The commitment to pay any shortfall if the property was sold at less than original cost.

The MI concluded that there were no Alberta cases that specifically addressed the sharing of a gain on the sale of land, nor were there any Court or Board decision that supported the position that shareholders were entitled to 100% of the gain.

MI stated that sharing of sale proceeds did not constitute an expropriation of any ownership interest. Rather it simply recognized that the assets in question were encumbered by the regulatory compact and by legislated restrictions with respect to their sale. The MI suggested that if the Board determined the TransAlta Formula should apply there should be a sharing between customers and shareholders. Customers were entitled to recovery of accumulated depreciation, shareholders were entitled to the remaining NBV, with the balance of the proceeds net of disposition costs shared two-thirds to customers, and one-third to shareholders based on the Centra Decisions.

Views of the Board

The Board considered evidence, written authorities and arguments from parties regarding the ratios of allocation of the net gain on the sale of the assets. The parties argued a range of allocations that varied from 100% of gain to the company to 100% of gain to customers while referencing a variety of cases in many jurisdictions. The Board observed that each case was

evaluated on its own specific set of circumstances and resulted in a percentage net gain allocated between customers and companies that varied from cases to case.

In balancing the interest of the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on investment made by the company, the Board considers that the interests of both parties must contribute to the business environment. Both parties' interests should contribute toward the factors affecting decisions made by the company.

To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.

Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.

The Board believes that some method of balancing both parties' interests will result in optimization of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. Appendix A sets out the calculation of the TransAlta Formula with respect to the proceeds of the Sale.

The Board determines in Appendix A that from the gross proceeds of $6,550,000, $465,000 goes to the Company to cover the cost of disposition ($265,000) and the provision for environmental remediation ($200,000), $2,014,690 goes to the AGS shareholder, and $4,070,310 goes to customers. The Board directs the Company to account for the environmental remediation in a deferred account to be reconciled at a future proceeding. The allocation of the $4,070,310 between AGS and APS customers is addressed in Section 6.3 of this Decision.

6.3 Allocation Between ATCO Pipelines and ATCO Gas Customers

Positions of the Parties

AGS

AGS disagreed with the FGA's assertion that the Stores Block was "used or required to be used" by ATCO Pipelines – South (APS). AGS argued that the provision of services to APS did not give APS any interest or claim to the assets of AGS. The Company submitted that APS terminated the service agreement for Materials Management services from ATCO Gas effective July 1, 2001 and further submitted that the new leased facility would not be used to serve APS.

FGA

FGA claimed that it was clear that the Stores Block was used and required to be used for the operations of APS, and that APS customers paid rates that included costs from the Stores Block.

The FGA submitted that APS paid AGS $30,000 annually for supplies management pursuant to an agreement that terminated July 1, 2001. Therefore, the FGA argued that the customers of APS should not be denied a share of the net proceeds from the Sale.

In the Withdrawn Application the FGA submitted that the fairest way to divide the proceeds of the Sale between customers would be to determine the usage of the various functions used by AGS and APS. However, the FGA suggested that might not be possible any longer due to insufficient information. As an alternative, the FGA proposed that the proceeds be divided between AGS and APS in the same proportion as the assets of the two companies. According to the information filed in the AGS and APS GRAs[34], 25.17% of assets were transferred to ATCO Pipelines (as part of the CU Reorganization involving Canadian Western Natural Gas Company Limited, the predecessor to ATCO Gas and Pipelines Ltd.) and therefore, this percent is the share of the proceeds from the Sale that should be allocated to the customers of APS as a method of compensation.

Calgary

Calgary argued that there was not enough evidence to determine the appropriate split of the proceeds between AGS and APS. Calgary suggested that the Board direct AGS to determine the relative use of the Stores Block between the two functions based upon the last 3 years prior to the reorganization.

Views of the Board

The Board notes the Company's claim that "the provision of services to APS does not give APS any interest or claim to the assets of AGS". Alternatively the Board notes that customers who would appear to be at odds regarding the appropriate splitting of any proceeds between AGS and APS, agree that some allocation could be required.

The Board considers that the use of the TransAlta Formula recognizes the historical nature of the Stores Block. The assets comprising the Stores Block are long-lived assets that have been used to provide service to both AGS and APS. Therefore, the Board agrees that any allocation should be based on their historical use. The Board does not agree that is necessary to determine the relative use of the assets between the two functions as suggested by Calgary. Rather the Board is prepared to rely upon the information filed in the AGS and APS GRA's and transfer 25.17% of the $4,070,310 customer portion to APS customers. APS customers shall receive $1,024,497 of the proceeds with AGS customers receiving the remaining $3,045,813.

In making this determination the Board recognizes that other customers no longer served by either AGS or APS could make a similar argument to that of the FGA. The Board notes that it would not normally consider make a finding that would have a rate impact on a party or parties no longer served by a utility, however the Board considers that the circumstances justify an exception in this case. The Board notes that APS was using services located at the Stores Block and that the Materials Management services agreement between ATCO Gas and APS was only terminated on July 1, 2001. The Board also notes that customers represented by the FGA that

[34] e.g. 2001/2002 General Rate Application by APS, Section 4.2, page 10, line 16

would benefit from this Decision have historically been served by AGS and more recently by APS.

7 ORDER

Having regard to the Application, the record developed with respect to the Withdrawn Application, the record developed in Part 1 and Part 2 of the Application, and the Board's own knowledge herein, the Board hereby orders that:

(1) The $4,070,310 portion of the Sale proceeds allocated to customers shall be credited to the customers by a method to be approved by the Board. AGS customer shall receive $3,045,813 and APS customers shall receive $1,024,497.

(2) The $2,014,690 portion of the Sale proceeds allocated to the Company shall be credited to the Company's shareholder, of which $225,245 shall be used to remove the remaining NBV of the Stores Block assets from the Company's accounts. The Company shall also be credited with the $265,000 cost of disposition, and the $200,000 provision for environmental remediation.

(3) The Company shall account for the provision for environmental remediation in a deferred account to be reconciled at a future proceeding.

Dated at Calgary, Alberta on March 21, 2002.

ALBERTA ENERGY AND UTILITIES BOARD

(Original signed by)

B. T. McManus, Q. C.
Presiding Member

(Original signed by)

T. McGee
Member

(Original signed by)

G. J. Miller
Member

APPENDIX A – ALLOCATION OF PROCEEDS

		($)
1	Original cost	$680,311
2	Current Dollar Index [1]	8.9444
3	Gross Proceeds	$6,550,000
4	Cost of Disposition	$265,000
5	Provision for Environmental Remediation	$200,000
6	Net Proceeds	$6,085,000
7	NBV to Company	$225,245
8	Available for Allocation	$5,859,755
9	Accumulated Depreciation	$455,066
10	To Customers [2]	$455,066
11	Remainder to be Shared	$5,404,689
12	Share to Company [3]	$1,789,445
13	Share to Customers [4]	$3,615,244
14	Total to Company	$2,014,690
15	Total to Customers	$4,070,310
16	Total	$6,085,000

[1] Current Dollar Index (2) equals Net Proceeds (6) divided by Original Cost (1)

[2] To Customers (10) equals lesser of line 8 or line 9

[3] Share to Company (12) equals (NBV x Current Dollar Index (2)) - NBV)

[4] Share to Customers (15) equals (Accumulated Depreciation x Current Dollar Index (2)) Line 10

1959 CarswellOnt 81, [1959] S.C.R. 578, 18 D.L.R. (2d) 447

1959 CarswellOnt 81, [1959] S.C.R. 578, 18 D.L.R. (2d) 447

01; 358210092Zhilka v. Turney

Omar L. Turney and Gladys M. Turney (Defendants), Appellants and Fred Zhilka (Plaintiff), Respondent

Supreme Court of Canada

Taschereau, Locke, Cartwright, Martland and Judson JJ.

Judgment: March 16, 1959
Judgment: March 17, 1959
Judgment: March 18, 1959
Judgment: April 28, 1959

Proceedings: reversed *Zhilka v. Turney* ((1956)), [1956] O.W.N. 369, 3 D.L.R. (2d) 5 ((Ont. C.A.))

Counsel: *J.T. Weir, Q.C.* and *J.M. Beatty*, for the defendants, appellants.

H.G. Steen, Q.C. and *W.S. Wigle*, for the plaintiff, respondent.

Subject: Property; Contracts

Sale of Land --- Agreement of purchase and sale — Formation of contract — Requirements for validity — Certainty — Description of land.

Sale of Land --- Completion of contract — Tender — Duty to tender.

Condition precedent to contract.

In an offer to purchase, the property in question was described as "all and singular the land and not buildings" situated at a specified location and "known as 60 acres or more" having a specified frontage. The intention was that the buildings and certain land around them were to be retained by vendor, who thought he had about 65 acres, but in fact had only 62.37 acres. The contract also contained the following condition: "Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision", and the date of completion was fixed as "60 days after plans are approved". Difficulties arose in connection with the shortage of land, and purchaser claimed 60.87 out of the total 62.37 acres. No effective progress was made with regard to the annexation by the village, the prospects of which were very remote. In an action for specific performance by purchaser Spence J. decreed specific performance and referred the action to the Local Master to ascertain the exact limits and description of the property. The Local Master found himself unable to do so, and on appeal it was held that a 10-acre parcel would be reasonable for the amount of the land enclosing the buildings. An appeal to the Court of Appeal was dismissed. On appeal, held, the appeal should be allowed. Parties

had never agreed on the retention of a 10-acre parcel around the buildings and had never reached agreement, oral or written, on the quantity or description of the land to be retained or the land to be conveyed. Parties having failed to make an enforceable agreement, the Court could not do it for them. The proviso with regard to the annexation was a condition precedent depending entirely on the will of a third party -- the village council -- and was not a condition solely for the benefit of purchaser which could be waived by him. Until the event specified occurred there was no right to performance on either side.

Tender of payment -- When unnecessary.

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

1 The first difficulty in this case arises from the description of the property contained in the offer to purchase made by the plaintiff Zhilka and accepted by the defendant Turney. The description was in these terms:

> all and singular the land and not buildings situate on the East side of 5th Line west in the township of Toronto and known as 60 acres or more having frontage of about 2046 feet on 5th line more or less, by a depth of about ... feet, more or less (lot boundaries about as fenced), being part of west $^1/_2$ lot 5 Con 5 west.

2 It is common ground that this description does not mean that the buildings are to be removed but that certain lands around the buildings are to be retained by the vendor, who assumed at the time when the contract was made that he had about 65 acres and that he could retain five acres around his buildings. Actually the vendor only owned 62.37 acres, as he discovered when he had a survey made. This shortage of land caused difficulty between the parties and when eventually the purchaser sued for specific performance, he defined his claim in the writ by metes and bounds in such a way that he left the vendor with only one and a half acres and a barn half on the land claimed by the purchaser and half on the land which the purchaser said the vendor might retain. The purchaser settled his own description with the surveyor and claimed 60.87 acres out of the total of 62.37 acres.

3 On this branch of the case the defence was non-compliance with s. 4 of *The Statute of Frauds*. If it had been intended to sell the whole of the lands owned by the vendor, the description in the contract would have been adequate. But the contract in this case does not show what is intended to be sold and what is intended to be retained by the vendor and no parol evidence can cure this defect because the admissibility of such evidence presupposes an existing agreement and sufficient certainty of description to enable the property to be identified once the surrounding facts are pointed to. These conditions do not exist here. There is not only lack of sufficient certainty of description but the evidence makes it quite clear that the parties never reached any agreement, oral or written, on the quantity or description of the land to be retained or the land to be conveyed.

4 The course taken by the litigation emphasizes these uncertainties. The trial judge decreed specific performance and referred it to the Local Master to ascertain "the exact limits and description of the property to be conveyed by the contract". The first order of the Court of Appeal directed the reference to proceed and reserved the final disposition of the appeal pending the outcome of the reference. However, the Local Master, in the following brief report, found that it was impossible to comply with the terms of the reference:

> 1. I find that on the evidence before me it is impossible to determine and state what is a reasonable amount of land immediately surrounding the buildings to be conveyed by the contract set forth in paragraph one of the said judgment.

5 On appeal to a single judge, the report was varied and a finding made that a reasonable amount of land enclosing the buildings would be a 10-acre parcel, which the order then proceeded to describe by metes and bounds. Following this order, the Court of Appeal[FN1] finally disposed of the matter and dismissed the appeal.

6 The reference to the Local Master was to ascertain the exact limits and description of the property to be conveyed. The report departs from this direction in stating that the Local Master is unable to determine what is a reasonable amount of land to be retained surrounding the buildings. It is apparent that the Local Master could not follow the order of reference and define the lands to be conveyed because there never was any agreement on this point. Therefore, what was referred to him as a problem of identification of the lands assumed to have been agreed upon by the parties is eventually solved by the imposition of what the Court considers to be reasonable terms, namely, the retention of a 10-acre parcel.

7 The reason why the judge, on appeal from the report, found 10 acres to be a reasonable amount of land to be retained was that *The Planning Act* provides that no vendor in the circumstances of a case such as this may convey unless the lands retained by him amount to 10 acres, or a plan of subdivision is approved. The parties never agreed on the retention of a 10-acre parcel around the buildings. The purchaser, however, is satisfied with his bargain and will accept the land minus this 10 acres and pay the full purchase price. But, on the other hand, he can only get specific performance if the parties have made an enforceable contract. They have not done so in this case and the Court cannot do it for them.

8 The purchaser sought to support his judgment on the principle that uncertainty of description may sometimes be resolved by finding that one party has a right of election, a right to choose the land to be retained or the land to be conveyed as the case may be. It is impossible to apply the principle to this contract, which gives no such right of election either expressly or by implication. The case against the defendant was not framed on this basis nor was the argument put forward until the case reached this Court.

9 The other defence pleaded was that the purchaser failed to comply with the following condition of the contract:

> Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision.

The date for the completion of the sale is fixed with reference to the performance of this condition — "60 days after plans are approved". Neither party to the contract undertakes to fulfil this condition, and neither party reserves a power of waiver. The purchaser made some enquiries of the Village council but the evidence indicates that he made little or no progress and received little encouragement, and that the prospects of annexation were very remote. After the trouble arose over the quantity and description of the land, the purchaser purported to waive this condition on the ground that it was solely for his benefit and was severable, and sued immediately for specific performance without reference to the condition and the time for performance fixed by the condition. The learned trial judge found that the condition was one introduced for the sole benefit of the purchaser and that he could waive it.

10 I have doubts whether this inference may be drawn from the evidence adduced in this case, but, in any event, the defence falls to be decided on broader grounds. The cases on which the judgment is founded are *Hawksley v. Outram*[FN2] and *Morrell v. Studd*[FN3]. In the first case a purchaser of a business stipulated in the contract of sale that he should have the right to carry on under the old name and that the vendors would not com-

pete within a certain area. A dispute arose whether one of the vendors, who had signed the contract of sale under a power of attorney from another, had acted within his power. The purchaser then said that he would waive these rights and successfully sued for specific performance. In the second case, the contract provided that the purchaser should pay a certain sum on completion and the balance within two years. He also promised to secure the balance to the vendor's satisfaction. The purchaser raised difficulties about the performance of this promise, and the vendor said that he would waive it and take the purchaser's unsecured promise. It was held that he was entitled to do so. All that waiver means in these circumstances is that one party to a contract may forego a promised advantage or may dispense with part of the promised performance of the other party which is simply and solely for the benefit of the first party and is severable from the rest of the contract.

11 But here there is no right to be waived. The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party — the Village council. This is a true condition precedent — an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur. The purchaser now seeks to make the vendor liable on his promise to convey in spite of the non-performance of the condition and this to suit his own convenience only. This is not a case of renunciation or relinquishment of a right but rather an attempt by one party, without the consent of the other, to write a new contract. Waiver has often been referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished.

12 The defence to this action succeeds on both grounds that were pleaded. It is unnecessary to consider the third defence based on non-compliance with *The Planning Act* and I express no opinion on this.

13 The appeal should be allowed with costs both here and in all proceedings before the Court of Appeal. The action should be dismissed with costs, including the costs of the reference and the motion to vary the report.

Appeal allowed with costs.

Solicitors of record:

Solicitors for the defendants, appellants: *Bowyer, Beatty & Andrews*, Brampton.

Solicitor for the plaintiff, respondent: *L.A. Maldaver*, Toronto.

FN1 [1956] O.W.N. 369, 815, 3 D.L.R. (2d) 5, 6 D.L.R. (2d) 223.

FN2 [1892] 3 Ch. 359.

FN3 [1913] 2 Ch. 648.

END OF DOCUMENT

1978 CarswellAlta 62, 6 Alta. L.R. (2d) 156, [1978] 2 S.C.R. 1072, 4 R.P.R. 208, 85 D.L.R. (3d) 19, 9 A.R. 308, 20 N.R. 500

1978 CarswellAlta 62, 6 Alta. L.R. (2d) 156, [1978] 2 S.C.R. 1072, 4 R.P.R. 208, 85 D.L.R. (3d) 19, 9 A.R. 308, 20 N.R. 500

02; 358211372; 358975380Dynamic Transport Ltd. v. O.K. Detailing Ltd.

Dynamic Transport Ltd. v. O.K. Detailing Ltd.

Supreme Court of Canada

Laskin C.J.C., Martland, Ritchie, Pigeon and Dickson JJ.

Judgment: May 1, 1978

Counsel: *J.T. Joyce, Q.C.*, and *J.A. Hustwick*, for appellant.

A.G. MacDonald, Q.C., for respondent.

Subject: Property; Public; Contracts

Municipal Law --- Subdivision control — Agreements contravening statutory subdivision control — Agreement conditional on compliance.

Sale of Land --- Agreement of purchase and sale — Formation of contract — Requirements for validity — Certainty — Description of land.

Statute of Frauds --- Compliance with statute — Essential elements — Subject-matter — Description of land.

Sale of land — Interpretation of contract — Certainty of land description — Adequate to show intention of parties — Surrounding facts admissible to construe written agreement — Obtaining subdivision approval a condition precedent of agreement — Obligation of vendors to make best efforts to obtain approval — The Planning Act, R.S.A. 1970, c. 276, s. 19(1).

The respondent vendor accepted an offer from the appellant to purchase part of its property. It then purported to cancel the sale. The appellant brought action for specific performance.

Held, the appellant was granted an order for specific performance, and the respondent was ordered to make its best efforts to obtain subdivision approval of its property. Damages were assessed in the event of respondent's refusal to try to obtain approval. The terms of the agreement were sufficiently clear to comply with the Statute of Frauds. Evidence was admissible of surrounding facts to show the land intended to be sold. The quantity of land to be conveyed was stated in the agreement; the shape of the land and the location of the respondent's buildings on the land contributed to certainty as to which portion was to be sold. The respondent had prepared the

land description, and the agreement had gone beyond the negotiating stage. Further, the conduct of the parties indicated that, until trial, there had been no difficulty indicated in construing the land description. There was no agreement as to obtaining subdivision approval, but both parties were aware of its necessity. Obtaining approval, lacking specific agreement, became the obligation of the vendor as a condition precedent of carrying out the contract for sale. The respondent was obliged to use its best efforts to get the approval.

Cases considered:

Barnett v. Harrison, [1976] 2 S.C.R. 531, 57 D.L.R. (3d) 225, 5 N.R. 131 — *referred to*

Steiner v. E.H.D. Invts. Ltd. (1977), 78 D.L.R. (3d) 449, leave to appeal to Supreme Court of Canada denied 14th December 1977 — *referred to*

Wroth v. Tyler, [1974] Ch. 30; *Northern Counties Securities Ltd. v. Jackson & Steeple Ltd.*, [1974] 1 W.L.R. 1133, [1974] 2 All E.R. 625 — *referred to*

Turney v. Zhilka, [1959] S.C.R. 578, 18 D.L.R. (2d) 447 — *followed in part*

Plant v. Bourne, [1897] 2 Ch. 281 (C.A.) — *followed*

McMurray v. Spicer (1868), L.R. 5 Eq. 527 — *followed*

Bleakley v. Smith (1840), 11 Sim. 150, 59 E.R. 831 — *followed*

Hogg v. Wilken (1974), 5 O.R. (2d) 759, 51 D.L.R. (3d) 511 — *followed*

The judgment of the court was delivered by *Dickson J.*:

1 This is an action for specific performance brought by the appellant, Dynamic Transport Ltd., to enforce a contract in writing between the respondent, O.K. Detailing Ltd., as vendor, and the appellant as purchaser, for the sale of land in the city of Edmonton. The price was $53,000. The land is now said to be worth $200,000. The respondent refuses to complete, maintaining that the contract is unenforceable on two grounds: (i) the description of the land is so vague and uncertain as to make identification impossible; and (ii) the contract is silent as to which party will obtain the subdivision approval required under the terms of the Planning Act, R.S.A. 1970, c. 276.

2 At all material times the respondent, as ultimate assignee of the purchaser's equity, was entitled to become the registered owner of 5.42 acres of property, legally described as:

> ALL THAT PORTION OF THE SOUTH WEST QUARTER ($^{1}/_{4}$) OF SECTION TWENTY-FIVE (25), TOWNSHIP FIFTY-TWO (52), RANGE TWENTY-FOUR (24) WEST OF THE FOURTH MERIDIAN in the said Province shown as Parcel (A) on a Plan of record in the Land Titles Office for this land registration district as Plan 6568 E.R. and containing EIGHT and FORTY-TWO (8.42) HUNDREDTHS ACRES more or less;
>
> RESERVING THEREOUT all Coal.
>
> EXCEPTING THEREOUT:

(A) TWO (2.0) ACRES MORE OR LESS as to surface only shown as Parcel (B) on filed Plan 1949 K.S.

(B) ONE (1.0) ACRES MORE OR LESS as to surface only subdivided under Plan 5039 M.C.

RESERVING THEREOUT all Coal and also RESERVING THEREOUT ALL OTHER MINES AND MINERALS.

3 The respondent carried on its business on the western part of the land and wished to sell the eastern part. To assist in effecting a sale, Andrew Kotun, president of the respondent, gave realtor George Christensen, of Christensen Agencies Ltd., a sketch showing a three-acre parcel bounded on the east by the property line, and on the west by a wire fence running north and south across the property. The appellant made an offer on 28th February 1973 to purchase the three-acre parcel shown on the sketch for $30,000 payable on terms. The offer was refused. Further negotiations ensued as a result of which the respondent on 1st March 1973 offered to sell property described as "Part of SW-25-52-24-W4 ... 25 x 80 - Bldg (4) four acres of land more or less". The price was $53,000, payable in cash. The manner in which the offer was made was somewhat unusual. A printed form of offer and acceptance was used. This form was completed by filling in the land description and price, then the "Acceptance" portion was signed by the officers of the respondent. No sketch was prepared as part of this offer. The appellant accepted the offer on 21st March 1973. Closing date was 30th April 1973. The appellant, through its solicitors, wrote on 6th April 1973 requesting delivery of documents, but the respondent refused to convey and the appellant thereupon commenced the present action.

4 The trial came on before O'Byrne J., who found for the appellant, and ordered specific performance of the agreement, or damages of $200,000 in lieu. The Appellate Division of the Supreme Court of Alberta allowed an appeal by the respondent in a short judgment which reads:

> We are all of the opinion that in view of the Supreme Court of Canada's judgment in *Turney v. Zhilka*, [1959] S.C.R. 578, 18 D.L.R. (2d) 447, it cannot be said that there was that certainty of agreement between the vendor and the purchaser as to the description of the land to be sold so as to satisfy the Statute of Frauds. We are unable to say that it was agreed that the west boundary of the parcel was to be in the situation that counsel for the purchaser would have us place it. There are other difficulties facing the purchaser in proving a completed contract but we find it unnecessary to deal with them.
>
> Accordingly the appeal is allowed with costs to the appellant here and below.

5 Although the Appellate Division did not identify the "other difficulties facing the purchaser", it would seem to be common ground that they related to the necessity for planning approval.

The land description

6 The 5.42 acres of land involved in this dispute are in the shape of a rectangle with a trapezium (i.e., an irregular quadrilateral with one pair of parallel sides) attached on the west side as in the following diagram:

[Graphic not reproduced].

The size of the eastern rectangular portion is exactly four acres. No physical boundary separates the two portions. The shape is clearly evident from visual inspection and from the plans recorded in the Land Titles Office. The respondent, as I have indicated, carries on business in the westernmost portion of the property, i.e., the

1.42-acre parcel. Its easternmost building, a long rectangular warehouse, lies directly on the line separating the rectangle from the trapezium. Without a survey it would be difficult to say in what portion the building lay. Following the signing of the sale agreement, the appellant ordered a plan of survey which disclosed that a line drawn parallel to the east boundary, allowing for four acres, would run midway through the warehouse. At first impression this seems to introduce a bizarre element, connoting uncertainty, but upon reflection it is apparent that the only real question is whether the building is included and the agreement in terms provides an affirmative answer to that question.

7 The first contention advanced by the respondent is that the description of the land in the document, which it itself prepared, is not sufficiently certain to satisfy the Statute of Frauds. It is argued that without parol evidence the four acres could be taken anywhere in the 5.42 acre parcel so long as the building was included. The appellant, on the other hand, argued that three of the boundaries of the parcel are fixed (being the north, east and south sides) and that the other boundary is simply a straight line, parallel to the eastern boundary, running immediately west of the west wall of the warehouse. The parcel thus delineated would comprise about 4 1/13 acres.

8 On the issue of certainty of description of the land, courts have gone a long way in finding a memorandum in writing sufficient to satisfy the Statute of Frauds. The judges have consistently attempted to ascertain and effectuate the wishes of the parties, undeterred by lacunae in the language in which those wishes have been expressed. Thus, in *Plant v. Bourne*, [1897] 2 Ch. 281 (C.A.), the defendant agreed to buy a property described in a memorandum signed by him as [p. 281] "twenty-four acres of land, freehold, ... at T ..., in the Parish of D ..." It was held by the Court of Appeal, following the principle of *Ogilvie v. Foljambe* (1817), 3 Mer. 53, 36 E.R. 21, and *Shardlow v. Cotterell* (1881), 20 Ch. D. 90 (C.A.), that parol evidence was admissible to show the subject matter of the contract. Lindley L.J. said, at p. 288:

> That there was an agreement is plain enough. What is it that the agreement refers to? The answer to that is, it was the twenty-four acres of freehold land which they were talking about. Evidence to shew that is admissible; and if that is once admitted, there is an end of the case.

9 In *McMurray v. Spicer* (1868), L.R. 5 Eq. 527, the defendant agreed to purchase from the plaintiff [p. 528] "the mill property, including cottages in *Esher* village ... all property ... to be freehold". In an action for specific performance, it was held that parol evidence was admissible to identify the property. And in *Bleakley v. Smith* (1840), 11 Sim. 150, 59 E.R. 831, the vendor, who had five houses and no other property in Cable Street, drew up a memorandum in his own handwriting, reading [p. 831]: "John Bleakley agrees with J.R. Bridges to take the property in Cable Street for the net sum of £248,10s." It was held that the memorandum was sufficient under the Statute of Frauds. Parol evidence, of course, was necessary to show that the vendor had no property in Cable Street other than the property in question.

10 The Alberta Appellate Division rested its decision solely and firmly upon the judgment of this court in *Turney v. Zhilka*, supra, in which it was said at p. 580:

> On this branch of the case the defence was non-compliance with s. 4 of *The Statute of Frauds*. If it had been intended to sell the whole of the lands owned by the vendor, the description in the contract would have been adequate. But the contract in this case does not show what is intended to be sold and what is intended to be retained by the vendor and no parol evidence can cure this defect because the admissibility of such evidence presupposes an existing agreement and sufficient certainty of description to enable the property to be identified once the surrounding facts are pointed to.

11 Although *Turney v. Zhilka* was relied upon in the lower court, in my view that decision is readily distinguishable from the case at bar. In *Turney v. Zhilka* the description of the property contained in the offer to purchase made by Zhilka was in these terms [p. 580]:

> ... all and singular the land and not buildings situate on the East side of 5th Line west in the township of Toronto and known as 60 acres or more having frontage of about 2046 feet on 5th line more or less, by a depth of about ... feet, more or less (lot boundaries about as fenced), being part of west $^1/_2$ of lot 5 Con 5 west.

12 It was common ground that this description did not mean the buildings were to be removed but that certain land around them was to be retained by the vendor. The exact size of the land to be retained was not specified. The vendor assumed at the time the contract was made that he had about 65 acres and that he could retain five acres around his buildings. Actually the vendor only owned 62.37 acres, as he discovered when he had a survey made. When the purchaser sued for specific performance, he defined his claim in such a way that he left the vendor with only 1 $^1/_2$ acres and a barn, half on the land claimed by the purchaser and half on the land which the purchaser said the vendor might retain. The purchaser claimed 60.87 acres out of the total of 62.37 acres. After the local master had been unable to determine what was to be retained as a reasonable amount of land enclosing the buildings, the trial judge on appeal from the master's report decided that the retained parcel should be ten acres. There was no basis for this in the agreement between the parties and thus Judson J., speaking for this court, found that there was not "sufficient certainty of description to enable the property to be identified once the surrounding facts are pointed to".

13 In the present case, the quantity of land to be conveyed is stated in the written agreement. It is "four acres *more or less*" (the italics are mine). This is one clear difference from *Turney v. Zhilka*. The language need not be construed in vacuo. We may have regard to the "surrounding facts." What are the surrounding facts which may properly be pointed to? First, the map of the land recorded in the Land Titles Office, a public document to which the purchaser is led by the legal description of the land, reveals that the natural configuration of the 5.42-acre parcel is a 4-acre rectangle attached to a smaller trapezium. This contributes to the certainty of description. Secondly, it is known that the warehouse is included in the property sold and that this building is located directly on the line dividing the rectangle from the trapezium. Its position would be apparent to anyone inspecting the property. It could not have been the intention of the parties to have the boundary cut through the building. I think it may reasonably be inferred that the purpose of adding the words "more or less" after "four acres" was to allow the western boundary to be determined by the western edge of the warehouse rather than by the exact limit of four acres. Finally, it is known that all of the respondent's buildings and equipment are located in the trapezium portion to the west of the warehouse. This negates any suggestion that the north boundary, or the south boundary, or the west boundary of the 5.42-acre parcel should be the line from which to begin in finding the limits of the 4 acres agreed to be sold.

14 I confess that during argument I had considerable doubt as to the sufficiency of the land description in this case, but after further consideration I have concluded that the only reasonable construction is that the 4-acre parcel was intended to be sold with a slight adjustment to the west to encompass the warehouse. It must be remembered that we are dealing here with experienced and successful businessmen. The officers of the respondent company prepared the land description. Insofar as that was concerned nothing was left to further negotiation of the parties. Agreement went beyond the negotiating stage and the inchoate. That is the critical difference between this case and that of *Turney v. Zhilka*.

15 Further, in seeking to determine whether there is difficulty with respect to land description, it is open to consider the conduct of the parties: *McMurray v. Spicer*, supra. On 22nd March 1973, following acceptance of the offer by the appellant, Mr. Kotun, president of the respondent, wrote to Christensen Agencies in these terms:

> This letter is to inform you that the counter proposal for the sale of 4 acres of land for the sum of $53,000 made by O.K. DETAILING LTD. is no longer in effect.
>
> We feel that sufficient time has elapsed for the counter proposal to expire.
>
> Thank you for your efforts, and we hope that you may be of service at a later date.

16 On 28th March Mr. Kotun telephoned the president of the appellant to say that the respondent was not going to sell the property as it was going to be needed for expansion purposes. On the same date, Mr. Kotun wrote another letter to Christensen Agencies Ltd., with a copy to the appellant, in which he said:

> Further to our conversation of March 20, 1973, and our letter of March 22, the offer to purchase approximately 4 acres of land has been cancelled.
>
> Firstly, as per conversation in our office on March 20 when I definitely stated that we were not going to sell, and secondly, by letter on March 22.
>
> We are returning your offer to purchase agreement and consider the matter closed.

17 At trial, the respondent sought to show that the offer to sell had been withdrawn on 20th March prior to acceptance, but the trial judge held otherwise and that line of defence was not pursued in this court. On 6th April 1973, the solicitors for the appellant wrote to the respondent advising that the appellant was ready, willing and able to perform, and requesting the respondent to provide a registrable transfer of the lands sold, together with duplicate certificate of title and statement of adjustments. On no occasion, neither in response to the letter of 6th April nor in its earlier letters of 22nd March and 28th March, nor in the telephone conversation of 28th March did the respondent take the position that imprecise formulation of the land description made completion impossible. Refusal to complete the transaction would appear to have been prompted by considerations other than difficulty in identifying the land agreed to be sold.

18 In my view the Statute of Frauds defence fails.

Planning Act approval

19 Both parties were aware that subdivision approval, pursuant to the Planning Act, was required, but the agreement is silent as to whether vendor or purchaser would obtain this approval. The statutory prerequisite became an implied term of the agreement. The obtaining of subdivision approval was, in effect, a condition precedent to the performance of the obligations to sell and to buy: see *Turney v. Zhilka*, supra; *Barnett v. Harrison*, [1976] 2 S.C.R. 531, 57 D.L.R. (3d) 225, 5 N.R. 131. The parties created a binding agreement. It is true that the performance of some of the provisions of that agreement was not due unless and until the condition was fulfilled, but that in no way negates or dilutes the force of the obligations imposed by those provisions, in particular the obligation of the vendor to sell and the obligation of the purchaser to buy. These obligations were merely in suspense pending the occurrence of the event constituting the condition precedent.

20 The existence of a condition precedent does not preclude the possibility of some provisions of a contract

being operative before the condition is fulfilled, as, for example, a provision obligating one party to take steps to bring about the event constituting the condition precedent: see, for example, the recent decision of the Appellate Division of the Alberta Supreme Court in *Steiner v. E.H.D. Invts. Ltd.* (1977), 78 D.L.R. (3d) 449, leave to appeal to this court denied 14th December 1977. No issue concerning waiver arises in the present case, and therefore nothing touches the rule in *Turney v. Zhilka*, supra, that a true condition precedent cannot be waived by either party without express reservation of a power of waiver.

21 In appropriate circumstances the courts will find an implied promise by one party to take steps to bring about the event constituting the condition precedent: see Cheshire and Fifoot's Law of Contract, 9th ed. (1976), at pp. 137-38:

> Where there is a contract but the obligations of one or both parties are subject to conditions a number of subsidiary problems arise. So there may be a question of whether one of the parties has undertaken to bring the condition about ... There is a clear distinction between a promise, for breach of which an action lies and a condition, upon which an obligation is dependent. But the same event may be both promised and conditional, when it may be called a promissory condition. A common form of contract is one where land is sold 'subject to planning permission.' In such a contract one could hardly imply a promise to obtain planning permission, since this would be without the control of the parties but the courts have frequently implied a promise by the purchaser to use his best endeavours to obtain planning permission.

22 There are many cases in which provisions of a contract were subject to the condition precedent of an approval or a licence being obtained, and one party was by inference in the circumstances held to have undertaken to apply for the approval or licence: see *Hargreaves Tpt. Ltd. v. Lynch*, [1969] 1 W.L.R. 215, [1969] 1 All E.R. 455 (C.A.); *Brauer & Co. (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd.*, [1952] W.N. 422, [1952] 2 All E.R. 497 (C.A.); *Société d' Avances Commerciales (London) Ltd. v. A. Besse & Co. (London) Ltd.*, [1952] 1 T.L.R. 644; and *Smallman v. Smallman*, [1971] 3 W.L.R. 588, [1971] 3 All E.R. 717 (C.A.). This type of case is merely a specific instance of the general principle that "the court will readily imply a promise on the part of each party to do all that is necessary to secure the performance of the contract": 9 Hals. (4th) 234, para. 359: see also Chitty on Contracts, General Principles, 23rd ed., p. 316, para. 698, where it is said: "The court will also imply that each party is under an obligation to do all that is necessary on his part to secure performance of the contract."

23 Section 19(1) of the Planning Act of Alberta provides:

> 19.(1) A person who proposes to carry out a subdivision of land shall apply for approval of the proposed subdivision in the manner prescribed by The Subdivision and Transfer Regulations.

24 "Subdivision" is defined in s. 2(*s*) as follows:

> (*s*) 'subdivision' means a division of a parcel by means of a plan of subdivision, plan of survey, agreement or any instrument, including a caveat, transferring or creating an estate or interest in part of the parcel.

25 In a purchase-and-sale situation, the "person who proposes to carry out a subdivision of land" is the intending vendor. It is he who must divide his parcel of land, which has hitherto been one unit, for the purpose of sale. If a purchaser carried out the actual work in connection with the application, he could only do so in the vendor's name and as his agent. The vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale. I cannot accept the proposition that failure to fix responsibility for obtaining planning approv-

al renders a contract unenforceable. The common intention to transfer a parcel of land in the knowledge that a subdivision is required in order to effect such transfer must be taken to include agreement that the vendor will make a proper application for subdivision and use his best efforts to obtain such subdivision. This is the only way in which business efficacy can be given to their agreement. In the circumstances of this case, the only reasonable inference to be drawn is that an implied obligation rested on the vendor to apply for subdivision. In making a similar finding on the facts in *Hogg v. Wilken* (1974), 5 O.R. (2d) 759, 51 D.L.R. (3d) 511, Lerner J. said at p. 761:

> In this contract the only inference to be drawn is that it was the vendors' obligation to make the application. An application for such consent would have to be carried out in good faith to its logical conclusion by presentation of same to the committee, the necessary appearance before the committee and furnishing any answers or material that would be reasonably within the power of the vendors to supply if requested by that committee.

26 In *Hogg v. Wilken* a mandatory order was made in these terms.

27 The procedure for application is set forth in detail in the Planning Act and the Regulations promulgated thereunder. There is no problem in determining the mechanics of what is to be done. The planning approval point was not raised as a possible defence in the statement of defence nor, it would seem, at trial. After delivering oral judgment the trial judge, in discussion with counsel, spoke of this matter as a "practical problem which I am sure you will be able to resolve without difficulty".

28 This issue was discussed by Megarry J. in *Wroth v. Tyler*, [1974] Ch. 30 at 50, as follows:

> The matter is perhaps summed up as well as is possible by Lord Redesdale L.C. in *Costigan v. Hastler* (1804), 2 Sch. & Lef. 159 at 166:
>
> > When a person undertakes to do a thing which he can himself do, or has the means of making others do, the court compels him to do it, or procure it to be done, unless the circumstances of the case make it highly unreasonable to do so.
>
> See also *Howell v. George* (1815), 1 Madd. 1 at 11, 56 E.R. 1, when Plumer V.C. cited this passage with approval. A vendor must do his best to obtain any necessary consent to the sale; if he has sold with vacant possession he must, if necessary, take proceedings to obtain possession from any person in possession who has no right to be there or whose right is determinable by the vendor, at all events if the vendor's right to possession is reasonably clear; but I do not think that the vendor will usually be required to embark upon difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession.

29 In *Northern Counties Securities Ltd. v. Jackson & Steeple Ltd.*, [1974] 1 W.L.R. 1133, [1974] 2 All E.R. 625, as part of a decree of specific performance of an agreement for the issue of shares, a company was required [p. 629] "forthwith at their expense to apply for and to use their best endeavours to obtain quotation for and permission to deal in the London Stock Exchange" in the shares concerned.

30 In *Steiner v. E.H.D. Invts. Ltd.*, supra, McGillivray C.J.A., speaking of circumstances akin to those in the present case, said at p. 455:

> The Court obviously cannot supervise such application, and in the result, in the event the defendant does not

> complete such application in accordance with this judgment, the plaintiffs will have damages for the loss of their bargain in an amount to be assessed. The circumstance that the defendant has failed to make application might, of itself, be regarded by a trial Judge as evidence of the fact there was a substantial probability of the application succeeding.

31 In the case at bar, the trial judge said:

> The plaintiff is entitled to an order for specific performance, and that order will go. In the alternative, the plaintiff is entitled to damages in the sum of $200,000, which I find is the present value of the land.

32 The judge overlooked the fact of the purchase price of $53,000. Therefore, the correct figure would be $147,000.

33 In my opinion, the appellant is entitled to a declaration that the contract between the parties mentioned above is a binding contract in accordance with its terms, including the implied term that the respondent will seek subdivision approval. The appellant is further entitled to an order that the respondent make and pursue a bona fide application as may be necessary to obtain registration of an approved plan of subdivision, including registration of the approved plan of subdivision with the registrar of the North Alberta Land Registration District if approval is obtained. Such application shall be at the expense of the respondent and shall be made within 60 days following delivery of this judgment, or such extended period as may be ordered by a judge of the Trial Division of the Supreme Court of Alberta in chambers. In the event that the respondent does not make such application within the time stated, or does not pursue such application with due diligence, the appellant shall be entitled to damages for loss of its bargain in an amount of $147,000. Upon the application for subdivision being successfully made and completed, including registration of the approved plan, the remaining provisions of the agreement, concerning the actual sale and purchase of the land, shall be specifically performed and carried into effect. The date of closing, date of adjustments, and any other matters incidental to closing the transaction shall be as ordered by a judge of the Trial Division of the Supreme Court of Alberta in chambers. In the event that the respondent makes and pursues a bona fide application as aforesaid, and such application is rejected, then the appellant's claim for specific performance of the provisions concerning sale and purchase stands dismissed, as does the claim for damages in the alternative, and the caveat filed by the appellant shall be discharged. Until that time, the caveat may be maintained.

34 I would allow the appeal, set aside the judgment of the Appellate Division and substitute therefor an order as aforementioned.

35 The appellant should have its costs throughout.

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