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February 25, 2015

The Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road, P.O. Box 21040
St. John's, Newfoundland & Labrador
A1A 5B2

Attention: Ms. Cheryl Blundon
Director Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: Newfoundland and Labrador Hydro - 2015 Interim Rates Application

Enclosed please find the original plus 12 copies of Newfoundland and Labrador Hydro's reply to parties' submissions with regard to the above noted application.

Should you have any questions, please contact the undersigned.

Yours truly,

NEWFOUNDLAND AND LABRADOR HYDRO

Geoffrey P. Young
Senior Legal Counsel

GPY/jc

cc: Gerard Hayes – Newfoundland Power
Paul Coxworthy – Stewart McKelvey Stirling Scales
Thomas J. O'Reilly, Q.C. – Cox & Palmer
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Ed Hearn, Q.C. – Miller & Hearn
Genevieve M. Dawson – Benson Buffett

SUBMISSION AND REPLY OF

NEWFOUNDLAND AND LABRADOR HYDRO

2015 Interim Rates Application

February 25, 2015

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IN THE MATTER OF the *Electrical Power Control Act, 1994,* R.S.N.L. 1994, Chapter E-5.1 (the EPCA) and the *Public Utilities Act,* R.S.N.L. 1990, Chapter P-47 (the *Act)* and regulations thereunder;

AND IN THE MATTER OF an application by Newfoundland and Labrador Hydro, pursuant to Sections 70 and 75 of the *Act,* for the approval of customer electricity rates, rules and regulations on an interim basis to become effective March 1, 2015 (the 2015 Interim Rates Application).

TO: The Board of Commissioners of Public Utilities (the Board)

SUBMISSION AND REPLY OF NEWFOUNDLAND AND LABRADOR HYDRO

The following is Newfoundland and Labrador Hydro's (Hydro) submission and its reply to the parties' submissions with regard to the above-noted application.

1.0 Application Background

On July 30, 2013, Hydro filed its General Rate Application (GRA) seeking approval of rates for January 1, 2014, based on a 2013 Test Year, in accordance with a government directive. Hydro subsequently filed two applications for interim relief recognizing that delayed rate implementation would deprive Hydro of the opportunity to earn a just and reasonable return on rate base for 2014. Both of these applications were denied. On June 6, 2014, Hydro notified the Board of Commissioners of Public Utilities (the Board) and the Parties that it would be filing an amended GRA in the fall of 2014 based on updated financial information. It became apparent to Hydro that because of changes in its forecast costs since filing the 2013 GRA, the prudent course of action was to update the evidence in its 2013 GRA to derive rates based upon 2015 forecast costs. The stipulation in the Order in Council which required the use of a 2013 Test Year for the GRA was rescinded effective October 30, 2014.

On November 10, 2014, Hydro filed its Amended General Rate Application (the Amended Application) with the Board. In its Amended Application, Hydro requested that the proposed customer rates be approved on an interim basis in advance of completing the GRA. Hydro also proposed revised Rate Stabilization Plan (RSP) Rules to become effective on an interim basis on January 1, 2015 to permit the continued phase in of the Island Industrial Customer (IIC) rates.

On November 28, 2014, Hydro filed an application requesting approval of the deferral and recovery of $45.9 million in revenue deficiency for 2014. The creation of a deferral account to address Hydro's 2014 revenue deficiency of $45.9 million was approved by the Board. In addition, Hydro's application regarding increased capacity-related supply costs of $9.6 million, dated October 8, 2014, was approved for deferral by the Board.

On December 24, 2014, Hydro was directed by the Board to file a comprehensive and complete interim rates application for rates to be charged effective March 1, 2015. In accordance with this direction from the Board, Hydro filed its 2015 Interim Rates Application on January 28, 2015, for an interim order from the Board as to rates to be charged to Hydro's IIC, Newfoundland Power (NP) and Hydro's Rural Customers, as well as changes to the RSP Rules to implement the phase in of changes to the IIC rates.

Since Hydro filed its Amended Application on November 10, 2014, the forecast cost of No. 6 fuel at Holyrood has decreased materially. Hydro's Amended Application was based upon an average No. 6 fuel of $93.32 per barrel while the most recent fuel forecast provided by PIRA indicates an average fuel cost of $65.63 per barrel for 2015. Based upon the 2015 Test Year forecast, the revised fuel cost reduces Hydro's 2015 Test Year Cost of Service by approximately $73 million. As such, the proposed increase to customer rates in 2015, as requested in Hydro's Amended Application, is no longer supported by the 2014 fuel cost forecast. Given the change in No. 6 fuel price was material, Hydro subsequently reflected the 2015 fuel cost reduction in this 2015 Interim Rates Application. In its written

submission dated February 18, 2015, Vale has indicated that it supports the adjustment of the fuel forecast of No. 6 fuel as this adjustment has the benefit of reducing the potential for rate shock and also ensures that interim rates are based on the most up to date information. Hydro also notes that none of the intervenors have submitted that they disagree with Hydro's adjustment of the forecast fuel cost of No. 6 fuel.

As stated in Hydro's letter to the Board dated February 17, 2015, Hydro wishes to clarify that it is its submission and intent that all of this evidence (the evidence filed with the Amended Application and the evidence and information filed with the 2015 Interim Rates Application) is properly before the Board and may be considered by it for its present purposes of considering the application for an interim order. The evidence that accompanied the Amended Application forms the foundation for the evidence filed with the application for an interim order. The evidence filed with the application for an interim order supplements and, for the limited purpose of the application for interim rates, modifies the Amended Application evidence with respect to the fuel cost change and the effects that flow from it.

2.0 Hydro's Interim Rate Application Proposals

Hydro's response to TIR-PUB-NLH-001 provides a detailed explanation of each proposal that has been changed in the 2015 Interim Rates Application from the Amended Application, and the customer impacts of Hydro's 2015 Interim Rates Application.

3.0 Regulatory Practice and Board Authority

Hydro respectfully submits that there is legal precedent in this province to support the Board's broad discretion in approving rates, tolls, and charges for utilities. Further, Hydro submits that such decisions should be based on generally accepted sound public utility practice.

As stated by Green J.A., as he then was, in *Reference Re Section 101 of the Public Utilities Act (Nfld)* (1998), 164 Nfld & PEIR 60 (NLCA) (the *Stated Case,* at tab 1) at para 13:

> [13]…The Board is a creature of statute and its jurisdiction and powers to deal with matters before it , and the manner of dealing with such matters, must be found, expressly or impliedly, within the statutes conferring jurisdiction on and governing the operation of the Board.

This was confirmed and restated by the Newfoundland and Labrador Court of Appeal in *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38 (the *RSP Appeal,* at tab 2) at paragraph 53. In describing the Board's jurisdiction and powers, the Court of Appeal in that decision stated:

> [54] The Board's jurisdiction and powers are governed by the PUB Act and the Electrical Power Control Act, 1994, SNL 1994 c. E-5.1 ("EPC Act"). The PUB Act confers on the Board the power for "the general supervision of all public utilities". Specifically the Board has sole authority to approve the rates charged by public utilities – ss. 70(1) and 71 – and the power to approve interim rates unilaterally – s. 75. The breadth of the Board's authority over rates is illustrated by s. 76 which confers the right to rescind or alter rates, s. 82 which confers the right to investigate a rate, where the Board believes that it is unreasonable or unjustly discriminatory, and ss. 84-87 which authorize the Board, following a formal complaint, to investigate and to cancel rates and void contracts where rates are found to be unjust, unreasonable, insufficient or unjustly discriminatory.
>
> [55] In considering the extent of the Board's powers under the PUB Act reference must be made to s. 118 which states:
>
> > 118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.
> >
> > (2) The board created has, in addition to the powers specified in this Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.
>
> …..

> [56] The EPC Act states the electrical power policy of the province in s. 3. It obligates the Board to implement that policy as it carries out its duties and exercises its powers under the PUB Act and in so doing s. 4 requires the Board to apply tests which are consistent with "generally accepted sound public utility practice".

It is clear from the sections of the *Public Utilities Act*, the *Electrical Power Control Act* (EPCA) and the court decisions referenced above, that in interpreting and applying the acts, a literal and technocratic interpretation should be avoided *"in favour of an interpretation which will advance the underlying purpose of the legislation, as well as the power policy of the province and be consistent with generally accepted sound public utility practice."*[1]

The Court of Appeal in the *RSP Appeal,* then went on to identify generally accepted principles of sound public utility practice applicable to the interpretation of the *Public Utilities Act* and the ECPA. At paragraph 57 (tab 2), relying on the *Stated Case,* the Court of Appeal stated:

> [57] In the Stated Case Green J.A. stated some of the general principles applicable to the interpretation of the PUB Act and EPC Act as follows:
>
> > [36] …
> >
> > 1. The Act (PUB Act) should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;
> >
> > 2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;
> >
> > 3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to

[1] *Reference Re Section 101 of the Public Utilities Act (Nfld)* (1998), 164 Nfld & PEIR 60 (NLCA) at para 18 (the *Stated Case*, tab 1).

advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;

4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;

5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges;

6. The Board has jurisdiction, which will not generally be interfered with on judicial review, to make a determination of what is a just and reasonable rate of return within a "zone of reasonableness" and in so doing is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice and are not inconsistent with the achievement of the purposes and policies of the legislation.

[58] Though the Stated Case concerned a utility's rate of return, the principles stated above, including those in sub-paragraphs 5 and 6, apply in a similar manner to the determination of rates for a utility's customers.

3.1 Jurisdiction to award Interim Rates

Section 75 of the *Public Utilities Act* provides that the Board has jurisdiction to make an order with respect to interim rates. Section 75 reads as follows:

Interim order

75. (1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.

(2) The schedule of rates, tolls and charges approved under subsection (1) are the only lawful rates, tolls and charges of the public utility until a final order is made by the board under section 70.

(3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be

(a) refunded to the customers of the public utility; or

(b) placed in a reserve fund for the purpose that may be approved by the board.

This authority was recognized by the Board in a recital in Order No. P.U.41(2006):

> Whereas section 75 of the Act provides that the Board may make an interim order unilaterally and without public hearing or notice, approving with or without modification a schedule of rates, tolls and charges submitted by a public utility upon the terms and conditions that it may decide;[2]

This authority was also confirmed by the Newfoundland and Labrador Court of Appeal in the *RSP Appeal,* with reference to a decision of the Supreme Court of Canada. At paragraph 61 (tab 2) of its decision, the Court of Appeal stated:

> [61] The power of the Board to authorize interim rates is granted in s. 75 of the PUB Act. That section allows the board to set rates expeditiously without full evidence and submissions, such rates being subject to review and possible modification in the final order of the Board, as is expressly provided for in subsections 75(2) and (3). Depending on the nature of the final order of the board it may have a retroactive or retrospective effect. In Bell Canada 1989, Gonthier J. stated:
>
> > The statutory scheme established by the Railway Act and the National Transportation Act is such that one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. I hasten to add that the words "further directions" do not have any magical, retrospective content. Under the Railway Act and the National

[2] Order No. P.U.41(2006), at page 4, at lines 17 to 20

> Transportation Act, final orders are subject to "further [prospective] directions" as well. It is the interim nature of the order which makes it subject to further retrospective directions.
>
> (p. 1752)
>
> …The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in obiter in Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission (1978), 87 D.L.R. (3d) 727 (B.C.C.A.), with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final decision for the period during which they are in effect so as to achieve just and reasonable rates throughout that period.
>
> (p. 1761)

3.2 Alberta Utilities Commission Interim Rates Test

The Consumer Advocate, IIC Group, NP, and Vale all agree that the Board has the jurisdiction to award interim rates. While the Board has this jurisdiction, there is no defined test in Newfoundland and Labrador to determine what Hydro must prove in order to achieve interim rates. The Consumer Advocate, in its submission, proposes that the "*Board apply the interim rates test used by the Alberta Utilities Commission.*"[3] Hydro agrees with the submission of the Consumer Advocate.

[3] Consumer Advocate's written submission, dated February 18, 2015, at page 2.

NP indicated in its written submission in this matter that it does not disagree with the test proposed by the Consumer Advocate. Further, NP highlighted the application of the Alberta Utilities Commission (AUC) test in their submission, referring to a December 19, 2008 decision regarding interim rates for ATCO Electric. As noted in the Consumer Advocate's submission, NP's own interim rates application dated November 20, 2009 would not have passed this test, nor did NP attempt to apply the AUC test from the ATCO decision in its interim rates application. In Hydro's response to TIR-CA-NLH-001, Hydro submitted that its interim rates application meets the requirements of this two-part test.

As noted in the Consumer Advocate's submission and in TIR-CA-NLH-001, the AUC has established a two-part test applicable to interim rate applications. This test was confirmed and used to evaluate the interim rates application of ENMAX Power Corporation (EPC).[4] The test, as set out in Decision 2014-311, includes two parts. The first part of the test relates to quantum and need, and includes the following considerations:

i. Is the identified revenue deficiency probable and material?
ii. Can all or some portion of any contentious items be excluded from the amount collected?
iii. Is the increase required to preserve the financial integrity of the applicant or to avoid financial hardship to the applicant?
iv. Can the applicant continue safe utility operations without the interim adjustment?

The second part of the test relates to the public interest and includes the following considerations:

i. Will the interim rates promote rate stability and ease rate shock?

[4] "Enmax Power Corporation; 2015 Interim Distribution and Transmission Tariff Application" dated November 12, 2014 http://www.auc.ab.ca/applications/decisions/Decisions/2014/2014-311.pdf. (tab 3)

ii. Will the interim adjustments help to maintain intergenerational equity?

iii. Can the interim rate increases be avoided through the use of carrying costs?

iv. Are the interim rate increases required to provide appropriate price signals to customers?

v. v. Is it appropriate to apply the interim rider on an across the board basis?

EPC originally filed an application with the AUC requesting approval of EPC's 2014 Phase 1 Distribution Tariff Application (DTA) and 2014-2015 Transmission General Tariff Application (GTA). However, as it was unlikely that final 2014 rates would be approved by the end of 2014, resulting in a forecasted revenue shortfall to EPC of $10.229 million for distribution and $14.260 million for transmission, the EPC brought an application for approval of interim rates that would permit it to recover 60% of its forecast revenue shortfall.

In considering EPC's interim application, the AUC applied the test and stated that:

> When evaluating the merits of an interim rate application, the AUB applies the above-stated test. It weighs the potential benefits of rate stability and minimization of rate shock and intergenerational inequity that might result on approval of final rates against the costs that underpin the interim rate increase, whether they be contentious or non-contentious items, the impact the revenue deficiency has on the financial welfare of the utility, and the potential impact on safe utility operations.[5]

As explained in detail in Hydro's response to TIR-CA-NLH-001, Hydro submits that its 2015 Interim Rates Application meets the two-part test established by the AUC for consideration of interim rate adjustments. Hydro states that:

- It has shown that the net income deficiency for 2015 is both probable and material;

[5] Enmax Power Corporation; 2015 Interim Distribution and Transmission Tariff Application Decision 2014-311 at paragraph 25 (tab 3).

- Approval of the proposed interim rates will provide an approximate 70**%** recovery of the 2015 forecast net income deficiency if implemented on March 1, 2015 and a recovery of slightly below 60% if implemented April 1, 2015. A 60% recovery of the 2015 forecast net income deficiency provides a forecast net income for 2015 of approximately $5.2 million;

- It is not appropriate to make further adjustments to reduce 2015 Test Year revenue requirement for the purpose of establishing interim rates. If upon final testing of 2015 costs, the Board determines that 2015 cost adjustments are required, then these amounts would be applied to reduce the 2015 net income deficiency to be recovered through customer rates in future years;

- The proposed interim rates will add rate stability for 2015, enable the phase-in of Island IC rates with materially lower customer impacts and help mitigate intergenerational equity concerns caused by delayed rate implementation. Delayed implementation of Hydro's 2015 base rates will further increase net income deficiency proposed for recovery from customers upon establishment of final customer rates; and

- Approval of Hydro's 2015 Interim Rates Application provides a reasonable balance of the interests of both the utility and its customers.

Hydro agrees with the Consumer Advocate's submission on this point:

> It is clear that given these circumstances, Hydro requires an interim rate increase and its application passes Part 1 of the interim rates test. Hydro also shows that with respect to Part 2 of the interim rates test, its proposed interim rates will promote rate stability, ease rate shock, help to maintain inter-generational equity, and improve price signals to consumers. The Consumer Advocate submits that Hydro's 2015 Interim Rates Application meets the requirements set out in the two-part interim rates test. The key consideration in the assessment of this Application is the impact on the

> electricity consumers in the Province. The Consumer Advocate does not see how electricity consumers can possibly benefit from Hydro's continuing financial deterioration.[6]

As required by the EPCA, and confirmed by the Newfoundland and Labrador Court of Appeal, in exercising its duties under the *Public Utilities Act*, the Board is required to follow generally accepted sound public utility practice. Hydro disagrees with the Board's assessment that "approval of interim relief in advance of the conclusion of a general rate application is an extraordinary measure which must be fully justified in the circumstances."[7] Hydro submits that the awarding of interim rates to provide revenue to a utility in advance of concluding a GRA is common in other jurisdictions[8] and is considered a generally accepted sound public utility practice, as noted above and in the evidence to the Amended Application and the evidence to the 2015 Interim Rates Application.

As is discussed at greater length below, there is nothing in the *Public Utilities Act* or in the decision of the other Canadian utility regulators that suggests that an application for an interim order ought to be denied on the basis that the evidence upon which it is grounded has not been tested. Moreover, there is nothing in section 75 of the *Public Utilities Act* to support the Board's characterization of interim rates as being an extraordinary measure and the regulatory and judicial jurisprudence make it clear that interim orders are part of the normal and common remedial measures to address circumstances such as those which Hydro finds itself in at present.

In a May 1, 2014 decision of the Manitoba Public Utilities Board concerning an application made by Manitoba Hydro, that Board was dealing with an application for interim rates that was made months in advance of an anticipated general rate application. The Manitoba

[6] Consumer Advocate's written submission, dated February 18, 2015, at page 5.
[7] Order No. P.U. 39(2014) and reiterated in Order No. P.U. 58(2014).
[8] The evidence of Mr. Larry Brockman filed with the Board on February 24, 2014 regarding the RSP Surplus disposition includes a number of instances where rate increases were implemented on an interim basis. Canadian jurisdictions include Saskatchewan, New Brunswick and FortisBC in British Columbia. In the United States, rate increases were implemented on an interim basis in Alaska, Connecticut, Delaware, Hawaii, Kentucky, Louisiana, Michigan, Minnesota, Montana, North Dakota and South Dakota.

Board dealt with the application on the basis of the *prima facie* case that was before it, based upon untested forecast information. The Board stated: "The Board agrees with Manitoba Hydro's rebuttal submission that urgency is not a necessary precondition for an interim rate increase."[9]

3.3 Impact of Interim Rates on Final Rates

Hydro submits that under section 75 of the *Public Utilities Act*, the implementation of interim rates is not final and can be adjusted by the Board, as necessary, upon final determination of the GRA. Indeed, if after review of the Amended Application and the testing of Hydro's costs, it is determined that the interim rates approved by the Board were too high and resulted in Hydro earning excess revenues, subsection 75(3) of the *Public Utilities Act* permits the Board to order that customers receive a refund or place the monies in a fund for a purpose approved by the Board.

> 75(3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be
>
> (a) refunded to the customers of the public utility; or
>
> (b) placed in a reserve fund for the purpose that may be approved by the board.

As submitted above, section 75 of the *Public Utilities Act* gives broad powers to the Board to make an interim order approving the rates, tolls and charges to Hydro's customers, until a final order of the Board is made. Subsection 75(3) empowers the Board to deal with any excess revenue that may be earned by Hydro, not only by refunding it, but also by placing it in a reserve fund "for the purpose that may be approved by the board."[10] As provided by the Court of Appeal in the *RSP Appeal* decision:

[9] Interim Order in respect of Manitoba Hydro's Application for Interim Rates Effective May 1, 2014, Order No. 49/14, at page 17 (tab 4).

[10] *RSP Appeal* at paragraphs 128-129 (tab 2).

> [129] Subsection 75(3) provides, in broad terms, that the Board may order that excess revenue earned pursuant to an interim order be dealt with, not only by refunding it to the customers of the public utility concerned, but also by placing it in a reserve fund "for the purpose that may be approved by the board." This provides considerable flexibility to the Board to dispose of excess revenue earned as a result of an interim order, that is not confirmed in the final order, in a variety of ways that may or may not involve the customers of the utility who contributed to the excess benefiting directly through a refund. As was noted in the *Stated Case*, "[t]he Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy" (paragraph 36, item 2). In so doing, the Board must "balance the interests, as identified in the legislation, of the utility against those of the consuming public" (paragraph 36, item 4).[11]

As noted in Hydro's response to TIR-CA-NLH-007, the Board has previously adjusted interim rates after the fact. In Order No. P.U. 1(2006), the Board approved interim rates for AUR Resources Inc. In Order No. P.U. 7(2007), the Board awarded rates for AUR Resources Inc. that were different from the interim order and approved a refund or credit to AUR Resources Inc. for the difference between the approved final rates and those approved in the interim order.

The 'truing up' of interim rates against final rates is also a common occurrence in other jurisdictions. In Decision 2014-311 noted above, in awarding EPC's interim rates, the AUC stated that:

> The Commission finds that as the proposed rate increases are requested on an interim basis, rates will be trued up once the final 2015 rates for distribution and transmission are approved.[12]

[11] *RSP Appeal* at paragraph 129 (tab 2).
[12] Enmax Power Corporation, Decision 2014-311 at paragraph 36 (tab 3).

Further, in paragraph 39 of Decision 2014-311, the AUC stated:

> In determining the level of interim rates for EPC, the Commission is not making any finding or determination with respect to any of the matters in EPC's 2014 DTC and 2014-2015 GTA, which is currently pending before the Commission.

Hydro submits that the awarding of interim rates pursuant to this application does not derogate from the jurisdiction of the Board to award final rates, which are different from the interim rates, upon final testing of 2015 costs, in Hydro's GRA. This position is supported by the Consumer Advocate in his submission:

> *Therefore, the Board has jurisdiction to approve interim rates, and if the review of the Amended 2013 General Rate Application determines that the interim rates have resulted in Hydro earning excess revenues, to refund revenues to customers.*[13]

4.0 Reasonableness of Rates

NP does not oppose interim rates for Hydro *per se.* However, NP asserts that the proposed interim rates are not "*consistent with the reasonableness requirement of the EPCA.*"[14] Hydro disagrees with this statement. At paragraph 56 of the *RSP Appeal*, the Court of Appeal states:

> The EPC Act states the electrical power of the province in S. 3. It obligates the Board to implement that policy as it carries out its duties and exercises its powers under the PUB Act and in so doing s.4 requires the Board to apply tests which are consistent with "generally accepted sound public utility practice".[15]

As referenced above section 3.0 of this submission, at paragraph 57, the Court of Appeal refers to its decision in *Reference Re Section 101 of the Public Utilities Act,* in which it

[13] Consumer Advocate's written submission dated February 18, 2015, at page 2.
[14] NP's written submission dated February 18, 2015, page 1.
[15] *RSP Appeal* (tab 2).

identified some of the general principles applicable to the interpretation of the *Public Utilities Act* and the EPCA. Two notable principles for the purpose of the current matter are 5 and 6 of paragraph 57.

> [57] … 5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. **The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based upon the full consideration of all available evidence, for the purpose of setting rates, tolls and charges.**
>
> 6. The Board has jurisdiction,…, to determine what is a just and reasonable rate of return within a "zone of reasonableness" and in doing so **is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice** and are not inconsistent with the achievement of the purposes and policies of the legislation. [emphasis added.]

Continuing in its decision, the Court of Appeal stated that although the *Stated Case* concerned a utility's rate of return, "*the principles stated above, including those in sub-paragraphs 5 and 6, apply in a similar manner to the determination of rates for a utility's customers".*[16]

As explained above in section 3.1 of this submission, paragraph 61 of the Court Appeal's decision in the *RSP Appeal* addresses the Board's authority to set interim rates and relies on the Supreme Court of Canada's decision in *Bell Canada 1989*, in which Gonthier J. stated that the determination of the justness and reasonableness of rates cannot be resolved as to interim rates until the final decision of the Board is rendered.

> In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return allowed in the final decision for the period during which they are in effect so

[16] *Stated Case*, Paragraph 58, (tab 1).

as to achieve just and reasonable rates throughout that period.[17](emphasis added)

The Board's powers to award interim rates allows it to set rates "*to make its best prospective estimate, based upon the full consideration of all available evidence, for the purpose of setting rates, tolls and charges".*[18] The Board *"is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice".*[19] When the final costs are approved, the Board can remedy any discrepancy *between* the rate of return allowed in the interim rates and the final decision so ***as to achieve just and reasonable rates*** throughout that period.

The evidence before the Board in this hearing shows:

- Hydro has not increased base rates since 2007;
- Hydro's net income was $209,000 in 2013;
- As at the end of the third quarter 2014, Hydro was forecasting a net loss of approximately $27 million under existing rates. Audited year-end results are not yet available;
- The Board approved a $45.9 million cost deferral in 2014 to provide an opportunity to earn a reasonable return in 2014, however, the cost deferral remains subject to testing by the Board;
- Under existing rates Hydro is forecasting a net loss of $68 million for 2015;

[17] *RSP Appeal*, at paragraph 61 (tab 2).
[18] *RSP Appeal*, at paragraph 57.
[19] RSP Appeal, at paragraph 57.

- If proposed rates are implemented for the remainder of 2015, Hydro forecasts a net income of $5.2 million for 2015 based upon a rate implementation date of April 1, 2015 (net income deficiency of $28 million); and

- Further delay in implementation or adjustment to the proposed rates will further increase the cost deferral of current costs to be recovered through future rates creating intergenerational equity concerns.

The current circumstances demonstrate that full consideration of the available evidence justifies approval of the proposed interim rates as soon as possible.

As set out in section 3 of this submission, the Board has the jurisdiction to award interim rates and to make adjustments to remedy any discrepancy between the rate of return allowed in the final decision for the period during which interim rates were in effect so **as to achieve just and reasonable rates.** An example of when the Board has adjusted rates to ensure rates were reasonable is provided in Hydro's response to TIR-CA-NLH-007. On November 10, 1997, pursuant to section 82 of the *Public Utilities Act*, the Board commenced, on its own motion, an investigation and subsequent hearing into the cost of capital reflected in the rates of NP. The commencement of a hearing effectively made NP's rates interim effective January 1, 1998. In Order No. P.U. 16(1998-1999), the Board approved interim rate adjustments to the rates that were in effect for the period January 1, 1998 to August 31, 1998 and refunds were issued to customers to reflect the reduced cost of capital approved in the Board's order. The Board conducted a further review of the reasonableness of the adjusted interim rates in NP's 1998 fall hearing, however, upon final review, determined that no further adjustment was required.

Hydro reiterates its submission that the Board "*has broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the*

purposes of the legislation and to implement provincial power policy."[20] In so doing, the Board must *"balance the interests, as identified in the legislation, of the utility against those of the consuming public."* [21]

5.0 2015 Tested Costs and Inclusion of Contentious Costs

Hydro submits that both the Consumer Advocate and Vale are supportive of Hydro's 2015 Interim Rate Application and are satisfied with the evidence provided to support its application. The IIC Group were also supportive of the interim rates, with the exception of the specifically assigned charge for one of their customers.

5.1 Untested Costs

In its written submission to the Board, NP takes issue with Hydro's proposal to use untested costs to determine interim rates. NP states on page two of their submission:

> The 2015 interim rates application appears to assume that Hydro's assertion of a forecast loss for 2015 provides, in and of itself, sufficient justification for the Board to approve interim rates for Hydro's customers, ***which are based on untested costs***.
>
> …..
>
> Hydro asserts that a forecast 2015 loss provides sufficient regulatory justification for the Board's approval of the rates requested by Hydro in the 2015 interim rates application. ***This is not consistent with regulatory practice in this province or Canada generally***. (emphasis added).

Hydro submits that these statements are inconsistent with the regulatory decisions which are relied upon by NP in its own submission, and that approval of interim rates based upon forecast untested costs is, in fact, quite common in regulatory jurisdictions across Canada.

[20] *The Stated Case,* at paragraph 36, item 2, (tab 1).
[21] *The Stated Case,* at paragraph 36, item 4, (tab 1).

A number of examples of approval of untested costs, found in authorities cited in NP's February 18, 2015 submission in this matter are as follows:

- Appendix A – AltaLink Management Ltd. and TransAlta Utilities Corporation, 2004-2005 Interim Transmission Tariff

At electronic page 12 of the NP submission (paragraph 23 of the AltaLink Management Ltd. Interim rates decision) the AUC noted the intervenor's position and stated *"Calgary submitted that there were numerous areas of contention in AltaLink's 2004-2007 GTA filing and that* ***these areas remain untested****. In Calgary's view, amounts pertaining to contentious issues should be excluded in whole or in part."* (emphasis added).

Hydro notes that interim rates were indeed approved by the AUC based on these untested costs.

- Appendix B – ATCO Gas, 2005-2007 General Rate Application Interim Rate Application

At electronic page 37 of the NP submission (at paragraph 49 of the Alberta Energy and Utility Board decision) the Board stated *"In determining the level of interim rates for AGN, the Board is not making any finding or determination with respect to any of the matters to be considered in the upcoming GRA.* ***The Board recognizes that the evidence before it is untested*** *and that a number of areas of concern identified by the interveners could result in an adjustment to forecasted shortfalls."* (emphasis added).

Hydro notes that interim rates were approved based on these untested costs.

- Appendix C – ATCO Electric Ltd.; 2009 Interim Distribution Tariff and Transmission Facility Owner's Tariff

At electronic page 44 of the NP submission, (at paragraph 18 of the AUC decision), the AUC stated *"The Commission agrees with the comments made by the UCA that **AE has provided limited information with respect to the two part test to support its interim tariff request. In particular, the Commission considers that AE has not provided specific evidence to allow examination** of the manner in which the principles of financial integrity, financial hardship or continuation of safe utility operations may be affected."* (emphasis added).

Hydro notes that interim rates were approved based on this limited evidence.

- Appendix D – ENMAX Power Corporation 2015 Interim Distribution and Transmission Tariff Application

At electronic page 115 of the NP submission (at paragraph 28 of the AUC decision), the AUC stated *"In respect of the 2015 billing determinant forecast, the Commission accepts EPC's explanation and **is satisfied that the forecast, using previously approved methodologies and updated historical data and key economic indicators, is sufficient for the purposes of 2015 interim distribution rates** based on 60 per cent of EPC's applied-for 2014 DTA. The 2015 billing determinant forecast will be tested in EPC's upcoming PBR proceeding. The Commission will make a determination at that time on the reasonableness of the forecast."* (emphasis added).

Hydro notes that interim rates were approved based on this untested forecast.

- Appendix E – Interim Rates for Manitoba Hydro Effective April1, 2011

At electronic page 147 of the NP submission, (at paragraph 31 of the Manitoba PUC decision) the PUC stated, *"CAC/MSOS, having fundamental issues with MH's GRA and **holding that their issues have yet been fully tested**, opined that it would be imprudent for*

the Board to make a directional judgment at this time, ahead of evidence yet to come." (emphasis added)

Further, at electronic pages 156-157 of the NP submission (at paragraph 102 of the decision) the PUC stated, *"Unlike the circumstances of the April 1, 2010 interim rate increase, the GRA is now well underway and* ***while considerable evidence remains to be provided and tested****, sufficient evidence is already on the record to justify the Board's consideration of granting another interim rate increase. MH has filed an extensive GRA (including its latest published annual report and financial forecasts), and thousands of interrogatories have been posed and responded to (involving MH, the Board, Interveners and expert witnesses)."* (emphasis added).

Hydro notes that interim rates were approved based on this untested evidence.

In addition to the aforementioned cases submitted by NP, there is an additional, more recent, decision from the Manitoba Public Utilities Board (Order No. 49/14, tab 4) where the Board approved an application by Manitoba Hydro for interim rates even though no GRA had been filed and one was not planned to be filed for a number of months. The information relied upon by the Board was filed by the applicant on March 7, 2014. A decision on the application was rendered by the Board on May 5, 2014 even though no GRA was planned to be filed by the applicant until the autumn of 2014. The Board considered the positions of the parties and ruled on the matter as follows (at pages 16-17 of the decision):

> **4.0 Board Findings**
> **Test for Granting Interim Rates**
> The Board notes that Manitoba Hydro plans to file a General Rate Application in the fall of 2014, which Application would likely be heard in a public hearing in the spring of 2015. Accordingly, a General Rate Application would likely only be decided towards the end of the Corporation's 2014/15 fiscal year. Interim rate orders are intended to relieve Manitoba Hydro from the

deleterious effects caused by the length of a regular regulatory proceeding. The questions to be determined by this Board are whether it would be just and reasonable to grant interim rates, and whether Manitoba Hydro would suffer a deleterious effect in the absence of an interim rate increase. For the reasons set out below, the Board considers it to be in the public interest to approve an interim rate increase, albeit at a level lower than requested by Manitoba Hydro.

Manitoba Hydro's Financial Position

According to Manitoba Hydro, the energy future in Manitoba will require significant annual rate increases regardless of which source of additional new generation is pursued, and regardless of which decision will be reached in the NFAT Review currently underway. All possible development plans presented in the NFAT Review require rate increases. As such, the Board and Manitoba Hydro customers cannot assume that in the absence of the Preferred Development Plan being approved, rate increases can be avoided. This requires the Board to take into account the need for rate stability and the avoidance of rate shock.

The Board notes that Manitoba Hydro's Interim Application for a 3.95% rate increase is consistent with the Preferred Development Plan that involves the construction of both Keeyask and Conawapa Generating Stations. The outcome of the NFAT Review will be known prior to the filing of Manitoba Hydro's next General Rate Application, and a full General Rate Application is needed to examine the magnitude of additional rate increases.

Nonetheless, the Board is satisfied on a *prima facie* basis, that an interim rate increase is required. Reliability of Manitoba Hydro's infrastructure is paramount, and the Board accepts that investments in the maintenance and replacement of existing infrastructure is required.

Electricity export price forecasts have decreased over successive forecasts, resulting in less projected export revenue to help offset the requirement for domestic rate increases.

The Wuskwatim Generating Station is now 'in service' and has resulted in an additional domestic revenue requirement to be carried by domestic customers as those additional costs are not paid from export revenues.

Lastly, and despite the Board's comments in Order 43/13 with respect to the need for Manitoba Hydro to contain OM&A costs, those OM&A expenses are projected to increase above the rate of inflation in 2014/15.

The Board agrees with Manitoba Hydro's rebuttal submission that urgency is not a necessary precondition for an interim rate increase. However, it is

> appropriate to consider Manitoba Hydro's current financial condition in light of favourable recent financial results and the fact that a General Rate Application will be filed this Fall. The Board has determined that an interim rate increase of 2.00%, approximating the annual rate of inflation, is sufficient at this time to meet the needs of Manitoba Hydro. Whether or not an additional rate increase is required is an issue to be left to the General Rate Application, by which time actual financial results for the 2013/14 fiscal year will also be available.

Hydro notes that, if anything, the Manitoba Public Utilities Board Act (an excerpt of which is reproduced and provided at tab 5) is more general and less specific and clear as to the intent of the Manitoba legislature to empower its Board the power to grant interim orders in these kinds of circumstances. The interim order provision from the Manitoba statute reads:

> **Interim order**
>
> 47(2) The board may, instead of making an order final in the first instance, make an interim order and reserve further directions, either for an adjourned hearing of the matter, or for further application.

The statutory provision empowering this Board on interim orders bears repeating here for comparison:

> **Interim order**
>
> 75. (1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.
>
> (2) The schedule of rates, tolls and charges approved under subsection (1) are the only lawful rates, tolls and charges of the public utility until a final order is made by the board under section 70.
>
> (3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be
>
> (a) refunded to the customers of the public utility; or
>
> (b) placed in a reserve fund for the purpose that may be approved by the board.

While the above case law examples indicate a consistent practice of approved interim rates based on untested costs in Canada, in its written submission to the Board, NP appears to submit that interim rates in this province should be based only on tested costs. On page two of their submission dated February 18, 2015 NP states *"The Board has historically used tested costs to establish rates, even interim rates. The use of tested costs ensures that the rates are reasonable. The costs which are included in the rates proposed in the general rate application have never been tested."* Hydro submits that Hydro's existing interim rates were set based upon 2007 tested forecast costs and are demonstrably not, at this time, reasonable rates. Hydro has provided a complete filing of evidence and has responded to in excess of 1400 Requests for Information in the GRA. In accordance with the tests used by other regulators, Hydro submits that this constitutes strong *prima facie* evidence of a revenue shortfall.

As noted in the examples provided in NPs own submission, the concept of using non-tested costs for interim rates is common in other jurisdictions in Canada. Further, the Board's authority to set rates without tested evidence was confirmed by the Newfoundland and Labrador Court of Appeal in the *RSP Appeal*. At paragraph 61 of its decision, the Court of Appeal stated:

> [61] The power of the Board to authorize interim rates is granted in s. 75 of the PUB Act. **That section allows the board to set rates expeditiously without full evidence** and submissions, such rates being subject to review and possible modification in the final order of the Board, as is expressly provided for in subsections 75(2) and (3). (emphasis added)

Therefore, Hydro submits that approval of interim rates based on untested costs and a forecast loss is consistent with regulatory practice in Canada, generally, and as noted in the cases above, including those cases provided in NP's submission to the Board and those other authorities noted in this submission. These cases signify that this approach is based on generally accepted sound public utility practice, and that there is legal precedent in this province to support the Board's ability to approve interim rates based upon untested costs.

Moreover, this Province's Court of Appeal has endorsed and clarified this power of the Board.

5.2 Inclusion of Contentious Costs

NP contends that Hydro's 2015 base rate includes costs and return that are not reasonable for interim recovery and that the return on items subject to the prudence review by the Board should not be included.

NP submits that partial recovery of a forecast utility revenue deficiency in interim rates may be appropriate in certain circumstances and in doing so relies upon the view expressed by the Newfoundland and Labrador Court of Appeal that the language contained in section 3 of the EPCA emphasizes the need for tempering each of the utility's and its customers economic interests. While Hydro agrees with the view as expressed by the Court of Appeal, Hydro respectfully submits that NP is overlooking the fact that the EPCA and the *Public Utilities Act* work together to provide jurisdiction and powers to the Board. Pursuant to section 75 of the *Public Utilities Act*, the Board does have the authority to grant interim rates and to later provide a refund to customers if upon final testing of Hydro's costs it is determined that revenues earned as a result of the interim rates were too high.

The Consumer Advocate does not take issue with the inclusion of contentious items in Hydro's 2015 base rate. As is stated in the Consumer Advocate's submission, the fact that Hydro is seeking implementation as of March 1, 2015 means that Hydro will not recover 100% of its revenue deficiency. Referring to Hydro's response to TIR-CA-NLH-003, the Consumer Advocate states that "*the revenues from proposed 2015 interim rates effective March 1, 2015 would be less that the 2015 revenue requirement even if all 2015 costs subject to the Board's prudency review were disallowed*."[22] Further, as submitted by the Consumer Advocate, there "*are ample opportunities for the Board to claw back any excess*

[22] Consumer Advocate's written submission, dated February 18, 2015, at page 5, footnote 4.

revenues that might accumulate to Hydro under the 2015 Interim Rates Application."[23] Hydro submits that a reasonable process to follow would be in accordance with Hydro's response to TIR-PUB-NLH-003.

6.0 Level of Recovery of Interim Rates

NP suggests in its submission that Hydro's 2015 Interim Rate Application will provide for 100% recovery of Hydro's 2015 revenue requirement on an annualized basis. Hydro disagrees with this assertion and submits that it is specious. Hydro has requested interim rates effective March 1, 2015. As of this date it is not possible for Hydro to achieve annualized (i.e. 12 months of) interim rates in 2015.

Table 1

Scenario ($000's)	2015 Net Income	Variance from January 1, 2015 Implementation	Effective Annual 2015 Recovery
Interim Rates, January 1, 2015	33.9	-	100%
Interim Rates, January 1, 2015 100% of Prudency Costs Removed	21.2	(12.7)	81%
Interim Rates, March 1, 2015 [1]	**14.0**	**(19.9)**	**71%**
Interim Rates, April 1, 2015	5.2	(28.7)	58%
2015 Net Income: Current Rates	(34.6)	(68.5)	0%

[1] Hydro's proposal

As shown in Table 1, Hydro's proposal for implementation of interim rates on March 1, 2015 has an effective annual rate increase of providing recovery of approximately 70% of the forecast 2015 net income deficiency. Hydro's application proposes two months of existing rates and ten months of interim rates in 2015. Delayed interim rate implementation decreases Hydro's effective annual return, as lower existing rates remain in effect for the first two months of the calendar year where energy demand and revenue are typically at

[23] Consumer Advocate's written submission, dated February 18, 2015 at page 6.

their highest. On an annualized basis, this proposed delayed implementation of interim rates to March 1, 2015 is no different in result than implementing rates effective January 1, 2015 to provide recovery of 70% of the 2015 forecast net income deficiency.

As noted on page 5 of NP's submission "*In their consideration of interim rates, the AUC does not automatically provide a utility with full recovery of a proposed revenue requirement increase. For example, the AUC has granted only a portion of the revenue requirement increase proposed in the principal rate case where such an approach seemed reasonable."* Hydro accepts that this approach appears to be common Canadian regulatory practice, however, this is not always the case.

On November 24, 2014, FortisBC received approval for 100% recovery of their applied for interim rate increase of 3.5% "*on an interim and refundable basis pending the outcome of the annual review of 2015 rates.*"[24] Hydro submits that the proposed increase in Hydro's interim rates application is conservative when compared to FortisBC's recent 100% recovery reflected in its approved interim rates, given that the effective annual revenue requirement increase proposed by Hydro is only 70%.

As provided for in Hydro's response to TIR-CA-NLH-001, if interim rates are made effective March 1, 2015, Hydro will recover 70% of its forecast net income deficiency for 2015. If rates are not made effective until April 1, 2015, Hydro will recover only 60% of the forecast net income deficiency. Approval of the proposed interim rates effective March 1, 2015 or later, does not provide recovery of the financial impact of delayed rate implementation beyond January 1, 2015. As such, Hydro is not seeking recovery of 100% of its 2015 net income deficiency in the interim rates proposed to become effective on March 1, 2015.

[24] Order Number G-182-14 of the British Columbia Utilities Commission. *FortisBC Inc. ~ Multi-Year Performance Based Ratemaking Plan for the years 2014 through 2019 Order G-139-14 Amended Financial Schedules Compliance Filing and Request for Approval of 2014 Permanent Rates and 2015 Interim Rates*, (tab 6). FortisBC applied for, and obtained approval of, a 3.5% interim refundable rate increase effective January 1, 2015.

The Consumer Advocate's submission states that regulatory boards that allow interim rate increases often cap the amount at a percentage of the additional revenue needed to provide the utility with a reasonable rate of return. The two cases provided by the Consumer Advocate notes that the AUC limited the interim rates awarded to 60% of the utilities required increase in revenue. According to the Consumer Advocate's submission, Hydro's is requesting 78.5% of its revenue deficiency for 2015 as the proposed rates would not become effective until March 1, 2015, as opposed to January 1, 2015. As Hydro is not seeking 100% recovery of its required revenue for 2015, the Consumer Advocate supports Hydro's 2015 Interim Rates Application, as proposed, subject to a full review of Hydro's costs during the GRA.

Hydro submits that, as stated above in section 3.2 of this submission, if upon final testing of Hydro's costs in the GRA the Board determines that Hydro has received more revenues than it requires, subsection 75(3) of the *Public Utilities Act* provides considerable flexibility to the Board to dispose of any excess revenue earned by Hydro as a result of an interim order, that is not confirmed in the final order, in a variety of ways.[25]

7.0 Phase in of IIC Rates

Order in Council OC2013-089 and OC2013-090, direct that IIC rates are to be phased in over a three year period with funding for this phase in to be drawn from the IIC RSP Surplus.

In a submission dated December 10, 2014, the IIC Group submitted that the impacts of the rate proposals reflected in the Amended Application constitute "rate shock". Current IIC rates do not include a fuel rider. As such, their rates do not recover the increased cost of Holyrood fuel since the 2007 Test Year. The proposed average base rate increase for IIC for the 2015 Test Year, based upon the fuel cost forecast used in the Amended Application and with no phase-in approach, is 39.2%. Using an updated Holyrood fuel price of $65.63 per barrel reduces the proposed base rate increase to 18.1%. The IIC Group submission of

[25] *RSP Appeal at* paragraph 129. (tab 2)

December 18, 2014 expressed concern with the customer impacts in the Amended Application. To mitigate the customer rate impacts, the IIC Group proposed that the Board consider: (i) disposition of the credit balance in the RSP load variation component; and (ii) using a lower No. 6 fuel price in establishing revenue requirement for the purpose of establishing interim rates.

As set out in the evidence to the 2015 Interim Rates Application, Hydro considered two alternatives to phasing in IIC rates and proposed that the Board accept alternative 1 on the basis that it would limit the maximum impact of any single base rate change to the IIC to approximately 10%. In its written submission, Vale submits that the Board should accept the second alternative proposed by Hydro "*as it reduces the number of rate changes experienced by industrial customers over an 18 month period from three (under alternative one) to two. The increased rate stability provided by alternative two is preferable for industrial customer's budgeting purposes.*"[26] Hydro considers either approach acceptable.

The Consumer Advocate has indicated in its written submission that Hydro's proposal to phase in IIC rates is not in compliance with OC2013-89. Hydro disagrees with this assessment and submits that the proposed phase-in approaches, either alternative one or two, are in compliance with OC2013-089. The OC dictates that the rates should be phased in over a three year period and conclude by August 31, 2016. Hydro submits its proposed approach to the phasing in of IIC will have started and concluded within the three year period specified by the OC and is therefore compliant with OC2013-89.

7.1 CBPP Specifically Assigned Charge

In its February 23, 2015 submission, the IIC Group indicated that its specifically assigned charge comprised 0.4% of its power bill in 2011 and if the interim rates are approved as applied for, will comprise almost 25% of CBPP's power bill. Hydro wishes to point out that these figures must be seen in their proper context. Hydro has invested significant funds in

[26] Vales's written submission dated February 18, 2015, at page 5.

the plant dedicated to serve this customer since that time – the plant's value used for allocating this amount is nearly ten times higher than it was then primarily due to replacements of aged equipment. From the perspective of understanding the proportion of the bill that fixed plant has to the demand and energy components of the bill, it should also be understood that CBPP's load is approximately one-seventh what it was in 2001. In Hydro's view, the level of increase arising from this component of this customer's rate should not be singled out for differential treatment for the purposes of the proposed interim order.

8.0 RSP Load Variation Component

The 2014 year end credit balance in the RSP load variation component is approximately $35.5 million. Pursuant to Order No. P.U. 29(2013), this component has been segregated with disposition between the IIC and NP to be determined in the GRA. In this 2015 Interim Rates Application, Hydro is proposing that the Board approve the disposition of the 2014 year-end load variation balance using the energy ratio allocation approach that was proposed in the Amended Application. The approval of this proposal would result in $2.1 million being allocated to the IIC, reducing the 2014 year-end IIC RSP balance from $6.8 million to $4.7 million. The remainder of the $35.5 million segregated RSP load variation balance would flow through the RSP for disposition to retail customers which will enable continuation of the existing RSP recovery rider of (0.551) cents per kWh until June 3, 2016, without resulting in a large balance owing from NP customers.

The Consumer Advocate disagrees with Hydro's proposal that $2.1 million from the balance of the load variation component of the RSP that has accumulated since September 1, 2013. The IIC Group and Vale support the use of the load variation component to reduce customer rate impacts of implementing the proposed interim rates. Hydro submits that the disposition of the RSP load variation component as proposed by Hydro reduces customer rates impacts and supports the principle of intergenerational equity in phasing in the IIC rates. As submitted by Vale in its written submission, "*By using current RSP balances owing*

to customers to offset balances currently owing to Hydro, Hydro reduces or eliminates the potential for intergenerational inequity created by the use of future rate riders to recovery past balances."

9.0 July 1, 2015 RSP Update

Each July, the RSP fuel rider is updated to reflect forecast fuel costs for the following 12 months and the RSP recovery adjustment is updated to reflect balances that have accumulated as a result of variances from forecast fuel costs and RSP recovery over the previous 12 months. The implementation of interim base rates effective March 1, 2015 which reflects updated fuel costs for 2015 removes the RSP fuel rider that has been in effect since July 1, 2014. Implementation of revised retail rates on March 1, 2015, which reflect both the disposition of the balance in the RSP segregated load variation component and the updated fuel forecast, avoids the necessity for a July 1, 2015 rate change. Hydro sees no additional benefit in providing a further fuel cost update to become effective July 1, 2015 and proposes that the July 1, 2015 NP RSP update be suspended.

As explained in Hydro's response to TIR-PUB-NLH-001, the implementation of new base rates to IIC requires modifications to the values used in the operation of the RSP for the period that interim rates are in effect. To avoid any implications on NP's customers of the interim changes to the RSP rules, Hydro is proposing that there be no RSP rate adjustment for 2015.

The Consumer Advocate, in its written submission, supports "*Hydro's proposal that there be no RSP rate adjustment for Newfoundland Power customers in July 2015*."[27] Hydro notes that NP made no submission on this point.

[27] Consumer Advocate's written submission, dated February 18, 2015, page 8.

10.0 Intergenerational Equity

As stated by Hydro in its response to TIR-CA-NLH-001, if its 2015 Interim Rates Application is not approved, there is substantial risk that customer rates for 2015 will not reflect the costs associated with providing service for that period. Rates charged in 2014, and now potentially in 2015, will not accurately reflect the costs of service provided in those periods. Denying Hydro's application will further increase the 2015 net income deficiency and place an increased burden on future customers to fund recovery of costs. [28]

Vale's submission also highlights the intergenerational equity concerns if interim rates are not awarded. The composition of the IIC class is changing radically with Vale ramping up production which will make it Hydro's largest IIC within a short period of time and with Teck Resources anticipating to close operations in 2015, while benefiting from current rates. As stated by Vale in its written submission,

> [I]f present day deficiencies are recovered from future customers, there will inevitably be intergeneration inequity in that the changing dynamic within the Island Industrial Customer Group:
>
> i) Will result in a customer responsible for contributing a small percentage to the accumulating deficiency repaying the largest percentage of that deficiency; and
>
> ii) Could result in an industrial customer that benefited from the rates that created the deficiency ceasing operations before its portion of the deficiency is repaid through a rate rider.[29]

As further stated by Vale in its written submission, as the "*evidence supports Hydro's submission that a revenue deficiency is accumulating, fairness dictates that an Order for interim rates should become effective at the earliest possible date. As discussed in detail in response to TIR-CA-NLH-001, maintaining generational equity is one of the factors demonstrating a need for interim rates*."[30] Hydro agrees with Vale's views on intergenerational equity for the IIC class.

[28] Also see page 6 to the Evidence of Hydro's 2015 Interim Rates Application.
[29] Vale's written submission, dated February 18, 2015, page 2.
[30] Vale's written submission, dated February 18, 2015, page 3, lines 3 to 7.

While NP's submission did not address intergenerational equity, Hydro submits that this issue is material to NP customers and should be an area of concern for NP. As noted in section 1 of this submission, late in 2014 the Board approved $55.5 million in costs for deferral ($45.9 2014 Net Income Deficiency and $9.6 million in Additional Capacity-Related Supply Costs). As sales to NP comprise the majority of Hydro's regulated income,[31] the majority of these costs, if approved for recovery, will be borne by NP customers.

If interim rates are not implemented and final rates take effect on December 1, 2015, Hydro's 2015 net income deficiency would be approximately $61.0 million.[32] This, combined with the above mentioned 2014 deferrals, represents a potential of $116.5 million to be recovered from future customers.

The magnitude of these deferred costs is the main driver for Hydro's intergenerational equity concerns for all customers, particularly those of NP. Keeping 2007 base rates in effect for the majority of 2015 will effectively require 2016 customers (and beyond) to subsidize the service provided to 2015 customers, as the rates charged in 2015 will not reflect the costs associated the service provided in that period.

Intergenerational equity is typically an area of concern for NP. As noted in Hydro's response to TIR-CA-NLH-001, NP's evidence on the 2011 Sale of Joint Use Support Structures application[33] states *"As time passes, the makeup and usage of a customer group changes. Therefore, the longer the period that costs are deferred, the more serious the breach of the intergenerational equity principle… cost deficiencies should be recovered over as short a period as is reasonable, so the customer group that eventually pays for the costs is similar to the one benefiting from the costs."* Hydro submits this issue is particularly relevant with

[31] Page 17 of Nalcor's 2013 Annual Report, sales to NP comprised 82.4% of Hydro's 2013 Regulated Revenue.
[32] Please see TIR-CA-NLH-001, Page 4 of 12, Lines 3 to 6.
[33] Newfoundland Power, Sale of Joint Use Support Structures, Consent #2, the Report of J.T. Browne Consulting, Appendix 3, Page 4 of 4.

respect to its 2015 Interim Rates Application. While NP has chosen not to address this issue with respect to Hydro's interim rates application and its impact on their customers, it is clear that NP is familiar with the concept of intergenerational equity and its application in their own proceedings.

In addition to the intergenerational equity evidence submitted by NP for an application of their own, NPs submission on Hydro's interim rates dated February 18, 2015, (at electronic page 35, paragraph 36) contains the interim rates decision for ATCO Gas which reads

> *The Board considers that interim rate increases are generally warranted where the forecast revenue deficiency identified for a given period is probable and material.* ***The Board considers it generally appropriate that customers' rates for a period reflect the costs associated with that period in order to maintain intergenerational equity.*** (emphasis added)

Hydro respectfully submits that the greater the delay with respect to Hydro's 2015 base rate implementation, interim or otherwise, the greater the concern with intergenerational equity for all customers.

11.0 Implementation of Interim Rates

The IIC Group and Vale do not oppose the implementation of interim rates as of March 1, 2015.

While retail rates may not practicably be implemented by March 1, 2015, Hydro submits that it is an option for the Board to consider that the Utility Rate change be implemented effective March 1, 2015. Newfoundland Power could then propose a flow-through approach to its retail customers. The Consumer Advocate recommends that the Board direct NP to implement interim rates promptly to ensure that its customers receive the rate reduction in a timely manner. As stated by Hydro in its response to TIR-CA-NLH-008, based upon the implementation period required as a result of Hydro's 2006 GRA, the process to

revise customer rates to reflect a new Utility rate can proceed quickly if NP starts the implementation process early and proceeds efficiently.

12.0 Submission

Hydro submits that the evidence supports the approval of the 2015 Interim Application proposals. Therefore, Hydro requests an interim Order pursuant to Section 75 of the Act, approving:

(i) the schedule of rates, tolls and charges set out in Schedule 1 to this 2015 Interim Rates Application to be effective on and after March 1, 2015, or as soon as is practical, until superseded by a final order of the Board; and

(ii) changes to the RSP rules to implement the phase-in of changes to the IIC rates and to remove the requirement for the RSP rate adjustment to NP scheduled for July 1, 2015.

If the Board finds that there is inadequate time for NP to implement the necessary changes to effect the retail rate proposals effective March 1, 2015, the Board could approve the wholesale rate proposed by Hydro to be effective March 1, 2015, with delayed implementation of the retail rates to be effective April 1, 2015.

All of which is respectfully submitted.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 25th day of February, 2015.

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Docket: 96/141

98 190 006

IN THE SUPREME COURT OF NEWFOUNDLAND
COURT OF APPEAL

IN THE MATTER OF Section 101 of the *Public Utilities Act*, R.S.N. 1990, c. P-47

AND IN THE MATTER OF a case stated by the Board of Commissioners of Public Utilities to the Court of Appeal for its hearing consideration and opinion on questions of law affecting the jurisdiction of the Board of Commissioners of Public Utilities

Coram: O'Neill, Cameron and Green, JJ.A.

Reference Heard: March 11 & 12, 1997
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Opinion delivered by Green, J.A.
Concurred in by Cameron, J.A.
Dissenting Opinion in part by O'Neill, J.A.

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Counsel for the Consumer Advocate: Mark Kennedy

Opinion of Green, J.A.:

[1] The Board of Commissioners of Public Utilities has stated a case for the opinion of this Court, pursuant to s. 101 of the **Public Utilities Act**[1]. The questions posed concern the jurisdiction and powers of the Board as they affect the approach of the Board to the determination of a "just and reasonable return" on the rate base of a utility, as well as related matters.

The Stated Case in Context

[2] The Board is the statutory body which has the authority and duty for the "general supervision of all public utilities" in Newfoundland and Labrador and in the course of exercising that supervisory role has general authority to "make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the law" and, as well, it has the right "to obtain from a public utility all information necessary to enable the Board to fulfil its duties"[2].

[3] One of the Board's primary functions with respect to electrical utilities is the regulation and approval of rates, tolls and charges[3]. In so doing, the Board must take account of the statutory requirement that the utility is entitled to earn annually a "just and reasonable return" as determined by the Board on the rate base as fixed and determined by the Board.[4] The process essentially involves the fixing and determining of the appropriate rate base, the determination of a "just and reasonable return" on that rate base and then the approval of a schedule of rates, tolls and charges that would be appropriate to generate the revenue which, in the Board's estimation, would be necessary to provide the determined rate of return. Once rates, tolls and charges are set by the Board they continue to apply until altered under the Act, as a result of a reapplication by the utility for an

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[1]R.S.N. 1990, c. P-47 as amended (hereinafter the "Act")

[2]**Act**, s. 16

[3]**Act**, s. 70

[4]**Act**, s. 80

increase, a complaint by the public or an order for a reexamination initiated by the Board itself.

[4] It is important to remember, however, that in addition to its periodic adjudicative role which itself involves a large measure of policy implementation in arriving at its decisions, the Board has, because of its duty of "general supervision of all public utilities", an ongoing supervisory role of the activities of the utility between hearings as well, which is facilitated by statutory requirements for periodic reporting of financial information to the Board.

[5] In 1991 the Board made Orders[5] determining a just and reasonable return for Newfoundland Light and Power Co. Ltd.[6] and approving a schedule of rates, tolls and charges based on estimated revenue requirements necessary to cover operating expenses and to provide that level of return. The essential features of the 1991 order determining the just and reasonable rate of return were that:

(a) The just and reasonable return was determined to be between a stated range (10.6% - 11.19%) of the company's average rate base;

(b) The rate base was determined on the basis of a hypothetical test year (1992);

(c) The Board determined that the just and reasonable return, as defined, would provide an opportunity to NLP to earn a rate of return on common equity between a certain stated range (13% to 13.5%);

(d) The schedule of rates, tolls and charges was determined applying a rate of return equal to the mid-point between the stated range of returns on rate base;

(e) The Board ordered that a particular capital structure of NLP be adopted and continue to be the basis of NLP's financial plan.

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[5]Board Orders P.U.6 (1991) and P.U.7 (1991)

[6]Hereinafter, "NLP"

[6] The Board had previously adopted a policy allowing NLP to retain earnings above the allowed range of return on rate base, provided those earnings were within the allowed range of rates of return on common equity. Where the earnings exceeded the allowed rate of return on common equity, the Board, in purported exercise of its statutory powers to regulate NLP's accounting procedures, as well as other powers, required NLP to set up a reserve account in which these excess earnings would be held and dealt with in accordance with subsequent direction by the Board.

[7] In April of 1996, NLP petitioned the Board for another order fixing and determining a new rate base, determining a just and reasonable return and approving a revised schedule of rates, tolls and charges, amongst other matters. One of the parties represented at the hearing was the "Consumer Advocate", who was appointed[7] by the Government of Newfoundland and Labrador to represent the interests of domestic and general service consumers in respect of the rate hearing.

[8] During the years between the making of the 1991 orders and the 1996 hearing, NLP had filed annual returns with the Board, as required by s-s. 59(2) of the Act, which indicated that in the years 1991, 1992 and 1993 the company's rate of return on rate base was in excess of the range determined in the 1991 Order. However, as calculated by NLP, the rate of return on common equity was always within the range that had been stipulated by the Board. The rates of return on rate base and on common equity were calculated based on actual expenses and on the actual capital structure of NLP.

[9] In its periodic reports to the Board, NLP disclosed that its actual advertising costs in 1992 exceeded the amounts projected to the Board as a forecast for 1992 which had been approved as reasonable and prudent by the Board in its 1991 Order in the course of fixing and determining the rate base.

[10] During the course of the 1996 hearing, certain submissions were made to the Board respecting, amongst other things,

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[7]Pursuant to s. 117 of the Act. See OC 96-226; OC 96-236

(a) whether NLP should be regarded as having earned revenue in excess of its allowed range of rate of return where its rate of return on common equity was nevertheless within the stated allowable range;

(b) whether the manner of calculation of excess revenue and the proposed manner of the disposition of any excess was permitted;

(c) whether NLP could and should be required to alter its capital structure so as to obtain its capital requirements in a manner other than the way in which it was presently doing;

(d) whether the Board could and should take account, in setting future rates, of past expenditures which were in excess of amounts deemed reasonable and prudent at the time of a previous hearing.

[11] Questions arose as to the jurisdiction and power of the Board to entertain and act on the sorts of submissions that were made. This prompted the Board to state the current case to this Court. NLP and the Consumer Advocate were granted standing to appear and be heard at the hearing.

The Specific Questions

[12] The Stated Case poses for consideration by this Court the following questions:

(1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

(2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return.

(3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:

(i) the base rate as fixed and determined by the Board for each type of service applied by the public utility; or

(ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,

does the Board have jurisdiction to:

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility.

(4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility, or

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years.

(5) Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common

shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question (4).

(6) Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

(7) Does the Board have jurisdiction to require a public utility to maintain:

(i) a ratio; or

(ii) a ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

(8) Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

Although the questions are stated above as they appear in the Stated Case filed with the Court, there are several obvious typographical errors in the language used. This was recognized by the participants in references to the questions in their written arguments. In particular "supplied" was at times substituted for the word "applied" in questions 1(i), 3(i) and 4(i) and "base rate" in Question 3(i) was replaced by "rate base." In addition, the phrase "In the event that a public utility should ..." at the beginning of Question 3 was used at times in the written submissions in preference to the phrase "Should a public utility ..." Nothing turns on these informal changes. They do, however, make the import of the questions clearer and I will interpret the questions in that light.

The Legislative Framework

[13] The answers to the questions which have been posed must, of course, be given taking account of the legislative framework within which the Board operates. The Board is a creature of statute and its jurisdiction and powers to deal with matters brought before it, and the manner of dealing with such matters, must be found, either expressly or impliedly, within the statutes conferring jurisdiction on and governing the operation of the Board.

[14] While a number of specific provisions of the Act and related legislation will have to be referred to in the course of this opinion, certain legislative provisions, which are central to this analysis, can be conveniently set forth here:

Public Utilities Act

58. The board may prescribe the form of all books, accounts, papers and records to be kept by a public utility and a public utility shall keep its books, accounts, papers and records and make its returns in the manner and form prescribed by the board and comply with all directions of the board relating to those books, accounts, papers, records and returns.

69.(1) A public utility, if so ordered by the board, shall, out of earnings, set aside all money required and carry it in a depreciation account.

(2) The depreciation account shall not, without the consent of the board, be spent otherwise than for replacements, new constructions, extensions or additions to the property of the company.

(3) The board may by order require a public utility to create and maintain a reserve fund for a purpose which the board thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations.

(4) The board, in a case where it has made an order which has the effect of increasing a public utility's revenues, may require the public utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the board's opinion attributable to the order.

(5) An order under this section shall be made only after hearing the public utility concerned.

70.(1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the schedule of rates, tolls and charges so approved shall be filed with the board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.

75.(1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.

(2) The schedule of rates, tolls and charges approved under subsection (1) are the only lawful rates, tolls and charges of the public utility until a final order is made by the board under section 70.

(3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be

(a) refunded to the customers of the public utility; or

(b) placed in a reserve fund for the purpose that may be approved by the board.

76. The board may upon notice to the public utility and after hearing as provided in this Act, by order rescind, alter or amend an order fixing rates, tolls, charges or schedules, or other order made by the board, and certified copies of the order shall be served and take effect as provided in this Act for original orders.

78.(1) Except as otherwise provided in this Act, the board may fix and determine a separate rate base for each kind of service provided or supplied to the public by a public utility, and may revise the base.

(2) In fixing a rate base the board may, in addition to the value of the property and assets as determined under section 64, include

.....

(h) other fair and reasonable expenses which

(i) the board thinks appropriate and basic to the public utility's operation, and

(ii) has, with the approval of the board, been charged to capital account,

but the expenses shall be allowed only to the extent not amortized in previous years.

80.(1) A public utility is entitled to earn annually a just and reasonable return as determined by the board on the rate base as fixed and determined by the board for each type or kind of service supplied by the public utility but where the board by order requires a public utility to set aside annually a sum for or towards an amortization fund or other special reserve in respect of a service supplied, and does not in the order or in a subsequent order authorize the sum or a part of it to be charged as an operating expense in connection with the service, the sum or part of it shall be deducted from the amount which otherwise under this section the public utility would be entitled to earn in respect of the service, and the net earnings from the service shall be reduced accordingly.

(2) The return shall be in addition to those expenses that the board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the board according to this Act and the rules and regulations of the board.

(3) Reasonable payments each year to former employees of a public utility who have retired and are receiving payments of supplemental income from the public utility are expenses that the board may allow as reasonable and prudent and properly chargeable to the operating account of the public utility.

(4) The board may use estimates of the rate base and the revenues and expenses of a public utility.

84.(1) Upon a complaint made to the board against a public utility by an incorporated municipal body or the Newfoundland and Labrador Federation of Municipalities or by 5 persons, firms or corporations, that the rates, tolls, charges or schedules are unreasonable or unjustly discriminatory or that a regulation, measurement, practice or act affecting or relating to the operation of a public utility is unreasonable, insufficient or unjustly discriminatory or that the service is

inadequate or unobtainable, the board shall proceed, with or without notice, to make the investigation that it considers necessary or expedient.

(2) The board may order the rates, tolls, charges or schedules reduced, modified or altered, and make other orders as to the reduction, modification or change of the regulation, measurement, practice or acts that the case may require, and may order on the terms and subject to the conditions that are just that the public utility provide reasonably adequate service and facilities and make extensions that may be required, but an order shall not be made or entered by the board without a public hearing or inquiry.

87.(1) Where upon an investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or in violation of this Act, the board has power to cancel those rates, tolls, charges or schedules and declare void all contracts or agreements, either oral or written, dealing with them upon and after a day named by the board, and to determine and by order substitute those rates, tolls or schedules that are reasonable.

91.(1) A public utility shall not issue shares, which for the purposes of this section shall include preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than 1 year from the date of issue, except as provided in subsection (2) until it has obtained approval from the board for the proposed issue; ...

.....

(3) After hearing the application and where satisfied that the proposed issue by a public utility of its shares, stocks, bonds, debentures or other evidence of indebtedness is to be made in accordance with law and for a purpose approved by the board, it is the duty of the board to make an order approving the proposed issue to the amount that it considers appropriate, and also to prescribe the purpose to which the issue or the proceeds of the issue are applied.

.....

(5) Without first obtaining the approval of the board,

(a) a public utility shall not make a material alteration in the characteristics of its stocks or shares, or its bonds, debentures, securities, or other evidence of indebtedness as those

characteristics are described by the board in granting its approval of the issue; ...

Electrical Power Control Act, 1994[8]

3. It is declared to be the policy of the province that

(a) the rates to be charged, either generally or under specific contracts, for the supply of power within the province

(i) should be reasonable and not unjustly discriminatory,

(ii) should be established, wherever practicable, based on forecast costs for that supply of power for 1 or more years,

(iii) should provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable return as construed under the *Public Utilities Act* so that it is able to achieve and maintain a sound credit rating in the financial markets of the world, and

.....

(b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner

(i) that would result in the most efficient production, transmission and distribution of power,

(ii) that would result in consumers in the province having equitable access to an adequate supply of power,

(iii) that would result in power being delivered to consumers in the province at the lowest possible cost consistent with reliable service, ...

.....

[8]S.N. 1994, c. E-51, as amended (hereinafter, the "EPC Act")

> 4. In carrying out its duties and exercising its powers under this Act or under the *Public Utilities Act*, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.

Approach to Interpretation

[15] The Court was not referred to any decisions in this or other jurisdictions which directly addressed, let alone answered, the specific types of questions which have been posed. To answer the questions, therefore, it is necessary to develop a theoretical frame of reference within the context of the general language of the existing legislation so as to determine the approach to be taken to its application in concrete situations.

[16] It is necessary to examine the specific legislative provisions in the larger regulatory context and against the background of the purposes of the legislation and the general principles which have been developed as part of regulatory practice[9]. This approach follows from s. 118 of the Act which provides:

> 118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.
>
> (2) The Board created has, in addition to the power specified in this Act, all additional implied and incidental powers which may be appropriate or necessary to carry out the powers specified in this Act.
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> (3) A substantial compliance with the requirements of this Act is sufficient to give effect to all the rules, orders, acts and regulations of the Board, and they shall not be declared inoperative, illegal or void for an omission of a technical nature.

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[9] I acknowledge a large indebtedness to the following sources for much of the information referred to herein about general regulatory principles and practice in North America: Charles F. Phillips, Jr. **The Regulation of Public Utilities** (Arlington: Public Utilities Reports Inc., 1993); A.J. deGrandpré, "Fair Returns for Utilities-Concept or Reality?" (1970), 16 McGill L.J. 19; A.B. Jackson, "The Determination of the Fair Return for Public Utilities" (1964), 7 Canadian Public Administration 343.

[17] In addition, the EPC Act[10], provides that the Board, in carrying out its duties and exercising its powers under the **Public Utilities Act** must implement the power policy of the province, as declared in s. 3 of the Act, and in so doing must "apply tests which are consistent with generally accepted sound public utility practice".

[18] It follows from these provisions that a literal and technocratic interpretation and application of the provisions of the Act is to be avoided, in favour of an interpretation which will advance the underlying purpose of the legislation[11], as well as the power policy of the province and be consistent with generally accepted sound public utility practice.

[19] In answering the questions posed, therefore, it is necessary to identify generally accepted principles of sound public utility practice and to give to the legislation an interpretation which follows those principles and advances the stated legislative policy of the Province.

[20] The trade off for the regulation by the state of the rates, tolls and charges of monopolistic utilities in the interests of consumers is the statutory recognition that the utility should be entitled to earn a fair return for its efforts. Although differing in details, the regulatory statutory regimes existing throughout North America can, as a generalization, be said to be broadly similar in approach[12], although in recent

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[10] s. 4

[11] See **Bell Canada v. Canada (CRTC)** [1989] 1 S.C.R. 1722 (hereinafter referred to as the "Bell Rebate case") where Gonthier, J. in response to an argument that a regulatory board did not have a particular power because it was not expressly provided for in the legislation stated at p. 1758: "This approach to the interpretation of statutes conferring regulatory authority over rates and tariffs is only the expansion of the wider rule that the Court must not stifle the legislator's intention by reason only that a power has not been explicitly provided for."

[12] "Nearly all the boards and commissions in the United States and Canada that regulate public utility rates do so on the basis of allowing a public utility a 'return' on the 'value' of the public utility property. The return that must be allowed is usually referred to as the 'fair return' ..." per Jackson, op.cit. fn.9, p. 343. See also **Re Union Gas Ltd. and Ontario Energy Board et al** (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.) per Anderson, J. at page 710: "By way of general observation ... there are substantial similarities between the situation here and in the United

years the regulatory schemes and their coverage are being affected more and more by the trends towards deregulation.

[21] The regulatory body in question (in Newfoundland, the Board of Commissioners of Public Utilities) is generally charged with balancing the competing interests of consumers and the investors in the utility[13]. As deGrandpré[14] observed:

> This involves the Board attempting to make sure that, in the consumers' interests, the service provided is adequate and provided at just and reasonable rates and, for the utility and its investors, that those rates provide a sufficient income.

[22] This balancing of interests is found in the province's stated power policy in s. 3 of the **EPC Act** where, emphasizing the interests of the utility, it is declared that the rates charged for the power should provide sufficient revenue to the utility to enable it to earn a just and reasonable return "so that it is able to achieve and maintain a sound credit rating in the financial markets of the world"[15] while at the same time declaring that the rates should be "reasonable"[16] and that the utilities' facilities should be managed and operated in a manner that would result in power

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States, and authorities of courts in the United States are frequently referred to and considered..."

[13]**Federal Power Commission et al v. Hope Natural Gas Co.** 320 U.S. 591 (1944), per Douglas J. at page 603: "The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests"; **Northwestern Utilities Limited v. City of Edmonton** [1929] S.C.R. 186, per Lamont, J. at pages 192-193: "The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested".

[14]deGrandpré, op.cit. fn. 9, p. 20. See also **Re Union Gas Ltd. and Ontario Energy Board et al** (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.) per Anderson, J. at page 710: "... it is the function of the [Board] to balance the interest of the [utility] in earning the highest possible return on the operation of its enterprise (a monopoly) with the conflicting interests of its customers to be served as cheaply as possible". See also **Bell Canada v. Canada (CRTC)** [1989] 1 S.C.R. 1722 per Gonthier, J. at p. 1748.

[15]**EPC Act**, s. 3(a)(iii)

[16]**EPC Act**, s. 3(a)(i)

being delivered to consumers "at the lowest possible cost consistent with reliable service"[17]. This policy finds legislative expression in the regulatory mechanisms of the Act itself, which provides that a utility must provide service and facilities which are "reasonably safe and adequate and just and reasonable"[18] and prohibits a utility from charging rates, tolls and charges unless they have been approved by the Board[19] while at the same time stating as a general principle that the utility is entitled to earn annually a just and reasonable return on its rate base[20].

[23] This statutory entitlement of the utility to earn a "just and reasonable" return is the linguistic touchstone for the balancing exercise. This phrase emphasizes the fairness aspect, both to the utility, in earning sufficient revenues to make its continued investment worthwhile and to maintain its credit rating in financial markets, and to the consumer, in obtaining adequate service at reasonable rates. It also emphasizes the need for a tempering of each interest group's economic imperative by consideration of the interests of the other.

[24] Having said that, the entitlement of the utility to a fair return on its investment is always regarded as of fundamental importance[21]. In the United States, controls which fail to allow a fair return have the potential of running afoul of constitutional strictures against confiscation of property without due compensation. While the same constitutional concerns may not be present in Canada, the case law has at times nevertheless referred to the entitlement to a fair

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[17]**EPC Act**, s. 3(b)(iii)

[18]**Act**, s. 37(1)

[19]**Act**, s. 70(1). Although, unlike the legislation of some other jurisdictions, s. 70 does not expressly state that the rates approved by the Board must be "reasonable" or "just and reasonable", that standard is nevertheless imported into the approval process by virtue of the **EPC Act**, s. 3(a)(i) which declares the policy of the province to be that rates must be "reasonable".

[20]**Act**, s. 80(1)

[21]**British Columbia Electric Railway Co. Ltd. v. Public Utilities Commission of British Columbia et al** [1960] S.C.R. 837, per Locke, J. at page 848: "The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute..."

return as a "common law right"[22] which should be read into the legislation even where it is not specifically expressed.

[25] There is no uniform methodology employed in the regulatory jurisdictions in North America for the determination of a just and reasonable rate of return[23]. What recurs, however, is a theme that the process is not an exact science and depends on a variety of factors necessary to balance the competing interests involved. Rate setting is essentially a prospective exercise where determinations are made on the basis of estimates and information that will not necessarily remain static.

[26] Most jurisdictions adopt a "multiple factor" approach. The **Bluefield Waterworks** case[24] in the United States emphasized early on that the determination of a fair rate of return

> ... depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.[25]

[27] Statements such as "the company will be allowed as large a return on the capital invested in the enterprise ... as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise"[26] often occur. For the

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[22]Ibid., per Locke, J. at pages 845, 847.

[23]Ibid., per Locke, J. at page 848: "I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases ...".This observation was adopted and followed by this Court in **Newfoundland Light and Power Co. v. P.U.C. (Bd.)** (1987), 25 Admin. L.R. 180 (NFCA) at page 193.

[24]**Bluefield Waterworks and Improvement Co. v. Public Service Commission of West Virginia et al,** 262 U.S. 679 (1923). (This case has often been referred and relied upon in subsequent decisions in the United States and Canada, including in this Court. See **Newfoundland Light & Power Co. v. P.U.C. (Bd.)** supra, fn. 23 at page 193.)

[25]Ibid., page 692.

[26]**Northwestern Utilities Ltd. v. City of Edmonton** [1929] S.C.R. 186, per Lamont, J. at page 193.

rationale for such statements one need look no further than the provincial policy, stated in paragraph 3(a)(iii) of the **EPC Act** that the utility must be "able to achieve and maintain a sound credit rating in the financial markets of the world" so as to be able to raise the money necessary for the proper performance of its functions. To achieve such a goal of attracting capital, factors such as comparisons with other comparable enterprises, the respective costs of debt and equity, the capital breakdown between debt and equity and general economic conditions, amongst other things, are considered.

[28] In **Federal Power Commission v. Hope Natural Gas Co.**[27], another landmark United States case, the court emphasized that it is the "end result of the process which has to be judged as to whether the rate is "just and reasonable". As a result, in the words of deGrandpré:

> In stating that the end result was the only point of consideration, whatever the means of arriving thereat, the court opened the door to a wide variety of ways and means to arrive at a proper calculation of returns. In effect, it left the valuation of rate bases to the Commission's or Court's discretion.[28]

DeGrandpré's conclusion, based on his survey of North American regulatory regimes, is later stated as follows:

> The constantly changing economic conditions are perhaps a good reason why there should be no stringent rules for determining a rate of return. As was often stated, the process is one which calls for common sense, good judgment and a proper appreciation of all surrounding factors.[29]

[29] This approach is also reflected in the decision of this Court in **Newfoundland Light & Power Co. v. P.U.C. (Bd.)** where O'Neill, J.A., speaking for the Court in rejecting an argument that the Board of Commissioners of Public Utilities had exceeded its jurisdiction in determining a just and reasonable rate of

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[27]320 U.S. 591 (1944)

[28]deGrandpré op.cit. fn. 9, page 28

[29]Ibid., page 37

return by not adopting a particular methodology (a "comparable earnings" test), stated:

> ... it is within the discretion of the Board, having heard all the evidence and giving consideration to the various tests which may be used, to make its ruling on the basis of what in the Board's opinion will give to the applicant a just and reasonable return and permit it to maintain a sound financial credit rating.[30]

The Board therefore has a broad discretion to adopt appropriate methodologies for the calculation of allowable rates of return. So long as the methodologies chosen are not inconsistent with generally accepted sound public utility practice and the purposes and policies of the Act, and can be supported by the available opinion evidence, the determination of what constitutes a just and reasonable return in a given case will generally be within the province of the Board and will not normally be interfered with[31]. The jurisdiction of the Board must therefore be defined to enable that process to occur.

[30] Because setting the rate of return is not an exact science no matter what methodology is chosen, because the viewpoint is essentially prospective, it has been recognized that there is a "zone of reasonableness" within which a rate of return chosen by the Board should be regarded as just and reasonable. This has been expressed by the United States Supreme Court in the following language:

> Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high[32].

This notion has also at times been recognized in Canada[33].

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[30]supra, fn. 23 at page 194

[31]Ibid. page 194

[32]**Montana-Dakota Co. v. Public Service Co.**, 341 U.S. 246 (1951), per Jackson, J. at page 251

[33]**Re The Bell Telephone Company of Canada** (1966), 56 B.T.C. 535 at page 731: "We are ... not persuaded that reasonableness can, in practical terms, be expressed as a fixed point from which there can be no deviation. We therefore propose to use a range of percentage

[31] This leads to another point: because the setting of the rate of return is based on projections, one cannot be sure that the rate of return will be achieved in practice. Although the utility is "entitled" by s. 80 of the Act to have the Board determine a just and reasonable rate of return based on appropriate predictive techniques and methodologies, it is not "entitled", in the sense of being guaranteed, to that rate of return[34]. The utility therefore takes the risk that its chosen management techniques and the future economic climate may not yield its expected success. Although some of the activities of the utility are regulated within the framework of the statutory objectives, the utility nevertheless remains subject to business risks and the effects of management decisions. To that extent, the financial risks associated with the operation of the utility, just as in the case of any private business, are to be born by the investors in the enterprise, not the consumer of the service.

[32] The corollary of this position is that the utility must be accorded a degree of managerial flexibility in decision-making in order to be able to minimize the risks to which it must respond. Thus, it is often said that the powers of the Board must be regulative and corrective, but not managerial, and they do not therefore contemplate a retroactive adjustment of the actions of management.

[33] This leads to the general principle of non-retroactivity which prevents a utility from recovering expenses incurred in the past out of current rates. The utility must live with the decisions it makes and the economic vicissitudes that occur.[35]

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earnings on total average capitalization."

[34]**Federal Power Commission v. Hope Natural Gas Co.** Supra fn. 13 per Douglas, J. at page 603

[35]In **Re Northwestern Utilities Ltd. et al and City of Edmonton** (1978), 89 D.L.R. (3d) 161 (SCC), Estey, J. stated at p. 164: "The statutory pattern is founded on the concept of the establishment of rates in futuro ... [T]he Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under the rates established for past periods." [Of course, such an approach assumes that without such rates, the utility will continue to be economically viable. If poor management leads to losses that threaten the very continued existence of the utility, the Board may well have to set future rates at a level that will

[34] By the same token, it is sometimes argued that the occurrence of the reverse situation, of the utility doing better than expected, should mean that the utility should be able to reap the advantage of better and more efficient management techniques and favourable economic conditions and keep any surplus. The concern for the consumer interest is often put forward as a brake on this idea, however. The requirement that the consumer receive power "at the lowest possible cost"[36] consistent with the utility's requirement of earning a just and reasonable return for its purposes means, it is often argued, that the regulator ought to have power to ensure that excessive returns are somehow accounted and compensated for.

[35] Another factor that is referred to in the cases is the recognition that the capital structure of the utility will often have a bearing on the total cost of capital and this will therefore be important where the determination of the rate base depends on the total debt and equity capital requirements. DeGrandpré observes that "the reasonableness of the ratio of debt to equity is a question of fact left to the appreciation of the Board or Court"[37]. Thus, issues such as whether the Board can dictate to the utility a particular mix of debt and equity or, for the purpose of setting the rate of return, do so on the basis of a notional blend of capital requirements if the actual blend is not in accordance with what the Board feels is optimal to ensure a fair return as well as low rates, tolls and charges, often surface. Indeed, this issue is presented in this case.

[36] Having conducted this brief survey, I will now attempt to state some general principles to be used in the interpretation and application of the local legislation:

1. The Act should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;

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enable the utility to remain operative so as to ensure continued service to customers. This is an unlikely scenario in view of the close monitoring that the Board should exercise between rate hearings.]

[36] **EPC Act**, s. 3(1)(b)(iii)

[37] deGrandpré op.cit. fn. 9, page 26

2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;

3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;

4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;

5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.

6. The Board has jurisdiction, which will not generally be interfered with on judicial review, to make a determination of what is a just and reasonable rate of return within a "zone of reasonableness" and in so doing is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice and are not inconsistent with the achievement of the purposes and policies of the legislation.

[37] It is now necessary to consider each of the specific questions that have been posed. In approaching them, it is worth remembering that the questions have been posed in the abstract and ask for answers to broadly-identified issues of jurisdiction. The case is not an appeal and there can be no findings of fact made by this Court in arriving at its conclusions. The information provided by the

Board as to past hearings was given as background only so as to assist the Court in better understanding the scope and potential importance of the questions. While the answers given may provide guidance with respect to specific issues that have arisen in hearings in the past, they cannot be taken as an adjudication of those issues in the specific factual context in which they arose.

Question No. 1

> (1) **Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:**
>
> (i) **the rate base as fixed and determined by the Board for each type of service applied by the public utility; and/or**
>
> (ii) **the investment which the Board has determined has been made in the public utility by the holders of common shares.**

[38] It will become apparent from the ensuing discussion that a number of the questions posed on this stated case are interrelated in the sense that the answer to some of them will provide a strong impetus for a particular response in others. This is particularly evident in Question 1.

[39] The answer to Question 1 in fact involves a consideration of two sub-issues. The first relates to the legal significance of a determination by the Board on a given application of the just and reasonable return to which the utility is entitled. The second sub-issue, which is affected by the decision on the first, relates to the powers of the Board to make determinations with respect to the rate of return on a utility's common equity portion of its capital structure.

(a) The Legal Significance of a "Determination"

[40] It is to be noted that Question 1 asks whether the Board has jurisdiction to "set and fix" the utility's return whereas s-s. 80(1) of the Act speaks in terms of the utility being entitled to earn a return as "determined" by the Board. The use of this differing terminology in the question, as explained by counsel for the Board at the hearing, was designed deliberately to raise the issue as to whether the Board may, by determining the level of return, be said to be prescribing that level as an upper limit to the level of earnings to which the utility may be entitled and thereby

exercise certain powers with respect to disposition of any excess that may in fact be earned. This issue becomes more focused when Question 3 is considered. The answer to that question will, to some extent, be influenced by the power which the Board can be said to have under s. 80 with respect to the setting of a level of return.

[41] It is obvious, of course, that in the process of approving rates, tolls and charges under s-s. 70(1) the Board must determine what is a just and reasonable return on the utility's rate base in order to determine the level of revenue needed by the utility[38]. This flows from the utility's "entitlement" in s-s. 80(1) to earn that level of return. The determination of a just and reasonable return on rate base is therefore an essential component in the series of calculations which the Board must undertake in the process of approving rates, tolls and charges.

[42] If the determination of a just and reasonable return is merely a step in the process of approving rates, tolls and charges under s-s. 70(1), that is, if it is only an intermediate calculation necessary to arrive at the final result of consumer rate approval, the "determination" of a just and reasonable level of return will have no independent legal significance, in the sense of prescribing the limit of the utility's return for other purposes of the Board's functions.

[43] On the other hand, if the determination of a just and reasonable level of return has, as it were, an independent life of its own, in the sense of it not being a mere intermediate calculation but can be "set and fixed", in the sense of being prescribed, it could, for example, be used to support an argument that a utility is not entitled to earn in excess of a just and reasonable return. As indicated, this impacts directly on Question 3. While counsel for NLP suggested that there may be other mechanisms available to deal with excess earnings (by means of the use of a designated excess revenue reserve fund), that would not require the derivation of such a power from s. 80, counsel for the Board and the Consumer Advocate both indicated that they were concerned about the legal basis for the derivation of the operation of an excess revenue account from other parts of the legislation, such

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[38] "The fixing of tolls and tariffs that are just and reasonable necessarily involves the regulation of the revenues of the regulated entity": per Gonthier, J. in **Bell Canada v. Canada (CRTC)** supra, fn. 11 at page 1747

as the administrative and supervisory power of the Board to regulate a utility's accounts. It is appropriate therefore that this matter be addressed.

[44] The issue boils down to this: If the power to "determine" the return encompasses the notion of fixing, in the sense of prescribing the limits of entitlement, one would be able to derive from s-s. 80(1) a power in the Board to say to the utility that it may earn that level of return and no more. If not, the power to determine would simply be part of a calculation that leads to consumer rate setting with no independent existence or significance for regulatory practice generally.

[45] **Black's Law Dictionary**[39] explains "determine" in part as follows:

> To bring to a conclusion, to settle by authoritative sentence, to decide. ... To adjudicate on an issue presented ...
>
> To estimate ...
>
> To decide, and analogous to "adopt" or "accept" ...

[46] The **Concise Oxford Dictionary**[40] defines the word in pertinent part as:

> 1. v.t. & i. settle, decide, (dispute, person's fate ...), come to a conclusion, give decision, be the decisive factor in regard to ...; ascertain precisely, fix; ...
>
> 3. v.t. & i. (esp. Law) bring or come to an end.
>
> 4. v.t. limit in scope, define; fix (date) beforehand.

[47] For what limited value these definitions can have in this context, it would appear that the primary meaning of the word determine, with its emphasis on coming to a final decision and amounting to a decisive factor as well as the notion of ascertaining something precisely and "fixing", encompasses something more than a mere calculation in a broader process.

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[39] 4th ed. rev., 1968

[40] J.B. Sykes (ed), 7th ed.

[48] Having said that, it is to be noted that s-s. 80(1) is structured in such a way that its emphasis is on the entitlement of the utility to a just and reasonable return, as determined by the Board, rather than involving the express conferral on the Board of a power to prescribe the level of return. The structure of the subsection could be said to be directed towards establishing a minimum base line of entitlement without saying anything expressly about the power of the Board to create a cap. To put the matter beyond doubt, the insertion of the words "and no more" after the language entitling the utility to a just and reasonable return would certainly have clearly indicated a prescriptive power in the Board, if that had been intended. Furthermore, although the return is referred to as being "determined" by the Board, the subsection goes on to indicate that the return so determined is applied to the rate base "as fixed and determined" by the Board. On a strict linguistic analysis alone, the use of the word "fixed" in conjunction with "determined" in one place would imply that its absence in the other was deliberate.

[49] Notwithstanding these matters, I am not satisfied that a linguistic analysis of the subsection can provide the answer in this case. Even a cursory perusal of the remaining provisions of the Act indicates that there is no uniform terminology chosen to describe the various decision-making functions in which the Board may engage. For example, the Act provides that the Board may "inquire into and determine"[41] the valuation of a utility's assets and may "determine"[42] those values in accordance with a number of stated rules. It may "ascertain and determine"[43] what are proper and adequate rates of depreciation of classes of utility property. Its role with respect to the utility's rates, tolls and charges is one of "approval"[44].

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[41] s. 64(1)

[42] s. 64(2)

[43] s. 68(4)

[44] s. 70(1). This provision makes the scheme administered by the Board a "positive approval scheme" (requiring advance approval of rates as being reasonable) rather than a "negative disallowance scheme" (permitting the utility to set its own rates subject to user objection, which would only then trigger a review into reasonableness), as those terms were explained by Gonthier, J. in the **Bell Rebate** case, supra, fn. 11 at p. 1758.

Indeed, if there is any decision of the Board which is contemplated as having operative legal effect and to amount to a "fixing" of the utility's rates, tolls and charges from which the utility may not deviate, it is the "approval" contemplated in this regard; yet the word "fix" does not appear. In another context, the Board may "fix and determine"[45] a separate rate base for each kind of service supplied by a utility; yet when describing what is to be included in the calculation of rate base, the reference to "determine" is dropped and it is simply described as "fixing a rate base"[46]. Finally, the term "approval" surfaces again in the context of the power of the Board to authorize new stock issues of the utility[47].

[50] To resolve this conundrum, resulting from inconsistency in terminology, resort must be had to the purposes of and policies underlying the legislation as mandated in s-s. 118 of the Act as well as s. 4 of the **EPC Act**. As indicated previously,[48] the Board is required, in carrying out its functions under the Act, to balance the interests, as identified in the legislation, of the utility against those of the consuming public. The notion of a "just and reasonable return" in s-s. 80(1) is the benchmark against which fairness to the utility and the consumer is to be measured. It is pivotal in the balancing exercise. The interests of the consuming public in obtaining power at the lowest possible cost consistent with reliable service[49] must accommodate the utility's interest in being afforded the opportunity to earn a fair rate of return for its efforts. In the methodology adopted by the Board, the approval of appropriate rates, tolls and charges necessarily factors the just and reasonable return, and only that level of return, into that calculation. Otherwise, the interests of the consumer would not be protected in obtaining power at the lowest possible cost. It is therefore inherent in the process that in determining a just and reasonable return for the utility, the utility should have the opportunity of earning that return but, other things being equal, should not expect to earn any more. Accordingly, determining the just and reasonable return

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[45] s. 78(1)

[46] s. 78(2)

[47] s. 91(1), (3)

[48] supra, paragraphs [21] -[23]

[49] **EPC Act**, s. 3(b)(iii)

necessarily involving prescribing the return and in that sense can be said to amount to "setting and fixing" the rate of return.

[51] It follows from this that the use of the word "determine" can, in the context of the use of that and other terminology in the Act, encompass something more than the notion of mere calculation and extends to the idea of prescribing, or fixing, a level of return in the nature of a legal decision which can bind and have effect on the utility for other purposes related to the Act.

(b) <u>The Power to Set and Fix the Level of Return on Common Equity</u>

[52] In order to determine the just and reasonable return on rate base to which the utility is entitled by s-s. 80(1), the Board must first determine the cost to the utility of the various components of its sources of funds. The costs associated with long term debt and preference shares are generally static over the period covered by a particular rate hearing. Accordingly, they are often described as "embedded costs". The rate of return necessary to be earned on rate base to cover the cost of debt and preference shares can therefore usually be easily determined based on the interest rates or dividend rates applicable to such instruments. In the case of common equity, however, the cost to the utility of this source of funds depends upon a number of factors, especially current market conditions which, by nature, can be volatile.

[53] At a rate hearing, therefore, the Board usually faces a greater difficulty in determining the component of rate of return on common equity than on the other sources of funds because their embedded costs are usually well defined.

[54] Since the rate base is financed by a combination of debt, preference shares and common equity, the rate of return on which is different for each component, the overall rate of return on rate base is calculated as a weighted average of the rates of return on the various individual components.[50]

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[50]See, e.g., Board Order P.U.6 (1991), page 72

[55] As a generalization, it is sometimes said that the cost of common equity is often higher than that of debt[51]. The rate of return on common equity may therefore be expressed as a percentage which is higher than the overall rate of return on the full rate base because the higher equity cost will be weighted downwards by the rates for the other components.

[56] The issue raised by Question 1(ii) is whether the Board may set and fix the rate of return on common equity, as a component of the overall rate of return on rate base in a manner such that it can be used as an independent benchmark for other purposes in the same way as the overall determination of return on rate base can be. Alternatively, is the "determination" of the rate of return on common equity to be treated in the narrower sense of a mere calculation leading to the final determination of overall return?

[57] Subsection 80(1) makes no reference at all to determining, let alone setting and fixing, the rate of return on common equity. The calculation of an appropriate rate of return on common equity is truly a mere component in the overall process of determining a just and reasonable return on rate base. Furthermore, there is nothing in the purpose of the Act or the policies which the Board is to implement which would lead inexorably to the conclusion that the Board ought to have the power to prescribe a rate of return on common equity as a component of an overall return or rate base, any more than it ought to have a power to prescribe a return on any other component.

[58] The Consumer Advocate submitted that inasmuch as s-s. 80(1), by its express language, contemplates that the only measure of what NLP may earn annually is to be determined by a just and reasonable return on rate base, to allow the utility to measure what it may earn annually based upon a different factor, such as a rate of return on common equity which could very well be higher than the overall rate of return on rate base and might lead to a higher overall return that could be said to be justified, would be to allow the utility to earn more than that to which it is statutorily entitled.

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[51]Phillips, op.cit., fn. 9, p. 389

[59] It is to be noted, however, that in its previous orders[52] the Board has not sought to determine the level of return on the basis of anything other than a rate of return on rate base. For example, in the 1991 Order, the Board ordered:

> A just and reasonable return for [NLP] is determined to be between 10.96% and 11.19% on its average rate base for 1992, which will provide an opportunity to earn a rate of return on common equity between the range of 13.00% to 13.50%.
>
> [Emphasis added]

The reference to the range of rates of return on common equity appears to have been inserted more as information in support of a rationale for the determination of the overall return on rate base, since the Board states that the determination of the return on rate base "will provide" an "opportunity" to earn a rate of return on common equity. Similarly, the 1996-97 Order simply described the rate of return on rate base as being "derived from" a given range of return on common equity. This is the correct approach.

[60] As to whether the Board may make other decisions, for example relating to the manner in which an excess revenue fund should be maintained, by reference to the contemplated rate of return on common equity, is a separate matter which should be dealt with in that context.

[61] I therefore conclude that the power to "determine" a just and reasonable return on rate base, as contained in s-s. 80(1) does not include within it a power to "set and fix a rate of return on common equity" but it obviously does contemplate that the analysis of appropriate rates of return on common equity will be undertaken and factored into the conclusion as to what is a just and reasonable return on rate base.

[62] Accordingly, giving the words "set and fix" in the question a meaning which implies the notion of prescribing, I would answer Question 1 as follows:

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[52]See, e.g. P.U. 6 (1991) and P.U. 7 (1996-97)

As to:

1. (i) - Yes

1. (ii) - No

Question No. 2

> **(2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return.**

[63] In light of my answer to the second part of Question 1, it is only necessary to address Question 2 in the context of whether the Board has jurisdiction to set the rate of return on rate base as a "range of permissible rates of return".

[64] It has already been stressed that the determination of a just and reasonable return on rate base involves a consideration of the differing costs of the components of the utility's capital structure and that in arriving at the overall rate of return, it is permissible for the Board to use a weighted average of the rates associated with each individual component. It has also been pointed out that the cost of common equity is often difficult to estimate with precision. The best that experts are often able to do is estimate rates within a reasonable range. Inasmuch as the cost of common equity is weighted into the overall rate of return on rate base, that range would also have to be reflected in the ultimate rate of return on rate base, as determined by the Board.

[65] In **Northwestern Utilities Ltd. v. City of Edmonton**[53] Smith, J. emphasized:

> The question of a fair rate of return on a risky investment is largely a matter of opinion, and is hardly capable of being reduced to certainty by evidence, and appears to be one of the things entrusted by the statute to the judgment of the Board.

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[53]Supra fn. 13 at p.199

[66] It is evident, as **Newfoundland Light & Power Co. v. P.U.C. (Bd.)**[54] demonstrates, that the determination of a just and reasonable return is an area in which the Board is accorded a broad discretion as to the methodology to be adopted. Obviously, the striking of a balance between the interests of the utility and the consumer, whilst at the same time attempting to comply with the Board's obligation to approve rates which will produce a fair return to the utility, cannot be done with the precision of a simple mathematical calculation. Realistically, the balance can only be struck within a reasonable range. It is for that reason that the courts have, on subsequent appeal or applications for judicial review, generally deferred to the determinations of boards in this regard provided the determination is not arbitrary or capricious and can be said to fall within a reasonable range.[55] As indicated in the earlier discussion[56], in the United States the notion of a "zone of reasonableness" as an "area rather than a pinpoint" has been recognized. Whilst this notion has been enunciated as a justification for deference to Board decisions in the context of challenges on appeal or judicial review, it nevertheless indicates a recognition of what is inherent in the rate setting process.

[67] I see no reason, therefore, why, instead of attempting to justify a particular decision ex post facto by an argument that a particular rate falls within a zone of reasonableness, the Board could not expressly indicate what it believes that area of reasonableness to be by expressing what it believes to be a just and reasonable return in terms of a range of rates of return. This indeed is a practice that has been adopted elsewhere[57]

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[54]supra fn. 23

[55]**Re Union Gas Ltd. and Ontario Energy Board et al**, supra fn. 12

[56]para.[30]

[57]See **Bell Canada v. Canada (CRTC)**, supra, fn. 11 at page 1733. Yvonne Penning, "The 1986 Bell Rate Case: Can Economic Policy and Legal Formalism be Reconciled" (1989), 47 U of T Fac. L.R. 607 observes at p. 617: "The CRTC has developed the practice of setting the allowed ROE on the basis of a one percentile range. While only one actual ROE - usually the middle of the range - is used in the calculation of rates to be charged customers, all rates encompassed by the range, in theory, represent a reasonable return. One reason for setting such a range is that it explicitly provides some incentive for the company to be efficient; financial rewards due to efficiency or productivity gains would accrue to the company's shareholders, rather than being passed on to consumers through lower prices." Another rationale for a range

[68] It is to be noted that s-s. 80(1) does not speak in terms of a "rate" or "rates" of return; rather, it speaks of a just and reasonable "return". It is not limited by its language to the pinpointing of a particular rate of return. I conclude that a liberal construction of the word "return" in the context of s-s. 80(1) leads to the conclusion that it can include a range of rates of return.

[69] Of course, in applying the rate of return to the rate base, as ascertained by the Board, a single figure will have to be used since rates, tolls and charges are expressed as finite numbers. The Board in practice has chosen the mid-point of its stated range of rates of return as the figure to be used for this purpose. This is a perfectly acceptable practice for the purpose of setting the rates. By expressing a range, however, the Board leaves open to the utility the flexibility of earning more than the mid-point up to the maximum end of the range so as, in effect, to give the benefit of the doubt to the utility that the expert evidence favouring the upper end of the range turns out to be the more accurate and to provide an incentive to the utility towards managerial efficiency.

[70] The Consumer Advocate expressed concern in argument that the use of the word "permissible" in Question 2, as qualifying the phrase "rates of return", might be misleading. As I understand the argument, the concern is that the adoption of a range approach might lead to the conclusion that the "entitlement" of the utility to a just and reasonable return would be regarded as an entitlement, or guarantee, of earning up to the maximum end of the range. While the utility, if it earned as much as the maximum would be entitled to keep that amount of earnings, it is not, for reasons already given, guaranteed that level of return if it is not in fact successful in earning them. The Board is under no obligation to adjust future rates or to take other steps to make up any such shortfall. Any rate of return earned within the range would be regarded as permissible and it is only when a rate of return exceeds the upper limit of the range that it would be regarded by the Board as subject to any excess revenue regulation.

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approach is given by Penning later in her article at p. 621 where, after noting that the U.S. Federal Communications Commission also employs ranges, states: "... it also serves a very useful administrative function in that it limits the circumstances under which it would be necessary to alter rates on a prospective basis, within the time period for which the range of rates of return was deemed to be reasonable, in response to changing economic circumstances."

[71] Accordingly, recognizing that, on my analysis, Question 2 only relates to whether the Board has jurisdiction to set rates of return as a range in relation to its determination of a just and reasonable return on rate base, the answer I would give to Question No. 2 is: "Yes".

Question Nos. 3 and 4

(3) **Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:**

(i) **the base rate as fixed and determined by the Board for each type of service applied by the public utility; or**

(ii) **the investment, which the Board has determined, has been made in the public utility by holders of common shares,**

does the Board have jurisdiction to:

(i) **require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or**

(ii) **require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or**

(iii) **require the public utility to rebate the excess earnings to customers of the public utility.**

(4) **Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,**

(i) **the rate base as fixed and determined by the Board for each type of service applied by the public utility, or**

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years.

[72] The analysis leading to the answers to Questions 3 and 4 can be considered together since they both address the same general theme: the scope of the Board's powers to deal with situations where a utility in fact earns a rate of return that is greater than that determined to be a just and reasonable return.

[73] It was suggested by counsel for NLP that the concept of "excess earnings" does not exist under the Act other than by reference to a definition of what is to be deposited into a reserve fund which the utility may be ordered to create and maintain pursuant to s-s. 69(3) of the Act. This submission follows from the position taken by NLP that the Board has no power under s-s. 80(1) to "set and fix", in the sense of prescribing, a maximum rate of return. NLP had submitted that the Board's power to deal with excess earnings comes solely from its statutory powers to prescribe the form of accounts to be maintained by the utility[58] and to create a reserve fund "for a purpose which the Board thinks appropriate"[59] which could include the purpose of dealing with excess returns. This argument has already been rejected in the analysis relating to Question 1. It follows, therefore, that the issue of excess earnings may present itself for consideration by the Board in circumstances even where a reserve account has not been ordered to be set up. For the purpose of regulation by the Board, the concept of excess earnings is derived from the process of prescribing a just and reasonable return on rate base and not by the decision to require the creation of a reserve account. The question to be considered is what enforcement mechanisms the Board may use to deal with excess earnings so identified.

[74] If, as determined in the answer to Question 1, the Board has jurisdiction flowing from s-s. 80(1) to prescribe the maximum rate of return which a utility may earn in a given year, it is a necessary consequence of such a determination that revenue earned in excess of the maximum of the prescribed range of return is

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[58] s. 58

[59] s. 69(3)

excess revenue to which, by definition, the utility will not be entitled. The Board accordingly must have jurisdiction to regulate how that excess revenue is to be dealt with.

[75] Question 3 requires the Court to consider the range of enforcement mechanisms which the Board may employ to ensure that the utility does not benefit from any windfall profits resulting from earnings in excess of the just and reasonable return to which it is entitled. Three scenarios are proposed:

(1) use excess earnings to reduce revenue requirements for the succeeding year ("Revenue Reduction Approach");

(2) place the excess earnings in a reserve fund to enable an adjustment of rates, tolls and charges at a future date ("Reserve Fund Approach");

(3) require a rebate of excess earnings to consumers ("Rebate Approach").

Question 4 is really a subset of the Revenue Reduction Approach. In one sense it really asks the same question as in Question 3(i) but does not limit the process to the application of excess earnings to only the year next succeeding the year in which the excess earnings have been achieved. It appears to ask the Court to address the question of whether, in the absence of the existence of a reserve account, the Board may, upon being made aware of excess earnings in prior years, reach back into those prior years and take account of those excess earnings by using them to reduce rates, tolls and charges in subsequent periods below what would otherwise be indicated.

[76] In approaching these questions, it is important to bear in mind the nature of the rate setting process and the general principles which are recognized as being applicable to govern the manner in which that process is carried out.

[77] The process of rate setting is generally prospective by nature. Although the Board must set rates for the future, it only has data from past experience, the evidence from utility officials as to planned changes in operations and the opinions of experts as to future economic trends as a guide to what the revenue requirements of the utility will likely be. It is, therefore, necessarily speculative. In developing the utility's requirements, the Board focuses on a "test year" as the

basis for its estimates and adjustments. Traditionally, in North America the test year was chosen as the latest 12 month period for which complete data were available.[60] More recently, due largely to inflation, boards adopted a forward-looking test year which in effect amounts to a forecast of what expenses and costs, and hence revenue requirements, will be. This has been the practice of the Board[61] and is supported by the Act[62] and the **EPC Act**[63]. Past experience of course remains relevant, however, insofar as it gives insight into the possibility of forecasting error.[64]

[78] Because the process is prospective, there is a good possibility that all of the assumptions will not be achieved in practice. The actual rate of return may therefore differ from the rate, or range of rates, prescribed at a previous hearing. On paper, this difference may appear to redound to the benefit or detriment of the utility depending upon whether the actual rate is greater or less than the rate or range prescribed.

[79] When, as a result of actual experience, it appears that the actual rate of return was greater than the rate prescribed for the same period, it becomes necessary to address what the Board can do, if anything, to ensure that the earnings in excess of the prescribed level, (which by definition will be regarded as greater than a just and reasonable return on the rate base), are not allowed to remain with the utility or its investors. In the **Bell Rebate** case[65], Gonthier, J. observed that differences between projected and actual rates "call for a high level of flexibility in the exercise of the [Board's] regulatory duties".

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[60]Phillips, op cit. fn. 9, page 196

[61]See, eg. Board Order P.U.6 (1991), page 81

[62]S. 80(4)

[63]S. 3(a)(ii)

[64]**Northwestern Utilities Ltd. v. City of Edmonton**, supra fn. 35, per Estey, J. at p. 170: "... the Act does not prevent the Board from taking into account past experiences in order to forecast more accurately future revenues and expenses of a utility".

[65]supra, fn. 11 at p. 1734.

[80] Those opposing a broad jurisdiction on the part of the Board to define and deal with excess revenue couch the objection, at least in part, in terms of a violation of the non-retroactivity principle.[66] In its narrow sense, it is a principle of benefit to consumers, that "today's rate payers should pay the cost of today's services and not the cost of past or future services"[67]. More broadly, it also yields a presumption (which is of benefit to the utility as well), flowing from the idea that the Board acts prospectively in setting rates, that the Board cannot or, even if it has jurisdiction, should not as a general rule, make orders that have the retroactive effect of disturbing existing rights already enjoyed by the utility. In practical terms, it leads to the argument that where rates, tolls and charges have been approved by the Board as being permissible for the utility to charge, the Board cannot or should not make a subsequent order that has the direct or indirect effect of reducing or otherwise changing those rates. In other words, changing past transactions or attaching new consequences to past transactions would be prohibited.

[81] As Penning points out[68] the retroactivity rule has its genesis in general rules of statutory interpretation that guard against interpreting a statutory provision as having a retrospective operation unless it is clear that such an effect was intended. It is not an immutable rule but can give way to contrary legislative intention.

[82] Doctrinally, in the context of utility rate regulation, the retroactivity principle is described by Penning in this way:

> ... the rule is concerned more with issues of fairness, both to customers and to utility shareholders. The customer-related fairness issue is often referred to as the "inter-generational equity" problem, which, broadly stated, means that today's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers. The fairness concern in terms of utility shareholders arises because to attract and maintain reasonably-priced equity

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[66]See supra, para. [33]

[67]**Wabush (Town) v. Power Distribution District of Newfoundland & Labrador** (1988), 71 Nfld. & P.E.I.R. 29 (N.F.C.A.), per Goodridge, C.J.N. at p. 33.

[68]op cit. fn. 57, pp. 608-610

> investment in a utility, shareholders require some certainty that matters already dealt with by the regulator have some degree of finality associated with them.[69]

[83] It was argued that one of the questions that is theoretically presented in this case is the degree to which the Board is authorized to trespass on the no-retroactivity principle in fulfilment of its legislative powers, specifically, to enforce a prescription that a utility may earn a just and reasonable return and no more.

[84] In reality, however, in light of the prospective nature of this Opinion, the non-retroactivity principle is not, in practical terms engaged by Question No. 3. The answers to previous questions have already established that the concept of excess revenue is to be determined by reference to the meaning of a "just and reasonable return" as that phrase is understood in ss. 80(1); and not by the definition used to operate an excess revenue account. All participants in the regulatory process must therefore take account of that concept and conduct their activities accordingly. The "rules of the game" are known.

[85] Section 59 of the Act requires the utility, unless otherwise ordered by the Board, to close its accounts at the end of each calendar year and to file with the Board its balance sheet, together with such other information as may be required by the Board, before April 2nd of the following year. Effectively, therefore, within 3 months after the utility's year end, both the utility and the Board will know the financial position of the company for the previous year and from that, as well as any other information which the Board may require, a determination of the actual level of return earned by the utility in the previous year can be made. Applying the known definition of excess revenue, by reference to the upper end of the range of return on rate base, as determined by the Board's prior orders under ss. 80(1), it can be determined whether there has been any excess revenue earned. There is no revisiting and revision of a prior order respecting the allowable return on rate base. The examination of actual results in the context of a comparison with the previously prescribed rate merely leads to enforcement of the original order. Any decision by the Board with respect to disposition of excess revenue will therefore not retroactively interfere with past revenues which the utility assumes belong to it and which may be disbursed to shareholders or otherwise

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[69] Ibid, p. 610

spent. Given the concept of excess revenue, as explained in this option, the utility knows in advance that it is not entitled to excess revenue so defined and may institute whatever accounting practices are necessary to segregate and deal with such revenues pending direction from the Board.

[86] The situation is conceptually no different from the concept behind an excess revenue account set up under ss. 69(3), which the utility accepts as a legitimate way of dealing with such revenue. Just as in the case of an excess revenue account, the definition of excess revenue is known in advance and the utility can account for such revenue accordingly.

[87] The scenario contemplated by Questions 3 & 4 is unlike the situation which arises where an interim order setting rates, tolls and charges is subsequently superseded by a final order, resulting in excess revenue being earned in the intervening period because the rates, tolls and charges charged in that period pursuant to the interim order were higher than those which were ultimately found to be justified in the final order. In that situation, if the final order is treated as being operative as and from the date of the interim order that was superceded, the final order will, indeed, have a retroactive effect. In the context of the Newfoundland legislation, that situation is specifically contemplated and authorized by ss. 75(3) of the Act.

[88] In the situation presently under consideration, however, there is no subsequent order of the Board which retroactively changes previously-approved rates, tolls or charges or revises the prescribed level of return to which the utility is entitled. All that occurs is the subsequent examination of actual results and a determination of whether excess revenue was in fact earned by applying a pre-existing standard derived from a previous Board order made under ss. 80(1).

[89] I recognize that, to the extent that the utility in the past may have been operating under the impression, perhaps engendered by positions taken by the Board, that excess revenue need only be calculated by reference to the excess over the rate of return on common equity as defined for the purpose of operating the existing excess revenue account, it may consider that if the concept of excess earnings as discussed in this Opinion is applied at this stage to those previous years, there may effectively be a change in the "rules of the game". In that practical sense, there would be a "retroactive" readjustment.

[90] The Court is not being asked, however, to determine the position of the utility specifically in relation to the years 1991 through 1996 and to determine the entitlement of the utility to excess revenues as calculated by reference to the current definition. The degree of NLP's misapprehension, if any, the actions of the Board in dealing with the excess revenue issue in the past, the degree to which NLP may have acted to its prejudice, and the degree to which the utility may nevertheless be required to disgorge excess revenues in previous years in accordance with presently understood concepts raise complex issues of mistake of law in the law of restitution and the defence of change of position which require for their resolution a detailed factual base. It would be inappropriate to attempt to answer such questions in this Opinion.

[91] The issue, therefore, is not whether the Board may revise the definition of excess revenue and then apply the revised definition to the results of previous years. That might well engage the principle of non-retroactivity. Here, assuming (without deciding) there was a misapprehension in the past as to how excess revenue should be calculated, the "change" in calculation method comes about, not because of a retroactive change in the rule by the Board but by a (perhaps) unanticipated declaration and clarification by the Court of what the law is and how it is or should be applied.

[92] I turn now to the determination of the powers of the Board to deal with excess revenue once it has been determined to exist.

[93] The only express provisions of the Act dealing with excess revenue are s-s. 69(4) which provides a power to require a utility to refrain from distributing extra revenue as dividends until further order, and s-s. 75(3) which enables the Board to order that excess revenue earned as a result of an "interim order" made under s-s. 75(1) and not confirmed by final order be either refunded to customers or placed in a reserve account for an approved purpose. Does the fact that similar powers are not expressed in respect of "final" orders mean that they were not intended to be available?

[94] I do not believe so. The power to deal with excess revenue is inherent in the nature of the regulatory scheme the Board is required to administer. The starting point is the power, found to exist in the answer to Question 1, that the Board may

prescribe a rate of return under s-s. 80(1) which carries with it the necessary corollary that the utility is only entitled to earn that level of return, as determined by the Board to be just and reasonable. It follows that unless the Board is to be a "toothless tiger" it must be accorded the means by which revenues earned in excess of the prescribed level of return are used in furtherance of the objectives and policies of the legislation and not simply for the benefit of the utility's investors. Such policies as the maintenance of a sound credit rating by the utility[70], the efficient production, transmission and distribution of power[71], the delivery of power at the lowest possible cost[72] and the provision of reliable service[73] are all candidates for the use of the excess. It does not follow, as the Consumer Advocate argued, that any dealing with the excess should involve only a return or rebate to consumers so as to ensure that the goal of delivery of low cost power is vindicated. While the maintenance of low rates is an important objective of the legislation, it is not the only one. As emphasized earlier,[74] the Board is always engaged in a balancing exercise between the interests of the consumer and the interests of the utility. It is not correct to say that any revenues earned in excess of a just and reasonable return belong to the consumer. Just as the utility is not "entitled" to earn and retain revenues in excess of such a level of return, so also the consumer is not absolutely "entitled" to the excess. The Board, having identified that an excess exists, must deal with it in furtherance of the objectives of the legislation.

[95] The means whereby the excess is dealt with should not be, unless expressly limited by the legislation, rigidly prescribed provided the means chosen comport with the objectives and policies of the legislation. It is worth repeating Gonthier, J.'s observation in the **Bell Rebate** case that the fact that the differences between

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[70]**E.P.C. Act**, s. 3(a)(iii)

[71]s. 3(b)(i)

[72]s. 3(b)(iii)

[73]s. 3(b)(iii)

[74]Paras. [21]-[23]

projected and actual rates of return are common calls for "a high level of flexibility in the exercise of the [Board's] regulatory duties".[75]

[96] Counsel for NLP argued that the only power of the Board to deal with excess revenue, aside from interim order situations, flows from its power in s. 58 to prescribe the form of books and accounts to be kept by the utility and that, if it ordered, pursuant to s-s. 69(3), the creation of a reserve fund "for a purpose which the Board thinks appropriate", it could stipulate that the accounts should be kept in such a way as to require excess revenues to be accounted for in such a reserve account. I do not find the jurisdiction to deal with excess revenue in the power to prescribe the utility's accounts. That is only a procedural means of exercising powers, the jurisdiction for which must be found elsewhere. Whilst the creation, pursuant to s-s. 69(3), of a reserve fund to deal with excess revenues could be said to be "a purpose which the Board thinks appropriate" (provided that purpose is consistent with the powers otherwise conferred on the Board), there is nothing in the language of s-s. 69(3) which expressly makes it applicable to an excess revenue situation and there is certainly nothing there which would purport to make the use of a reserve fund for the purpose of dealing with excess revenue as the only mechanism which would be at the Board's disposal to deal with this issue.

[97] I conclude that, bearing in mind the approach to interpretation mandated by s-s. 118(2) of the **Act**, the Board must of necessity have broad powers to deal with revenue earned by a utility in excess of the prescribed rate of return. Inasmuch as the ascertainment of the existence of excess revenue can only be made following a subsequent review, any order dealing with excess revenue will of necessity have certain retrospective elements about it. But that is not the same as saying that an order dealing with excess revenue ascertained by application of a pre-existing concept of what constitutes excess revenue is a retroactive order. It was argued by NLP that the setting up of a reserve account would be the only method that would not involve any trespass on the principle of non-retroactivity because the utility would know in advance that it had to set up its reserve account and could therefore provide for it without running the risk of spending or distributing excess revenues in ignorance of the fact that they would have to be held accountable for them.

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[75]Supra fn 11, at p. 1734

[98] For reasons already given, this argument is unconvincing. By virtue of the answers given to Question 1, the utility knows that it is only entitled to earn a just and reasonable rate of return pursuant to any order made by the Board to that effect under s-s. 80(1). It can monitor its financial progress and can organize its accounts in such a way as to account for excess revenue so as to prevent the possibility of it being disposed of before any subsequent order dealing with the excess may be made. The utility does not need an express order of the Board requiring it, as a general rule, to set up a reserve account for this purpose. Nevertheless, the use of a reserve account is a convenient way of doing this. It may well be, however, that the Board may, through other directions with respect to the manner of keeping accounts, develop other accounting procedures that will enable the utility to identify excess returns and to segregate them for other use.

[99] A reserve fund could be ordered by the Board to be used in the future to improve service, or to keep rates low or for some other purpose that is consistent with the objectives and policies of the legislation. Whether the advancement of these policies is done formally through the use of a reserve fund or through some other mechanism such as an order setting further rates, tolls and charges taking the prior excess revenue into account, the utility should not be prejudiced, in light of the fact that it knows that it is not entitled to earn a return in excess of a just and reasonable return.

[100] A rebate to consumers would also be permissible since it would have the indirect effect of ex post facto keeping the rates low. While it is true that any rebate would not, because of the fluid nature of the customer base, result in a return to exactly the same body of consumers who had paid the original rates, this is not an insuperable objection to using this type of mechanism. Penning[76] observes:

> As a practical matter, however, at least some of this concern appears misplaced. By far the majority of today's rate payers for the majority of regulated public service utilities were also yesterday's rate payers - especially since the time frames at issue are typically not more than a year or two. So the unfairness argument about cost allocation loses some of its force. Furthermore, to the extent it is still present, it can be dealt with through the choice of mechanism design - so

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[76]Op.cit. fn. 57 at page 619

> instead of adjusting all rates, through either surcharges or refunds, the individual customers who met the timing criteria would receive an adjustment to their bill.

[101] This recognition was echoed by Gonthier, J. in the **Bell Rebate** case[77] as follows:

> ... it is true that the one time credit ordered by the appellant will not necessarily benefit the customers who are actually billed excessive rates. However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one time credit is not the perfect way of reimbursing excess revenues. However, in view of the cost and the complexity of finding who actually paid excessive rates, where these persons reside and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in weighing the many factors involved in apportioning respondent's revenue requirement among its several classes of customers to determine just and reasonable rates, the appellant's decision was imminently reasonable ...

[102] Accordingly, I conclude that each of the Revenue Reduction, Reserve Fund and Rebate approaches to dealing with excess returns are within the jurisdiction of the Board and could, in particular circumstances, all constitute reasonable responses to a finding that the utility has earned in excess of a just and reasonable return.

[103] I would also add that the setting up of a reserve fund in a given case does not exhaust the ways in which the Board may deal with excess revenue. The methodologies proposed are not mutually exclusive. The Board has jurisdiction to deal with all revenue in excess of a just and reasonable return on rate base using one, or a judiciously blended combination, of the methodologies identified.

[104] Having said that, it must be emphasized that just because the Board has the jurisdiction to use these approaches, the particular circumstances may well dictate that one or more of them may be inappropriate in a given case. For example, the ordering of a rebate to consumers of the total amount of an excess return might not, in the light of the general financial condition of the utility, be appropriate

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[77] supra, fn. 11 at page 1762 - 3

when measured against such legislative objectives as the maintenance of the utility's sound credit rating. It might be appropriate, when all of the interests are properly balanced, for the Board, for example, to order that only the excess over a stipulated rate of return on equity, or some other measure, be refunded or otherwise dealt with. These are all matters to be considered by the Board in a given case.

[105] The answers to Questions 3 and 4 can be given as follows:

As to: 3(i) - Yes
3(ii) - Yes
3(iii) - Yes

[106] The answer to Question 4 is also "yes" on the assumption that what is being asked is not whether the Board may retroactively revise a previous order but merely whether, applying a defined and understood concept of excess revenue, (ie. an excess of a just and reasonable return on rate base) the excess so determined to have existed in prior years may then be taken account of and applied in setting future rates, tolls and charges.

Question 5

> **Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question (4).**

[107] In order to understand the import of this question, it is necessary to review the approach taken by the Board to the definition of excess earnings in past years.

[108] In correspondence passing between NLP, Newfoundland Telephone Company Limited (which at that time was regulated by the Board) and the Board during the late 1980's, there was considerable discussion as to the manner of

defining "excess revenue" for the purpose of the operation of the reserve account which the Board had required the utilities to maintain for that purpose. As a result of these discussions, the Board approved a change in the utilities' systems of accounts to recognize a new definition of excess earnings. As indicated, this was accomplished by defining the excess revenue account in the utilities' system of accounts as follows:

> This account shall be credited with any revenue in excess of the maximum return on common equity determined by the Board at the previous rate hearing to be refunded to customers or used for such purposes as the Board may order.

[109] By the operation of this definition, the situation could occur whereby the utility might earn a rate of return on rate base in excess of the maximum range of returns determined by the Board pursuant to s-s. 80(1) but could nevertheless be within the range of return on common equity used by the Board for the purpose of determining a just and reasonable return on rate base under s-s. 80(1). If that eventuality occurred, there would be no requirement on the utility to pay anything into the excess revenue account; yet, the result would be that the utility would have earned more than a just and reasonable return on rate base. In light of the answer given to Question 1, the benchmark for determining excess revenue is the range of return on rate base determined by the Board to be just and reasonable. Does the Board have jurisdiction to deal with this money as excess earnings in light of the fact that it has defined excess earnings for the purposes of the utility's accounting by reference to the maximum return on common equity?

[110] Question 5, we were told, attempts to address this issue. As phrased, however, the question merely asks whether the fact that the Board has "advised" (presumably, in the form of its order changing the definition of excess revenue for the purposes of the establishment of the excess revenue account) the utility of this new definition of excess revenue "affect" the jurisdiction of the Board to approve rates, tolls and charges. The short answer to this question, strictly construed, is "no". The Board cannot limit its jurisdiction, in the sense of its legal power, by determinations made in exercise of its powers. It either has the jurisdiction or it does not. Whether it chooses to exercise the jurisdiction is another matter.

[111] As a result of the discussions at the hearing, however, it is apparent that there is a more fundamental issue at stake. The assumption appears to be that if

the Board chooses to define excess revenue for the purpose of establishment of the excess revenue account in terms of revenue earned in excess of the maximum return on common equity, it is in effect saying that revenue earned below that maximum but which happens to be in excess of the just and reasonable return on rate base as determined by the Board under s-s. 80(1) is necessarily money which the utility can keep. This position is obvious from the arguments made by counsel for NLP since his position has been throughout that excess revenue has no meaning other than by reference to the definition used for the purposes of the excess revenue account. As indicated previously,[78] this is not a correct interpretation of the situation. The same assumption is also apparent from the position taken by the Consumer Advocate who argues that the decision of the Board to define excess revenue for the purpose of the excess revenue account in terms of exceeding the return on common equity, as opposed to rate base is ultra vires the Board because the Board must determine excess revenue by reference to revenues which are earned in excess of a just and reasonable return on rate base.

[112] The assumption that the definition of excess revenue for the purpose of the operation of the reserve account is equivalent to the concept of excess revenue flowing from earnings in excess of a just and reasonable return on rate base as prescribed under s-s. 80(1), is false. I agree with the Consumer Advocate, for reasons already given[79], that any revenues earned in excess of the maximum range of a just and reasonable return on rate base are revenues to which the utility is not automatically entitled. It does not follow, however, that for the purposes of regulating the accounts of the utility, the Board is prevented from requiring payment into an excess revenue account on a different basis (provided it does not deprive the utility of the level of return on rate base to which it has been determined to be entitled). The Board can and should deal with all revenue earned in excess of a just and reasonable return on rate base; however, it does not have to require that all of it be paid into an excess revenue account.

[113] As indicated in the answers to Questions 3 and 4, the Board has a broad jurisdiction as to how to deal with the excess and it may well be that, in the circumstances obtaining, it will determine that only a portion (i.e. that portion

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[78]para.[73]

[79]paras.[31], [50]

above the maximum return on common equity) should be paid into a reserve account. It might determine that the rest should be rebated to consumers or used by the utility in furtherance of the objective of ensuring that it maintains a sound credit rating in the financial markets of the world. In short, there is nothing wrong in principle with the Board defining excess revenue for the purposes of a reserve account differently from the notion of excess revenue as determined by a comparison with a just and reasonable return on rate base as determined by s-s. 80(1). In so doing, however, the Board ought not to assume that any additional excess revenue ought necessarily to be returned to the utility to be used as it sees fit. The Board has jurisdiction, and in exercise of its legislative mandate it ought to exercise that jurisdiction, to make a determination as to how that remaining excess revenue, if any, should be dealt with consistent with the objectives and policies of the legislation.

[114] Accordingly, the technical answer to Question 5 is "no" but so as to limit any confusion over the implications of the wording of the question, I would add that the Board has jurisdiction to define excess revenue for the purposes of maintenance of a reserve account by reference to the maximum level of return on common equity (or any other appropriate measure for that matter) but that does not mean that the Board may for all purposes define the level of excess revenue to which the utility is not entitled by reference to that measure; rather, the Board must determine, on the specific circumstances of the case, what is to be done with respect to any excess revenue measured against a just and reasonable return on rate base. If all or a portion of the excess revenue, measured against the return on rate base, is not ordered to be paid into a reserve account, it must nevertheless be dealt with in some other manner consistent with the objects and policies of the legislation. It should not be simply assumed that such excess revenue if not required to be paid into a reserve account belongs to the utility to be dealt with as it sees fit.

Question 6

> **Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of**

expenses were allowed as reasonable and prudent and properly chargeable to operating account.

[115] The just and reasonable return on rate base which the Board determines that the utility is entitled to earn annually is "in addition to those expenses which the Board may allow as reasonable and prudent and properly chargeable to the operating account ..."[80]. Thus, in the process leading up to the prospective setting of rates, the Board may look at the type and level of projected expenses of the utility in the test year and determine whether they are reasonable and, if not, only allow, for the purposes of calculation of a just and reasonable return on rate base, such types and levels of expenses as are, in the opinion of the Board, reasonable.

[116] In the 1991 rate hearing, certain types and levels of projected advertising expenses were approved by the Board. At the 1996 rate hearing, it was suggested that in the light of what actually happened in the years subsequent to 1991, the utility had in fact incurred advertising expenses well in excess of the amounts approved as reasonable and also of a type different from those which were approved, i.e. for corporate image building rather than related to the supply of service. The issue posed by Question No. 6 is whether expenses of a class which were previously approved as reasonable but which are in excess of the projected amounts can be disallowed by the Board for the purposes of rate regulation.

[117] The level of operating costs is obviously an important factor in fixing rates. It is generally accepted that Board supervision as to reasonableness of such costs is therefore essential to effective regulation.[81] Phillips describes the matter thus:

> Commissions seldom challenge expenditures controlled by competitive forces, such as those for plant maintenance, raw materials and labor. Conflicts do arise over whether certain expenditures should be charged to operating expenses or paid for by owners out of earnings.
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> Management might vote itself high salaries and pensions. Payments to affiliated companies for fuel and services might be excessive. Expenses for advertising, rate investigations, litigation and public relations should be closely

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[80] **Act**, s. 80(2)

[81] Phillips, op.cit. fn. 9, pages 256-257

> scrutinized by the commissions to determine if they are extravagant or if they represent an abuse of discretion. In all cases, moreover, the commissions should require proof as to the reasonableness of a utility's charges to operating expenses.[82]

Accordingly, the power to determine reasonable rates necessarily requires supervision of operating expenses.

[118] In defining the parameters of such supervisory power, however, the Board must account for a competing principle, namely, that the Board is not the manager of the utility and should not as a general rule substitute its judgment on managerial and business issues for that of the officers of the enterprise[83].

[119] Nevertheless, it is recognized that regulatory boards have a wide discretion to disallow or adjust the components of both rate base and expense[84]. In an American case[85] the matter was put as follows:

> The contention is that the amount to be expended for these purposes is purely a question of managerial judgment. But this overlooks the consideration that the charge is for a public service, and regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs for these or any other purposes.

[120] Having said that, however, there will normally be a presumption of managerial good faith and a certain latitude given to management in their decisions with respect to expenditures. In the United States, the test for disallowance is usually "abuse of discretion" showing "inefficiency or improvidence" or "extravagant or unnecessary costs".[86]

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[82]Ibid. page 256

[83]supra, para. 32

[84]**Re Union Gas Ltd. and Ontario Energy Board et al** supra fn. 12 per Anderson, J. at page 712.

[85]**Acker v. United States**, 298 U.S. 426 (1936), per Roberts, J. at pages 430-431

[86]Phillips, op. cit. fn. 9, at page 258

[121] When the issue becomes a retrospective examination of actual expenses as compared with what was projected and determined to be reasonable and prudent, there ought, similarly, to be caution exercised before determining that an expense was improperly incurred. The circumstances facing a utility are not static and a considerable latitude has to be given to the decisions of management in making expenditures to respond to the new situations as they present themselves.

[122] Nevertheless, it is still within the jurisdiction of the Board to supervise and review both the type and level of expenses incurred by the utility in respect of its operations. If it did not have that jurisdiction, the actual rate of return earned on rate base in a given year would be subject to manipulation by the utility as, for example, in a year where near the close of the fiscal period it appears that the rate of return will be more than anticipated, the utility, if totally unsupervised, could make large expenditures, unrelated to the delivery of service, simply to bring the rate of return in line with what had been projected.

[123] The jurisdiction of the Board to take account of deviations from estimates of expenses when setting future rates does not differ from that pertaining to its jurisdiction with respect to taking account of excess revenue. The disallowance of an expense may lead, in effect, to a greater rate of return, and potentially to excess revenue if the resulting actual adjusted rate of return is in excess of the previously determined acceptable range of return. The excess revenue over a just and reasonable range of return on rate base can be dealt with by the Board as discussed in the answers to Questions 3 and 4. It does not remain the property of the company.

[124] Accordingly, the answer to Question 6 is "yes". In giving this answer, however, I would emphasize that the question that was asked is a jurisdictional one. It does not give, in the circumstances of a particular case, a wide unfettered power to "second guess" managerial decisions with respect to expenses. In this regard, I agree with the comments of Phillips:

> Public utilities ... cannot spend freely and expect all expenditures to be included as allowable operating expenses. In effect, this means the commissions are permitted to question both the judgment and integrity of management. And if rates must be high enough to yield sufficient revenue to cover all operating expenses, the consumer has the right to expect that such expenditures will be necessary and reasonable.

At the same time, managerial good faith is presumed. Public utilities must be given the opportunity to prove the necessity and reasonableness of any expenditure challenged by a commission (or intervenor). To justify an expenditure, a company must show that the expense was actually incurred (or will be incurred in the near future), that the expense was necessary in the proper conduct of its business or was of direct benefit to the utility's rate payers, and that the amount of the expenditure was reasonable. Moreover, it must be emphasized again that a public utility may still spend its money in any way it chooses. Management's function is to set the level of expenses; the commission's duty is to determine what expense burden the rate payer must bear.

Question Nos. 7 and 8

(7) **Does the Board have jurisdiction to require a public utility to maintain:**

(i) **a ratio; or**

(ii) **a ratio within a stated range of ratios**

of equity and debt, as the means of obtaining the capital requirements of the public utility.

(8) **Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.**

[125] These two questions will be considered together because the issues they raise are interrelated.

[126] In theory, both the overall level of capitalization and the individual components of a utility's structure are of interest to regulatory boards. Clearly, if a utility is allowed to engage in financing practices which result in overcapitalization, the whole viability of the enterprise may be threatened with consequent impact on the delivery of service to the public.

[127] Furthermore, unlike in competitive conditions where the enterprise would not be able effectively to raise its prices over those of its competitors even if its costs of capital were excessive, overcapitalization of a regulated utility may well affect rates. That is because, in principle, rates must be set at such a level as to allow for recovery of the utility's costs, including its costs of capital, as well as a just and reasonable return. Overcapitalization, if uncontrolled, would increase the utility's costs and hence its rates. If the utility is not permitted to recover its costs in this regard it will, like any unregulated business, face bankruptcy with the consequence of disruption of service to customers. Overcapitalization may therefore indirectly put an upward pressure on rates to ensure the continued viability of the utility to enable service to be maintained. Alternatively, service may suffer.

[128] Arguably, the purpose of s. 91 of the **Act** is to enable the Board to control the risk of overcapitalization and its impact on the viability of the utility, or at least on its credit standing. By examining each proposed new security issue in advance, the Board has a chance of minimizing the adverse effects of overcapitalization before they occur.

[129] The composition of a utility's capital structure, that is, the mix of debt and equity, is also a matter that is necessarily of interest to regulatory boards.

[130] Because the costs of the individual components of a utility's capital structure, i.e. the embedded costs of debt and preference shares and the reasonable rate of return on common equity, are given a weighted cost, proportional to their share of the total capital structure, for the purpose of deriving a reasonable rate of return on rate base, the level of the actual proportional share of each component will necessarily have an effect on the result of the overall determination of a just and reasonable return on rate base. The makeup of the utility's capital structure can therefore influence that determination.[87]

[131] Phillips[88] expresses it this way:

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[87] deGrandpré op cit. fn. 9, page 26; Phillips op. cit. fn. 9, page 233

[88] Phillips, op. cit. fn. 9, pages 388-389

> ... the traditional theory of business finance holds that the average cost of capital to a firm varies with the capital structure upon which it is based. The interest rate on debt is normally lower than the cost of equity capital. Consequently, within limits determined by such factors as the risk of a business, the overall cost may be somewhat lower when the debt-equity ratio is high than when the debt-equity ratio is low.

It is too simplistic, however, to say that in all cases, the higher the debt equity ratio, the lower will be the overall costs of capital. As deGrandpré[89] points out:

> It is often argued that if utilities increased their debt ratio, their cost of capital would be reduced since the cost of debt is less than the cost of equity. This may be true, but then the rate of return would have to be increased under the risk factor since the interest has to be paid before dividends and the investor might find himself deprived of dividends because of insufficient earnings.

The debt equity ratio can, therefore, have a complicated effect. What is undeniable, however, is that the debt-equity mix does have an effect on the rate of return. Hence, it is something which, in principle, should come within the regulatory umbrella in fulfilment of the policies of keeping the costs to consumers low and of ensuring a sound credit rating for the utility. The higher the cost of capital, the higher will be the return necessary to be awarded to the utility to enable it to maintain a sound credit rating in world financial markets. This would inevitably lead to higher rates, tolls and charges which would work against the policy of providing power to consumers at the lowest possible cost consistent with reliable service.

[132] From this, the Consumer Advocate and the Board itself argued that it is a necessary and appropriate power on the part of the Board to regulate the ratio of debt to equity in a utility's capital structure. Without such a power, the Board is limited, it was suggested, in its ability to ensure that sources and facilities for the production, transfer and distribution of power are managed and operated in a manner that would result in power being delivered to consumers at the lowest possible cost consistent with reliable service.

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[89] op. cit. fn. 9, page 26. See also to the same effect Phillips, op. cit. fn. 9, page 233

[133] In like manner, it was argued that the Board has the power, as a necessary incident of the legislative scheme, to stipulate, from time to time, that a public utility must obtain its capital requirements by the issue of financial instruments of a specified nature.

[134] Granting that the level of overall capitalization and the composition of the capital structure of a utility are both matters of regulatory concern, at least insofar as they affect the utility's rate of return on rate base and hence the cost to consumers of the delivery of reliable service, the question to be determined is the degree of intrusion which the Board may undertake into the financial affairs of the utility. Can it be proactive and, as Question 7 suggests, "require" the utility to maintain a particular debt-equity ratio or, as Question 8 implies, "require" the utility to finance its activities in a particular way, or is it limited to passive disallowance of particular financing proposals either in the process of setting rates or in the course of other applications?

[135] In approaching these questions, it has to be remembered that there is no such thing as one ideal capital structure. It is a function of economic conditions, business risks and "largely a matter of business judgment".[90] Furthermore, a given capital structure cannot be changed easily or quickly. As well, the long-term effects of changes on capital structure on the enterprise and on the future cost of capital may not be easily predictable. Capitalization decisions also have other business dimensions that transcend the considerations relevant to the issues directly presented in the regulatory process.

[136] All of these considerations favour an approach that, in principle, should limit the degree of intrusion by the Board into the managerial control by the utility over financial decision-making. As emphasized earlier[91] the powers of the Board should be generally regulatory and corrective, not managerial. A debate has nevertheless occurred over whether regulatory agencies can and should "fix" debt-

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[90]Phillips, op. cit. fn. 9, p. 234

[91]paragraphs [31] - [32]

equity ratios and restrict new financing techniques to specified types of instruments.[92] Phillips notes that:

> These methods, however, have limitations. For example, since the financial conditions of individual utilities vary, no one ratio of debt to equity is correct. The refusal to approve a bond issue may lead to no issue at all, since, if a utility's earnings are insufficient to maintain its stock at par, it is in no position to issue more stock; bonds are the only way new capital can be raised. As a result of these problems, few commissions are willing to substitute their judgments for those of management...[93]

[137] An alternative to actual intrusion into the utility's financial affairs in the form of a direction as to how the enterprise should be structured is for the regulator, for the purpose of setting rates, to base its estimates of the cost of capital on a hypothetical appropriate capital structure, thereby disregarding the utility's actual capitalization[94]. The justification for this approach is given by Phillips who, citing other authors, states:

> Locklin has argued that most commissions 'disregard actual capital structures and set up an ideal or normal structure for the purpose. To do otherwise would burden the public with the higher costs of obtaining capital that result from a capital structure that is something less than ideal, and may, in fact, be quite unsound'. And Rose argues: 'When a commission in determining cost of capital disregards the actual capital structure or a capital structure proposed by management it is no more invading the domain of management than when it disregards unreasonable expenses for labor, fuel, or other productive factors in prescribing rates'.[95]

It appears, however, that actual capitalization has also been used as a basis[96]. Nevertheless, the arguments in favour of the ability of the Board to disregard the actual capital structure in an appropriate case and base its determinations upon a

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[92]Phillips, op. cit. fn. 9, p. 236

[93]Ibid.

[94]Phillips, op. cit. fn. 9, pages 388-392

[95]Ibid., page 389

[96]Ibid., page 391

hypothetical structure are convincing. Indeed, this has occurred in Canada.[97] Without such a power, the Board would not be able effectively to fulfil its mandate of promoting the delivery of reliable service to consumers at the lowest possible cost and at the same time maintaining a sound credit rating for the utility in the financial markets of the world. Having said that, in exercising that power, it goes without saying that the Board ought to have a healthy respect for managerial judgment[98] in such matters since if a hypothetical capital structure is used that is too far off the mark of the actual structure, it may in practical terms make the utility unable to meet its actual commitments, thereby threatening its credit standing and possibly affecting service to customers.

[138] It is not necessary to go further, for the purpose of promotion of the objectives and policies of the legislation, and accord to the Board a power of actual intrusion into the capital structure of the utility. The distinction between actual intrusion and disallowance for rate making purposes is justified in the context of the existing legislation and enables the Board to respect the principle of general deference to managerial decisions.

[139] The question that remains is whether s. 91 of the Act, which is the only provision expressly dealing with the powers of the Board respecting capital structure, can be said, either expressly, or by necessary implication, to accord greater powers to the Board.

[140] On its face, s. 91 appears to be limited to a situation where the Board may approve or disapprove of a particular proposal from the utility for the issuance of a proposed form of securities. It is expressed in terms of a power of negative disallowance rather than positive direction.

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[97]Re **The Bell Telephone Company of Canada**, supra. fn. 33 at page 723: "... the Board has, when the circumstances so warrant it, seen fit to adjust the company's debt-ratio *for rate making purposes*."

[98]No doubt as a practical matter, the Board would also be hesitant to make assumptions respecting a utility's capital structure for rate-making purposes, that are different from the actual structure which will have been created as a result of previous approvals given by the Board (though perhaps in not as focused a context as a rate hearing and without the benefit of argument from rate hearing participants, such as the Consumer Advocate) to the issuing of individual share or other financial instruments in the past pursuant to s. 91.

[141] As noted previously[99], s. 91 enables the Board to control the level of overall capitalization. Is that the only purpose for which a disallowance under s. 91 can be made? Obviously, an indirect effect of an approval or refusal of a particular security issue could be to affect the utility's future proposed debt-equity ratio and hence the composition of its capital structure. In practical terms, the power to disallow a specific proposal will enable the Board to exercise at the very least, by means of moral suasion in discussion, a degree of positive influence over total capitalization as well as capital structure. The power of disallowance under s. 91 may, in my view, be used, in appropriate cases, to further such objectives. Subsection 91(3) requires the Board, before approving a security issue, to be satisfied that it is in accordance with law and "for a purpose approved by the Board". Accordingly, so long as the power of approval or disallowance under s. 91 is exercised in a manner that is consistent with and in furtherance of any of the policies which the legislation was designed to serve, it will be within the jurisdiction of the Board to so act. In that way, the Board may influence the total level of capitalization as well as the particular debt-equity ratio. It does not, however, permit the Board to direct the utility to raise money in a particular way or to maintain a particular debt-equity ratio. In other words, it cannot be used as a springboard for an aggressive intrusion into the day to day financial and managerial decision making of the utility with respect to the capital structure of the enterprise. Nor can the general policies underlying the legislation justify such a power. As indicated, financing is undertaken for considerations that are not necessarily directly related to utility regulation. Furthermore, it has also been noted that, within the regulatory context, the utility is still subject to business risks and the effects of management decisions and the utility, other things being equal, ought to have the power to respond to that zone of risk. To that extent, the utility must be able to make financial decisions related to the overall health of the enterprise for reasons other than strictly regulatory ones, provided that in so doing it does not trespass on the objectives and policies of the legislation.

[142] Accordingly, while recognizing that a degree of influence over the utility's capital structure and over the choice of financial instruments to be used in financing the enterprise can be exercised by means of the powers conferred by s.

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[99]paragraph [128]

91 and the powers inherent in the regulatory scheme itself, the answers to Questions 7 and 8, insofar as the questions imply an ability to directly stipulate particular financing results, is, in each case, "no".

General Observations

[143] In answering the foregoing questions, it is worth emphasizing that the answers are given in terms of the jurisdiction of the Board. The fact that the Board may have jurisdiction, in the sense of legal power, to do something does not mean that, in a particular case, the power ought to be exercised. In the arguments which were presented on the hearing of the stated case, it was apparent that some of the positions taken by a party were being advanced out of a concern that if the jurisdiction was conceded, it would necessarily follow that the Board would exercise its power in a manner adverse to that party.

[144] The question of whether the Board should in fact exercise powers within its sphere of jurisdiction and the question of the manner in which those powers should be exercised raise very different considerations. It must always be remembered that, as has been emphasized throughout this opinion, the Board is charged with balancing the competing interests of the utility and the consumers of the service it provides. Neither set of interests can be emphasized in complete disregard of the interests of the other. Thus, in choosing to exercise a particular power within the Board's jurisdiction, the Board must always be mindful of whether, in so acting, it will be furthering the objectives and policies of the legislation and doing so in a manner that amounts to a reasonable balance between the competing interests involved.

Opinion

[145] Pursuant to s. 101 of the **Act**, I would summarize my opinion on the questions posed as follows:

Question 1(i)	Yes
Question 1(ii)	No
Question 2	Yes

Question 3(i)	Yes
Question 3(ii)	Yes
Question 3(iii)	Yes
Question 4	Yes
Question 5	No
Question 6	Yes
Question 7	No
Question 8	No

I emphasize that inasmuch as the import of the answers given depends on my interpretation of the questions posed, it is necessary to read the answers in the context of the rest of this Opinion.

[146] Pursuant to s. 102, the Deputy Registrar of the Court is directed to remit this Opinion to the Board.

J. Derek Green, J.A.

I concur: Margaret Cameron, J.A.
M. A. Cameron, J.A.

Opinion of O'Neill, J.A.:

[147] The Board of Commissioners of Public Utilities (the Board) is a statutory body existing under the provision of the Public Utilities Act, R.S.N. 1990, c. P-47, as amended (the Act).

[148] The general powers of the Board are set out in s. 16 of the Act:

> The board shall have the general supervision of all public utilities, and may make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the law and shall have the right to obtain from a public utility all information necessary to enable the board to fulfil its duties.

[149] In addition to the powers and obligations given to and imposed on the Board by the Act, the Board has certain duties and powers under the Electrical Power Control Act, 1994, Chapter E-5.1, as amended and, by s. 4 of that Act, is specifically directed to "implement the power policy" of the Province, as set out in s. 3 of that Act, and in doing so to apply tests "which are consistent with generally accepted sound public utility practice".

[150] By s. 101 of the Act, the Board may, of its own motion, state a case in writing for the opinion of the Court upon a question which in the opinion of the Board is a question of law.

[151] On August 14, 1996, the Board stated a case requesting the opinion of the Court with respect to certain specific questions as set out therein. Following an application for directions, the court ordered that, inter alia, certain parties be notified of the proposed hearing. Subsequently Newfoundland Light & Power Co. Ltd., a utility, and "the Consumer Advocate" were granted status to appear and be heard at the hearing before the court.

[152] In its application to the Court, the Board stated that in the course of a hearing before it, the submissions of various parties raised questions as to the jurisdiction of the Board under the Act and the Board thereupon stated a case for the Court upon the following questions:

> (1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

(2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissable rates of return.

(3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or

(ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,

does the Board have jurisdiction to:

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date; or

(iii) require the public utility to rebate the excess earnings to customers of the public utility?

(4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility, or

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years.

(5) Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question (4).

(6) Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

(7) Does the Board have jurisdiction to require a public utility to maintain:

(i) A ratio; or

(ii) A ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

(8) Does the Board, upon an application pursuant to Section 91 of the Act or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

Question #1

(1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

[153] It may be useful to set out here the relevant parts of ss. 37, 70 and 80 of the Act:

> 37.(1) A public utility shall provide service and facilities which are reasonably safe and adequate and just and reasonable.
>
> 70.(1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the schedule of rates, tolls and charges so approved shall be filed with the board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.
>
> 80.(1) A public utility is entitled to earn annually a just and reasonable return as determined by the board on the rate base as fixed and determined by the board for each type or kind of service supplied by the public utility but where the board by order requires a public utility to set aside annually a sum for or towards an amortization fund or other special reserve in respect of a service supplied, and does not in the order or in a subsequent order authorize the sum or a part of it to be charged as an operating expense in connection with the service, the sum or part of it shall be deducted from the amount which otherwise under this section the public utility would be entitled to earn in respect of the service, and the net earnings from the service shall be reduced accordingly.
>
> (2) The return shall be in addition to those expenses that the board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the board according to this Act and the rules and regulations of the board.
>
> (4) The board may use estimates of the rate base and the revenues and expenses of a public utility.

[154] In the past, the Board has ordered that a just and reasonable return for a utility is "determined" to be between two stated percentages of its annual rate base

for a test year, and ordered the utility to file, for examination by the Board, a schedule of rates, tolls and charges which will comply with the Board's determination, and, if so found to comply, approval is granted for those rates, tolls and charges.

[155] The rate base is arrived at by calculating the utility's net investment in plant and equipment required for the rendering of the regulated service.

[156] While not having fixed the return which the utility may earn, the Board has, in its orders, directed that a utility establish an "excess revenue reserve" into which revenue exceeding a certain rate of return on equity is to be deposited.

[157] The Board, in its order dated December 4, 1991, having fixed the average rate base for Newfoundland Power for the year 1992, and having determined a just and reasonable return for Newfoundland Power on its average rate base for that year, noted that that return would provide an opportunity for it to earn a somewhat higher rate of return on common equity:

> A just and reasonable return for [Newfoundland Power] is determined to be between 10.96% and 11.19% on its average rate base for 1992, which will provide an opportunity to earn a rate of return on common equity between the range of 13.00% to 13.50%.

[158] The Board's position before the court was that since what is a just and reasonable return on rate base is influenced by the proportion of the various financing components, including long term and short term debt and preferred shares, it is imperative that the Board be able to set and fix the return which the holders of the common shares in the utility may earn since the market conditions for debt could alter the return to the holders of the common shares significantly.

[159] Although s. 80 does not specifically provide for a rate of return for common shares, the determination of a rate of return on the common shares of a utility is very much a part of the rate making process. Further, it must be noted that by s. 3 of the Electrical Power Control Act, the policy of the Province is declared to be that the rates to be charged, either generally or under specific contracts, for the supply of power within the Province "should provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable return as

construed under the *Public Utilities Act* so that it is able to achieve and maintain a sound credit rating in the financial markets of the world...".

[160] For Newfoundland Power it was argued that the Board has the jurisdiction to determine the just and reasonable return on the rate base and, as part of that process, the jurisdiction to determine the return on common equity, it being one of its sources of funds. I see no distinction between "determine" and "set and fix" insofar as the jurisdiction of the Board here is concerned. The calculations and projections made by the Board in arriving at the rate of return, whether specifically on rate base or the return on common equity, involve by their very nature, looking into the future, estimating as best can be done the revenues and expenditures contemplated for the utility's operations, the costs of money which may vary substantially, up and down, and then to fix a rate base, and a just and reasonable return on that base upon which the rates, tolls and charges will be based and approved.

[161] Although the Board is supplied on a regular basis and has the authority to demand all the financial information it requires of a utility, the rates are, in effect, established for relatively long periods, (in excess of one year) and the likelihood of the accuracy of the forecasts which are necessarily made in setting the rate base and the rates of return is somewhat diminished.

[162] For the Consumer Advocate it was argued that s. 80(1) only gives the Board the jurisdiction to calculate the rate of return on rate base and does not allow a calculation of what return the common equity shares will have.

[163] As noted earlier, common shares constitute one of the components of the financial make-up of a utility and, as argued by counsel for the Board, while, theoretically, the Board only determines a just and reasonable return on the rate base as fixed and determined by it, in a practical sense, the return on common equity must be considered as part of the mix in setting the return on rate base, just as are the rates of interest paid on preferred shares, bonds and other financial obligations.

[164] In the result, in my opinion, questions 1(i) and 1(ii) should be answered in the affirmative.

Question #2

> Does the Board have jurisdiction to set the rates of return referred to in question (1) as a range of permissible rates of return?

[165] There is no question but that the rate setting process of the Public Utilities Board is prospective and is performed by the Board's making estimates of the myriad of factors which have to be considered. The problem is exacerbated by the fact that the process is not one which is contemplated to be reviewed regularly or on a short term basis. The meaningful interpretation of the word "return" as it appears in s. 80(1) allows for and, in the circumstances, contemplates a range of rates of return. It follows then that a just and reasonable return, though it may be stated as a fixed percentage, may be a range of rates which is determined to be just and reasonable. In making such a determination, the Board is clearly acting within its jurisdiction. As noted earlier, a consideration of a just and reasonable return on common equity as one of the components of the financial investment in the company is a necessary part of the process of arriving at a just and reasonable return on rate base, and this return may also be stated as a range.

[166] I would answer question 2 in the affirmative.

Question #3

> Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:
>
> (i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or
>
> (ii) the investment, which the Board has determined has been made in the public utility by holders of common shares,
>
> does the Board have jurisdiction to:
>
> (i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility?

[167] Under s. 69 of the Act, the Board has very broad powers including requiring a public utility to set aside from earnings monies in a depreciation account and creating and maintaining a reserve fund. Section 69 of the Act is as follows:

> 69.(1) A public utility, if so ordered by the board, shall, out of earnings, set aside all money required and carry it in a depreciation account.
>
> (2) The depreciation account shall not, without the consent of the board, be spent otherwise than for replacements, new constructions, extensions or additions to the property of the company.
>
> (3) The board may by order require a public utility to create and maintain a reserve fund for a purpose which the board thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations.
>
> (4) The board, in a case where it has made an order which has the effect of increasing a public utility's revenues, may require the public utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the board's opinion attributable to the order.

[168] The answer to the question also requires a consideration of the powers of the Board as set out in ss. 58 and 59 of the Act.

[169] By ss. 58 and 59, the Board may prescribe the form of all books of account and records to be kept by the public utility and to make its returns to the Board on such forms as may be prescribed by it. By s. 59, unless otherwise ordered by the Board, the utility shall close its accounts at the end of each calendar year and shall file with the Board its balance sheet, together with such other information as may be required by the Board, before April 2nd of the year following. In effect, approximately three months after the close of the utility's financial year, the Board

is made aware of the exact financial position of the company at the end of the previous year and of any other information which it may require.

[170] It will be seen from s. 69(3) that the Board has the power to direct a utility to set up reserves out of revenue to be used for replacement of equipment, new construction, extensions or additions to the property of the company. As well, reserves may be ordered to be created which would have the effect of "improving the status of the utility as a borrower or seeker of funds for necessary maintenance or expansion". There is a further power which comes to the Board from s. 69(4) and that is to require the utility to set up a reserve of monies which may have been in excess of those anticipated by the Board at the time of setting the rate of return and to prevent the distribution of that money or any part of it as dividends until the further order of the Board.

[171] In the setting of rates, the Board is looking into the future and addressing the anticipated revenues and expenses of the utility with the many variables which may occur. It follows then that it must have the authority to anticipate that there will be variations from what was forecast. While the rates, tolls and charges are set following a hearing and only by an order following a hearing, the constant reporting which a utility must make to the Board allows the Board to be kept informed as to the financial operations of the utility and, in the result, to be aware of how these revenues and expenditures affect the rate of return anticipated by the Board and set out in its order. At the same time, as stated earlier, the rate of return on rate base and on common equity are set not as specific percentages but as a range.

[172] In order P.U. 6-1991, the following appears at p. 56:

> The applicant has applied for a rate of return on common equity in the range of 13.5% to 14.0%, with rates set at 13.75%. The midpoint of the range was chosen since it is consistent with past practice and gives the Company the motivation to strive for a higher range (up to 14.0%) while giving them an opportunity to remain within the range if they are unable to come in on forecast (i.e. earn 13.5%).

And later at p. 72:

> The Board orders a range of 13.00% to 13.50% be adopted as the Company's rate of return on common equity with rates being set at the mid-point of the range,

> 13.25%. In the opinion of the Board this will give [Newfoundland Power] the opportunity to earn a fair and reasonable return and will increase [Newfoundland Power's] interest coverage in 1992 to 2.87 times.
>
> The Board believes that [Newfoundland Power's] interest coverage in 1991 of 2.81 times at existing rates, which is an increase from 2.7 times in 1990, together with the increase to 2.87 in 1992 is satisfactory.

[173] In my view, when rates, tolls and charges are set, the revenues generated belong to the company. If the net revenues are less than forecast and result in a return on rate base or on common equity less than as set out in the Board's order, then that loss is the company's loss. Revenues which are greater than anticipated belong to the company and any revenues in excess of those forecast by the Board as reflected in its order belong to the company and cannot be used, except as discussed in the following paragraph, to reduce the revenues of the utility in the future.

[174] I see nothing to preclude the Board's directing that those revenues of a utility in excess of the top of the range allowed by the Board in its order as a return on common equity, be set aside and maintained in a reserve fund by an order of the Board, as contemplated by s. 69 "for a purpose which the [B]oard thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations". I do not view any revenues of a utility in excess of those required to achieve the higher point of the range of return either on rate base or on common equity as becoming excess funds unless and until they are set aside by an order of the Board as authorized by s. 69. Until such order, these funds remain the property of the utility and may be treated as such. The creation of a reserve fund is a power given to the Board to be exercised as it sees fit. Indeed, s. 69(4) gives the Board the authority to "require the utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the [B]oard's opinion, attributable to the order". Indeed, it may happen from time to time that circumstances may so change following the making of an order that a utility may need to and may actually earn revenues in excess of those contemplated by the Board when the last order was issued.

[175] It follows from what I have said that the Board does not have the power to order rebates to the customers of the utility other than out of such a reserve fund.

To order a rebate from revenues other than those which have been placed in a reserve fund and, in that sense, not available to the company directly, would be to make a retroactive order. A sufficiently good reason for this is that just as additional billings are not permitted to be made to customers because of revenues which have fallen below the range set when the order was made, so any additional revenues may not be paid out. The role of rate making is prospective and this in itself in my view would preclude any reaching back.

[176] Reference should also be made to s. 80(1) which in my view contemplates, by the use of the words "earn annually", that each year becomes a separate unit and the revenues from one year may not be applied to another year so as to effect any change in the financial makeup of the utility, except through the use of the reserve fund, which, on its creation by order of the Board, has the effect of removing funds from the particular financial year affected by the order of the Board creating or ordering the placing of funds in the reserve fund and, in effect, makes those monies unavailable for the general use of the utility, including the payment of dividends to the holders of common equity.

[177] I would answer question 3(i) in the negative, 3(ii) in the affirmative and 3(iii) in the negative.

Question #4

> Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,
>
> (i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or
>
> (ii) the investment which the Board has determined has been made in the public utility by the holders of common shares,
>
> in prior years?

[178] Although the Board's jurisdiction is to fix and determine a rate base which will enable the utility to earn annually a just and reasonable return on that rate base, it follows that, depending on the range settled upon by the Board in its order

and considering that the rates, tolls and charges are set using the mid-point of that range as a basis, the utility may, from time to time, record net revenues which are less than or more than that contemplated by the range as set. Although the wording of s. 80 of the Act states that the utility is entitled to earn a just and reasonable return, it does not follow that it may not nor should not have revenues in excess of those contemplated. At the same time, for reasons which may be beyond the complete control of the utility, the revenues received might be substantially below those anticipated when the rates, tolls and charges were set and approved.

[179] In my view, the Board cannot set rates, as argued by counsel for the Board, in a manner that would compensate for prior "excess" earnings. At the same time, in setting rates, as it must do prospectively, the Board must be alive to the various factors which may have caused the utility in any previous year to earn more or less than that anticipated by the Board in its order, and it must factor those causes into the percentages and ranges for return on rate base and for return on common equity in future orders.

[180] I would answer question 4 in the negative.

Question #5

> Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question 4.

[181] Counsel for the Board argued that the authority of the Board to amend, alter or rescind any order made by it is plenary and the Board has full power to reconsider any order made previously by it, notwithstanding that there is a right of appeal in respect of its decisions on questions of law. Further, he argued that the fact that the Board has previously ruled or ordered a particular basis for the calculation of excess revenue does not preclude the Board from considering the effect of such earlier decisions in determining what revenues will be required by

the utility in setting new rates based on a just and reasonable return in accordance with a new method of calculation.

[182] Counsel further argued that since there is no fixed term for the continuing application of any approved rates, tolls or charges, the Board is not precluded from altering its previous order and assessing what is a just and reasonable return based upon its current assessment of the utility. Counsel argued that s. 87(1) of the Act clearly sets out that power:

> 87.(1) Where upon an investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or in violation of this Act, the board has power to cancel those rates, tolls, charges or schedules and declare void all contracts or agreements, either oral or written, dealing with them upon and after a day named by the board, and to determine and by order substitute those rates, tolls or schedules that are reasonable.

[183] The investigation undertaken under s. 87(1) follows upon a complaint made to the Board as set out in s. 84(1) and following upon the procedures set out in ss. 85 and 86 of the Act.

[184] The legislation empowers and indeed directs the Board to conduct a constant monitoring of the financial position of the utility and gives the Board the authority to institute a correction process at any time. It does not, in my opinion follow, as argued by counsel for the Board, that the Board in setting new rates, tolls and charges may take into account earnings of the utility in previous years in excess of a just and reasonable return upon the rate base or upon the investment which the Board has determined has been made in the public utility by the holders of common shares. This is so notwithstanding that the Board has previously ordered or advised a utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return upon the rate base as fixed and determined by the Board where not in excess of the return determined by the Board to be a just and reasonable return upon the investment made by the holders of common shares.

[185] Counsel for the utility argued that the Board does not have jurisdiction to order that the rates, tolls and charges shall be approved taking into account earnings in excess of a just and reasonable return, either on rate base or on

common equity, in prior years. Counsel further argued that such a power would "constitute retroactive appropriation of past revenues for future purposes". He further argued that the only mechanism available to the Board, where a utility earns in excess of the rate of return on rate base or on common equity, is to require the utility to deposit excess revenue, as defined by the Board, into a reserve account in the year earned. It is then, he argued, that the Board may approve the application of these funds as revenue in determining the rates, tolls and charges for a future period but any funds not ordered to be deposited in the reserve account are funds of the utility, belong to the utility, and cannot be considered in setting future rates. To do so, he argued, would be to change the system of accounts so that funds which were not excess in a previous year will then become excess and be brought forward - a retroactive order which is beyond the jurisdiction of the Board.

[186] For the Consumer Advocate it was argued that although the Board had advised the utility that it was permitted to retain earnings in excess of the rate of return as determined by the Board, it is not precluded from later making an order under s. 80(1) and s. 76 of the Act rescinding, altering or amending any existing order and in declaring these earnings as excess revenue. The Consumer Advocate also argued that in light of its position taken in response to question 4, the Board does not have jurisdiction to order that the "excess revenue" earned in previous years by the utility should be taken into account in setting rates, tolls and charges in subsequent years but that the Board must order that it be rebated to customers of the utility.

[187] I agree with the position taken by the utility. I would answer question 5 in the negative.

Question #6

> Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

[188] The example given by the Board in its factum illustrative of the situation giving rise to question 6 is as follows:

> In determining in 1991 what was a just and reasonable return on the basis of projections for test year, 1992, the Board was presented with projections for the future cost of operating expenses including advertising. The actual cost of advertising for 1995 exceeded the projection for 1992 by some $314,000.00. As such, the amounts for advertising contemplated by the Board as being reasonable, prudent and properly chargeable to operating account vary significantly for the year 1995 from the estimate upon which the Board determined a just and reasonable rate of return.

[189] Counsel for the Board argued that "the circumstances of a significant increase in expenses over the estimates used for the test year is indistinguishable from the circumstances of an increase in net earnings. For the same reasons as advanced by it in question 5, it argued that the Board had jurisdiction to order that the rates, tolls and charges could be approved taking into account these expenses, previously incurred, but now considered inappropriate to be allowed as reasonable and prudent.

[190] For the utility, it was argued that once rates, tolls and charges are set, the resulting revenue belongs to the utility except for any amounts which the Board may order to be deposited into an excess revenue account. Further, although the Board has the authority to determine whether the expenses comply with s. 80(2), which jurisdiction is necessary to ensure the integrity of the excess revenue account, the Board does not have jurisdiction to disallow the amount of any operating expense which is reasonable or which had previously been allowed as a just allowance. Further, it argued that the Board may not disallow an expense because it is of the opinion that had it been the manager, it would not have made that expenditure. The question is whether the expenditure is one that could have been made by a reasonable and prudent manager.

[191] The utility further argued that there should be no "microscopic review" especially with the benefit of hindsight. Counsel argued that the Board makes its annual review of the returns made by the utility and, in the specific example here, the Board had obviously made the decision that that expense, although it exceeded predictions, was reasonable (or at least the fact that it didn't say anything about it would indicate that it was reasonable). That expense should not, except in very

rare circumstances, be later held to be unreasonable. The utility's position was stated in its factum as follows:

> The Board does not have jurisdiction to order that rates, tolls and charges shall be approved taking into account the amount of such "disallowed" expenses. The Board's jurisdiction is limited to disallowing expenses which it determines not to be "reasonable and prudent and properly chargeable to operating account" or otherwise not a "just allowance" under s. 80(2). The disallowance of an expense would lead to the company earning a somewhat greater return on common equity for the purpose of the excess revenue account for the year in which the expense was incurred. However, this revenue remains the property of the company and its shareholders unless the amount disallowed would mean that the company's return on common equity would exceed the maximum return on common equity previously allowed by the Board. If that were to occur, the amount which would be beyond the maximum return on common equity would be deposited into the "excess revenue account".

[192] For the Consumer Advocate, it was argued that the Board may take into account past expenses in order to forecast more accurately future revenues and expenditures. However, its counsel argued that the Board does not have jurisdiction to set future rates, tolls and charges designed to compensate for past expenses that the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account.

[193] I agree with the arguments proferred by the utility and the Consumer Advocate.

[194] I would answer question 6 in the negative.

Questions #7 & 8

Question #7

> Does the Board have jurisdiction to require a public utility to maintain:
>
> (i) A ratio; or
>
> (ii) A ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

Question #8

Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year.

[195] In his decision which I have read in draft, Green, J.A. considered questions 7 and 8 together because, as he stated, the issues they raise are interrelated. I agree with the reasoning of Green, J.A. in dealing with these questions and I would answer both questions, as he did, in the negative.

[196] I would also agree with the comments made by Green, J.A. in that part of his decision, entitled "General Observations".

Conclusion

[197] In the result then I would answer the questions posed as follows: 1(i) yes, 1(ii) yes, question 2 - yes, question 3(i) - no, question 3(ii) - yes, question 3(iii) - no, question 4 - no, question 5 - no, question 6 - no, question 7 - no, and question 8 - no.

J.A.

J.I. O'Neill, J.A.

78P

Date: 20120619
Docket: 10/113
Citation: *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

NEWFOUNDLAND AND LABRADOR HYDRO — APPELLANT

AND:

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES — FIRST RESPONDENT

AND:

THE CONSUMER ADVOCATE as represented by THOMAS JOHNSON — SECOND RESPONDENT

AND:

CORNER BROOK PULP AND PAPER LIMITED — THIRD RESPONDENT

AND:

NORTH ATLANTIC REFINING LIMITED — FOURTH RESPONDENT

AND:

TECK RESOURCES LIMITED — FIFTH RESPONDENT

AND:

VALE NEWFOUNDLAND AND LABRADOR LIMITED — SIXTH RESPONDENT

AND:

ABITIBI CONSOLIDATED COMPANY OF CANADA — SEVENTH RESPONDENT

AND:

NEWFOUNDLAND POWER INC. — EIGHTH RESPONDENT

AND

Docket No. 10/114

BETWEEN:

THE CONSUMER ADVOCATE as represented by THOMAS JOHNSON — APPELLANT

AND:

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES — FIRST RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR HYDRO — SECOND RESPONDENT

AND:

CORNER BROOK PULP AND PAPER LIMITED — THIRD RESPONDENT

AND:

NORTH ATLANTIC REFINING LIMITED — FOURTH RESPONDENT

AND:

TECK RESOURCES LIMITED — FIFTH RESPONDENT

AND:

VALE NEWFOUNDLAND AND LABRADOR LIMITED — SIXTH RESPONDENT

AND:

ABITIBI CONSOLIDATED COMPANY OF CANADA — SEVENTH RESPONDENT

AND:

NEWFOUNDLAND POWER INC. — EIGHTH RESPONDENT

Coram: Green C.J.N.L., Mercer and Harrington, JJ.A.
Appealed From: Newfoundland and Labrador Board of Commissioners of Public Utilities, (Order No. P. U. 25)

Appeal Heard: December 9, 10 and 13, 2010
Judgment Rendered: June 19, 2012

Reasons for Judgment by the Court.

Counsel for Newfoundland and Labrador Hydro: Geoffrey Young

Counsel for the Consumer Advocate: Thomas Johnson

Counsel for Newfoundland and Labrador Board of Commissioners of Public Utilities: Dan Simmons, Jackie Glynn

Counsel for Corner Brook Pulp and Paper Limited, North Atlantic Refining Limited, Teck Resources Limited and Vale Newfoundland and Labrador Limited:	Paul Coxworthy Dean Porter
Counsel for Abitibi Consolidated Company of Canada:	Greg Moores
Counsel for Newfoundland Power Inc.:	Ian Kelly, Q.C. Gerard Hayes

By the Court:

[1] Two appeals come before this Court arising from a preliminary decision of the Newfoundland and Labrador Board of Commissioners of Public Utilities ("Board") in Order No. P.U. 25 (2010) ("Decision") issued August 26, 2010. They come directly to this Court under s. 99 of the *Public Utilities Act*, RSNL 1990, c. P-47 as amended ("*PUB Act*").

[2] Fundamentally, what is at issue in this appeal is whether certain savings generated in a rate stabilization plan established by the Board can be shared among all residential and industrial power consumers on the island portion of the province or only among industrial customers. The appeal engages the interpretation of the Board's governing legislation, in particular, s. 75 of the *PUB Act*, and whether the Board erred in determining it did not have jurisdiction to allocate savings to customers other than certain industrial customers.

[3] The appellant, Newfoundland and Labrador Hydro ("Hydro"), is a Crown corporation and the appellant, the Consumer Advocate ("Advocate"), is a statutorily appointed representative of the interests of domestic and general service customers of both Hydro and Newfoundland Power Inc. ("Newfoundland Power") pursuant to s. 117 of the *PUB Act*. The Advocate does not represent Hydro's industrial customers or the utility, Newfoundland Power. A hearing was conducted following written submissions by interested parties regarding a series of preliminary questions posed by the Board. The questions were raised in the context of a pending general rate application by Hydro affecting its industrial customers to have interim rates for the years 2008, 2009 and 2010 made final ("2009 GRA").

[4] The appellants allege that the Decision unduly restricts the Board's authority to deal with the disposition of certain surplus revenue credits or system savings which have been accrued under a rate stabilization plan ("RSP") in accounts established for tracking cost of service to Hydro's industrial customers for the three year period under consideration. As noted, the characterization of these accounts and the determination of whether customers other than industrial customers can benefit from the disposition of these credits either prospectively or retrospectively is at the core of this appeal.

[5] The appellants allege that the Board erred by fettering its jurisdiction when it ruled in its preliminary determination of the scope of Hydro's 2009 GRA that it was prevented from conferring any benefit from the disposition of systems savings accruing within the RSP for industrial customers on any of its other customers. Specifically, the Board held that the fact that the rates for Hydro's non-industrial customers had been made final for the period 2008 to 2010 barred consideration of any claim of entitlement to the systems savings by non-industrial customers when settling the final rates for industrial customers for the three year period affected by the 2009 GRA.

BACKGROUND

[6] Hydro established the RSP effective January 1, 1986 under a directive from the Provincial Government. The Board modified and approved the RSP. The object of the RSP was to provide rate stability to Hydro's customers through a mechanism designed to eliminate volatility in Hydro's revenue requirements beyond its reasonable expectations.

[7] The RSP provided for adjustments to recover the differences between the forecasted test year costs used to set rates and the actual costs affected by: (i) differences in the price of bunker C fuel affecting the cost of oil-fired power generation at Holyrood, ii) variation in Hydro's hydraulic power generation; and iii) major variations in load consumed by its customers.

[8] These appeals directly affect customers who are on the Interconnected System on the island portion of the Province. These include Hydro's one utility customer, Newfoundland Power and in turn all of Newfoundland Power's customers. These appeals also directly affect Hydro's industrial customers and Hydro's own residential and general service customers on the Island Interconnected System.

[9] There are two major electrical systems operating within the Province. The Island Interconnected System functions as a stand-alone system comprised of various hydro-electric developments and thermal power generated at the Holyrood Thermal Generating Station ("Holyrood"). The Labrador Interconnected System is supplied by Churchill Falls and is connected to the North American power grid. The more remote and isolated areas of the Province, whether on the island or in Labrador, are serviced by individual diesel generating facilities owned and operated by Hydro.

[10] The primary source of electrical power and energy for the Island Interconnected System is hydro-electric with the other major source of power being the Holyrood generating plant which burns bunker C oil purchased by Hydro on the world oil markets. It is much less costly for Hydro to generate electricity on the Island Interconnected System by its hydro-electric sources than it is to generate electricity at Holyrood.

[11] Hydro is the primary generator of electricity in the province. Hydro sells its power to utilities, industrial and its own 35,000 residential and general service customers in over 200 communities across the Province. Newfoundland Power serves over 239,000 residential and commercial customers making up approximately 85% of all electricity customers in the province. Newfoundland Power purchases approximately 90% of its electricity from Hydro and generates the balance from its own smaller hydro electric stations.

[12] Hydro's overall fuel costs at Holyrood on an annual basis can vary significantly. These fuel costs are affected by:

a) the price of a barrel of oil as determined by the world market;

b) the amount of available hydro-electric energy - which essentially is a function of the amount of precipitation; and

c) the amount of energy consumed by the customers on the Island Interconnected System (referred to as "load").

[13] Given the variability that can occur in Hydro's annual fuel costs, a mechanism in the form of the RSP was developed to ensure that Hydro's rates are adequately collecting the cost of fuel that it is purchasing to service the needs of the Island Interconnected System customers. Absent such a mechanism, the rates that are set for Hydro to charge its customers for electricity which are based on forecast costs for the test year, could cause

Hydro to lose or gain considerable sums of money in a given year. At Hydro's last general rate application filed in 2006, a 2007 test year was used as the basis for establishing the electricity rates to be charged by Hydro. At that time, it was known that large increases in oil prices or lower than expected hydrology could create a significant revenue shortfall for Hydro. On the other hand, higher than expected hydrology at its hydro electric generating facilities and lower than expected load consumption by industrial consumers could result in large unexpected revenues.

[14] The RSP provides a mechanism to smooth the effects on rates of increases or decreases in commodity costs over time. The RSP has been modified a number of times since its introduction. However, the current RSP has been in place since Hydro's general rate application in 2003.

[15] Under the RSP, these variables are tracked for the purpose of calculating RSP adjustment rates for Hydro's utility and industrial customers. In the case of Newfoundland Power, Hydro makes an annual application to the Board for approval of the appropriate RSP adjustment to take effect on July 1st of each year. In the case of the industrial customers, the RSP adjustment takes effect on January 1st of each year. The amount of the rate adjustment and whether the adjustment will be a decrease or increase on January 1st or July 1st, as the case may be, depends upon the net activity in the RSP as calculated in accordance with its provisions.

[16] The load variation element of the RSP is of particular significance on these appeals. The load variation - the amount of energy consumed compared to the amount forecast for the test year - works generally in a similar manner to fuel price and hydrology - to the extent that if higher load occurs (i.e., more electrical energy must be generated to meet customers' electricity requirements than was forecast when rates were last set) it results in higher fuel costs at Holyrood and the corresponding amount is owed by customers to the RSP to be recovered in rates in a future period. However, if the load is lower than the test year forecast, it will result in an amount owing to customers from the RSP.

[17] In another way, the load variation provisions work differently from the fuel price and hydrology elements. Load variation can affect the amount of oil that is required to be burned at Holyrood, thereby affecting Hydro's costs. Load variation also has an impact upon the amount of revenue that Hydro receives from its rates. At Hydro's 2003 GRA the RSP was amended so as to place the financial consequences of the load variation on the

customer class whose actual load varied from the test year load forecast. Therefore, in a year in which the industrial customers' load was higher than forecast in the last test year, the effect of the variation would be to cause rate increases for the affected class.

[18] Increased industrial customers' load causes higher rates between GRAs because energy rates for this class are based upon Hydro's average costs of electricity production (e.g. reflecting a mix of cheaper hydro power and more expensive Holyrood power). However, the incremental energy production to actually service the increase in load comes from Holyrood where the cost of production is higher than the average energy cost which the energy rate reflects. Therefore, on each extra kilowatt hour that Hydro sells to fulfill an increased load, Hydro would, without an adjustment mechanism, be actually losing money. While it is collecting more revenue from the industrial customers because of the increased load, the increase in revenue is outstripped by the extra cost to which it is being put in order to supply the extra kilowatt hour. The load variation provisions in the RSP require that customer class which caused the load increase to bear the burden of those costs in a future period so that Hydro is made whole.

[19] On the other hand, if the industrial customers' load were to decrease relative to the test year forecast, the opposite would be the case. That is to say, a decrease in load would cause Hydro to burn less oil than anticipated thereby being able to supply more of the system's requirements with cheaper hydro energy instead of being required to burn the estimated number of barrels of oil that its rates were based upon in the last GRA. In this instance, while Hydro's revenues from the industrial customers would be decreased, so would Hydro's costs. In fact, the avoided costs vastly outstrip the loss in revenue occasioned by the decrease in load. The load variation provisions in the RSP assign to the customer class that caused the load decrease the benefit of these cost savings in a future period. It is this load feature of the RSP that is a key aspect in the factual matrix of these appeals.

[20] At Hydro's 2003 GRA, the participating parties agreed that both the revenue and the fuel amounts related to load variation should be assigned to the customer base within the RSP where the load variation occurred. Previously, revenues were assigned to the RSP based on which customer class caused the load variation but the related fuel costs were allocated between Newfoundland Power and the industrial customers based on the 12 months-to-date energy ratios for each customer class. The change in customer assignment was considered to improve fairness because costs

would now be assigned between Newfoundland Power and industrial customers based on causality.

[21] Hydro's 2006 GRA resulted in a Settlement Agreement which provided for a further review of the RSP (the "2007 RSP Review"). It was anticipated that any changes resulting from the 2007 RSP Review would be implemented by January 1, 2008. The allocation of load variation transfers was one of the items to be addressed in the review. Meanwhile, arising out of Hydro's 2006 GRA, final rates were approved for the industrial customers to be effective January 1, 2007 in Order No. P.U. 8 (2007).

[22] Starting in the fall of 2007, significant events were taking place in the province's pulp and paper sector adversely affecting the load variation of the normal operation of the RSP. In November of 2007, Corner Brook Pulp and Paper Limited shut down a paper machine which resulted in a 22% reduction in load from the industrial customers on the island. In 2008, Abitibi Bowater closed its paper mill at Grand Falls-Windsor. In anticipation of projected volatility in load during the 3 year rate period, Hydro sought and obtained an order from the Board for interim rates for 2008 and 2009 which were effectively sustaining those that were in place for 2007.

[23] A projected rate change that otherwise would have taken place for industrial customers on January 1, 2008 under the established rules, prompted Hydro to take another approach. On December 20, 2007 Hydro applied to the Board for an Order "that the Board approve and make an Interim Order that the rates currently in effect for industrial customers, which were approved in Order No. P.U. 8 (2007) and which are set out in Schedule "A" continue in effect on an interim basis until such time as the Board issues a final order with respect to industrial customers' rates for 2008".

[24] Hydro provided the Board with its rationale for the requested Order in the following terms:

> By Order No. P.U. 40 (2003) the Board approved the manner by which the Rate Stabilization Plan (RSP) is calculated and by which RSP adjustments are applied to the rates charged by Hydro to its Island Interconnected Industrial Customers. Under that Order, Hydro is required to provide an Industrial Customer fuel price projection to the Board and to certain of Hydro's customers by the tenth working day of October each year.

> Due initially to a projected increase in the RSP rate and subsequently to a significant load change of one of Hydro's Industrial Customers, Hydro determined that there was potential volatility in its Industrial Customers' rates both for 2008 and future years. The impact of these changes was deemed to be significant and it was judged to be prudent to further analyze and consider their impact, in conjunction with also determining the final level of year end hydraulic balances, prior to making application to the Board with respect to an appropriate treatment of this issue.
>
> Hydro wishes to have further opportunity to consider the appropriate means to address Industrial Customers' rates issues.

The Board approved the interim rates requested.

[25] On June 30, 2009, Hydro applied to the Board requesting the finalization of rates charged to industrial customers.

[26] In its cover letter accompanying the application, Hydro stated:

> Although the attached Application does not contain any proposed changes, the Board may wish to consider suspension of the existing load variation allocation rules and holding in abeyance current and future load variation amounts until such time as Hydro can develop a proposal to address the current anomalies in the RSP. Hydro anticipates that an application with regard to the RSP load variation can be made prior to the end of 2009.

[27] Since the industrial customers' rates were declared interim effective January 1, 2008 there had been large sums of money accruing in the RSP due to the fuel savings that Hydro was experiencing at Holyrood due to the steep decline in the load of the industrial customers since Hydro's last GRA. Evidence filed in the proceeding before the Board forecast that over the period 2007 to 2010 some $74 million in system savings tied to load would have accrued, with some $68 million accruing since the industrial customers' rates were declared interim.

[28] The load variation balances that have been assigned to the industrial customers under the interim RSP rules produced rate scenarios well beyond reasonable expectations. Using the refunding methods provided by the RSP rules, the forecast average rates for industrial customers for 2010 were projected to be *negative* figures reflecting a scenario where there would be more money to be refunded to customers than energy revenues received from them by Hydro.

[29] The industrial customers claimed entitlement to the entire load variation balance. Based on the available information prior to the preliminary hearing, the current industrial customers were paying approximately $20 million in annual electricity costs. However, $68 million of load variation transfers were accumulating as system savings on an interim basis since January 1, 2008 which represented approximately three and a half times the annual electricity costs of the current industrial customers.

[30] Hydro, Newfoundland Power and the Consumer Advocate in their evidence recommended that the Board allocate these system savings between the industrial customers and Newfoundland Power using a cost of service approach.

[31] The Board advised all parties that the public hearing respecting the 2009 GRA would not proceed and further advised that the Board wished to hold a preliminary hearing into its jurisdiction and authority. Counsel for each of the parties and the Board met and developed the preliminary issues that would be addressed by the Board. These issues were then formally posed to the Board by way of a letter from Hydro's counsel dated June 2, 2010.

[32] The questions posed were:

> Does the Board have the jurisdiction to issue an order which changes how the Rate Stabilization Plan (RSP) operated before the date of the order and, if so, does this jurisdiction extend to any aspect of the operation of the RSP, including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes? In particular:
>
> - Does legislation or common law give the Board any specific relevant authority or alternatively, restrict the Board's authority?
>
> - What would generally accepted sound public utility practice as set out in s. 4 of the EPCA require?
>
> - Are there any concerns in relation to vested rights, i.e. does the language of the RSP create a right/obligation in each of the customers or customer classes? If so, at what point does this right/obligation accrue? Does this mean that credits/debits allocated to each customer in accordance with the plan are the responsibility of or to the benefit of customers in the class at the time of the accumulation or does the Board have the jurisdiction to order alternative disbursements of the balances?

- Does the issuance of Order Nos. P.U. 34 (2007), P.U. 37 (2008), P.U. 6 (2009), the filing of Hydro's application on June 30, 2009, or any other order of the Board impact the jurisdiction of the Board?

THE BOARD DECISION

[33] The written decision of the Board issued August 26, 2010 was divided into a discussion of deferral accounts and interim orders. The deferral account section dealt primarily with the Board's general jurisdiction over the disposition of balances accumulated in deferral accounts, such as the RSPs. The interim order section dealt more specifically with the Board's jurisdiction under section 75 of the *PUB Act* to deal with balances accumulated due to a difference between interim and final rates.

[34] The Board considered the RSP to be an example of a deferral account. Such an account is used for various purposes in public utility rate regulation to, amongst other things, allow a public utility to maintain its approved rate of return when actual revenues or expenses vary from those that were forecast when rates were set. This would reduce fluctuations in rates charged to consumers of power if such variances were not spread over longer periods of time.

[35] With respect to its jurisdiction over deferral accounts generally the Board stated at p. 8:

> While the Board has jurisdiction in relation to deferral accounts the Board has stated that it views the use of these accounts to be an extraordinary measure ... The Board believes that its jurisdiction with respect to deferral accounts is limited by the principles of predictability and fairness, as discussed by the Alberta Court of Appeal in *ATCO [Calgary (City) v. Alberta (Energy and Utilities Board*, 2010 ABCA 132], and does not necessarily extend to changing how balances are calculated and allocated in the past.

[36] The Board continued at p. 9:

> In the Board's view changing how the RSP operated in prior years would be analogous to the situation that Mr. Justice Green suggested might constitute retroactive regulation in *Reference: re s. 101 of the Public Utilities Act (Nfld)* (1998), 164 Nfld & PEIR 60 (Nfld. C.A.) at paragraph 91:

> *The issue, therefore, is not whether the Board may revise the definition of excess revenue and then apply the revised definition to the results of previous years. That might well engage the principle of non-retroactivity.*
>
> (Emphasis in original.)

[37] The Board determined that the interim orders gave the Board the full jurisdiction to change all aspects of the industrial customers' rate, including the power to change the rules and regulations affecting the RSP.

[38] However, having noted that the Hydro applications for interim rates and its 2009 GRA seeking the approval of a final rate for industrial customers had not sought any changes to the RSP, the Board held at p. 9 that the RSP rules applying to allocation of load variations continued to apply:

> In the absence of an application, the Board did not take it upon itself to consider suspending the operation of the load variation allocation rules as suggested by Hydro in its correspondence [that accompanied the June 20, 2009 application for final rates].

[39] The Board then considered the effect on its jurisdiction of the interim rate orders and section 75 of the *PUB Act* which provides in pertinent part:

> **75.** (1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.
>
> ....
>
> (3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be
>
> (a) refunded to the customers of the public utility; or
>
> (b) placed in a reserve fund for the purpose that may be approved by the board.

[40] Addressing the position of Hydro, Newfoundland Power and the Consumer Advocate, the Board stated:

> Hydro, Newfoundland Power and the Consumer Advocate suggest that [s. 75] permits the Board to place any excess revenue paid by the Industrial Customer group as a result of the interim rates into an account for the possible benefit of [another] customer group. This interpretation would not appear to be consistent

> with the scheme of the legislation generally or with generally accepted sound public utility practice which requires that rates be just and reasonable and not unjustly discriminatory. The Board has reference to the comments of Mr. Justice Green in Reference Re: s. 101 of the Public Utilities Act (Nfld.) (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. CA) ... at paragraph 18 ...

[41] The Board then concluded at pp. 11-12:

> Reading s. 75 in the overall context of the legislation and regulatory structure the Board believes that a purposeful interpretation would require that the refund or the reserve fund must, to the extent possible, be for the benefit of the customer group which was found to have paid the excess revenue. There may be times when it is not practical to refund to the customers that paid the excess, for example where the amount is nominal or the customers cannot be found. The Board believes that, in the absence of extraordinary circumstances, a finding that interim rates for a group of customers were in excess of reasonable rates would require that the same customer group be effectively charged the reasonable rates through a refund or the use of a reserve account.

[42] In response to the position of the industrial customers that the ability to set final rates under s. 75 of the *PUB Act* did not authorize the Board to revise the RSP rules that applied to the industrial customers, the Board concluded at p. 13:

> The interim orders clearly provide the Board with the full jurisdiction to, in the words of the Supreme Court of Canada, "*modify in its entirety the rate structure*" for the Industrial Customer group, which includes all aspects of the Industrial Customers' rate, including the RSP rate. The Board does not accept the position of the Industrial Customers that the Board has no power to change the rules and regulations affecting the RSP.

[43] However, the Board held at p. 14 that:

(i) it has jurisdiction to set "just and reasonable rates" for the Industrial Customers for 2008 and 2009, including the determination of the industrial customers' RSP rates and the manner of operation of the Industrial Customer RSP for those years,

(ii) "given the manner in which this matter was brought forward", it has no jurisdiction to change the manner in which the Newfoundland Power RSP operated in prior years, either in terms of the rates charged or the resulting balances, and

(iii) it has jurisdiction to determine whether overpayments by the Industrial Customers resulting from the interim rates should be refunded to the industrial customer group or placed in a reserve account to the benefit of that customer group.

[44] Although the Board ultimately determined that its jurisdiction to deal with the RSP balance was limited to determining "...whether any overpayment as a result of the interim rates is to be refunded to the Industrial Customer group or placed in a reserve account to the benefit of the Industrial Customer group", the Board essentially determined that the accrued balance of system savings had to be used for the benefit of the Industrial Customer class only and could not be applied to the benefit of other customers on the Island Interconnected System or used for other purposes in connection with the operation of the Island Interconnected System.

LEAVE TO APPEAL

[45] Section 99 of the *PUB Act* provides that an appeal from an order of the Board can be taken directly to the Court of Appeal upon a question of the Board's jurisdiction or upon a question of law, but only with leave of a judge of the Court.

[46] Leave to appeal will only be granted: (i) where it is apparent that the question on appeal is one of jurisdiction or law; and (ii) where the appellant can show "a reasonably arguable case for success" on the appeal: *Consumer Advocate v. Newfoundland Power Inc.*, 2006 NLCA 20, 255 Nfld. & P.E.I.R. 234, per Cameron J.A. at para. 10; *Labrador City (Town) et al. v. Newfoundland and Labrador Hydro Inc.* (2004), 241 Nfld. & P.E.I.R. 81 (NLCA) at para. 5.

[47] It is manifest from the notices of appeal that have been filed that each of the stated issues involves a question as to whether the Board erred in determining its jurisdiction or erred in law in reaching the Decision it did. Given the position taken by the respondents and the Board in not opposing leave, it can be presumed that there is a reasonably arguable case to be made on appeal.

[48] In this case, on the application for leave, all parties, except the Board, who were provided with notice pursuant to s. 99 (2), consented to leave being granted and, in the case of the Board, it stated that it "does not object" to the granting of leave. Accordingly, on a preliminary application, both the Consumer Advocate and Hydro were granted leave to appeal.

[49] Newfoundland Power supports Hydro and the Consumer Advocate on these appeals. Various industrial customers support the decision of the Board. The Board itself was also represented by counsel in support of the Decision.

ISSUES

[50] The following issues arise on these appeals:

(a) What is the appropriate standard of review to be applied to the Board's decision?

(b) What is the extent of the Board's jurisdiction to change the operation of the RSP, particularly with respect to the operation of the load variation component, and to allocate load variation balances accrued to Industrial Customers before and after the interim order effective January 1, 2008 for the benefit of other customers on the Island Interconnected System?

(c) Is the Board's jurisdiction limited to determining whether any overpayment as a result of the interim rates is to be refunded to the industrial customer group or placed in a reserve account for the benefit of the industrial customer group?

[51] The main focus of this appeal is the Board's determination that it did not have the jurisdiction to allocate balances accrued under the RSP rules, while the industrial customer rates were interim, to other customer classes. The practical effect of this determination is that the system savings which accrued in what was characterized as a "deferral account" while rates were interim must flow to the exclusive benefit of the industrial customers.

ANALYSIS

(a) Statutory Framework and Basic Principles

[52] An outline of the Board's statutory framework and the nature of deferred accounts and interim rates will assist in the resolution of the issues before the Court.

[53] In *Reference Re Section 101 of the Public Utilities Act (Nfld.)* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld.C.A.) ("*Stated Case*"), Green J.A. noted the Board's statutory basis as follows:

> [13] The answers to the questions which have been posed must, of course, be given taking account of the legislative framework within which the Board operates. The Board is a creature of statute and its jurisdiction and powers to deal with matters brought before it, and the manner of dealing with such matters, must be found, either expressly or impliedly, within the statutes conferring jurisdiction on and governing the operation of the Board.

[54] The Board's jurisdiction and powers are governed by the *PUB Act* and the *Electrical Power Control Act, 1994*, SNL 1994 c. E-5.1 (*"EPC Act"*). The *PUB Act* confers on the Board the power for "the general supervision of all public utilities". Specifically the Board has sole authority to approve the rates charged by public utilities – ss. 70(1) and 71 – and the power to approve interim rates unilaterally – s. 75. The breadth of the Board's authority over rates is illustrated by s. 76 which confers the right to rescind or alter rates, s. 82 which confers the right to investigate a rate, where the Board believes that it is unreasonable or unjustly discriminatory, and ss. 84-87 which authorize the Board, following a formal complaint, to investigate and to cancel rates and void contracts where rates are found to be unjust, unreasonable, insufficient or unjustly discriminatory.

[55] In considering the extent of the Board's powers under the *PUB Act* reference must be made to s. 118 which states:

> 118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.
>
> (2)The board created has, in addition to the powers specified in this Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.
>
> .....

[56] The *EPC Act* states the electrical power policy of the province in s. 3. It obligates the Board to implement that policy as it carries out its duties and exercises its powers under the *PUB Act* and in so doing s. 4 requires the Board to apply tests which are consistent with "generally accepted sound public utility practice".

[57] In the *Stated Case* Green J.A. stated some of the general principles applicable to the interpretation of the *PUB Act* and *EPC Act* as follows:

[36] ...

1. The Act *(PUB Act)* should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;

2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;

3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;

4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;

5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.

6. The Board has jurisdiction, which will not generally be interfered with on judicial review, to make a determination of what is a just and reasonable rate of return within a "zone of reasonableness" and in so doing is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice and are not inconsistent with the achievement of the purposes and policies of the legislation.

[58] Though the *Stated Case* concerned a utility's rate of return, the principles stated above, including those in sub-paragraphs 5 and 6, apply in a similar manner to the determination of rates for a utility's customers.

[59] The *EPC Act* requires that, wherever practicable, rates are to be established based on forecast costs – s. 3(a)(ii) – and utilizing tests which are consistent with "generally accepted sound public utility practice" – s. 4. The

rates policy stipulated in s. 3 of the *EPC Act* is consistent with the widely accepted principle of ratemaking that rates should be set prospectively, i.e., retroactive ratemaking should generally not be permitted. That principle and the distinction between retroactive and retrospective ratemaking were summarized recently in *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132 ("*Atco Gas*") in the following paragraphs of the majority decision:

> [46] A brief overview of some central principles of ratemaking, including the related concepts of retroactive and retrospective ratemaking, is necessary. Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd. v. Saratoga Processing Co.* (1981), 31 A.R. 541 at para. 29, 16 Alta. L.R. (2d) 60 (C.A.). A utility's past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies: *Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684 at 691 and 699 ("*Northwestern Utilities*").
>
> [47] Retroactive ratemaking "establish[es] rates to replace or be substituted to those which were charged during that period": *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at 1749 ("*Bell Canada 1989*"). Utility regulators cannot retroactively change rates (*Stores Block* at para. 71) because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.
>
> [48] Retrospective ratemaking, in contrast, imposes on the utility's current consumers shortfalls (or surpluses) incurred by previous generations of consumers. It is generally prohibited because it creates inequities or improper subsidizations as between past and present consumers (who may not be the same). "[T]oday's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers": Yvonne Penning, *"The 1986 Bell Rate Case: Can Economic Policy and Legal Formalism be Reconciled"* (1989), 47(2) U.T. Fac. L. Rev. 607 at 610. This is sometimes referred to as the problem of inter-generational equity (which the Board discusses at p. 12 of the Limitations Decision reproduced at para. 23).
>
> [49] Sometimes *retrospective* ratemaking is referred to as *retroactive* ratemaking. This is because rates imposed on a future generation of consumers, while prospective, create obligations in respect of past transactions, and in this sense they are retroactive: *City of Edmonton* at 402.

See also *Stated Case*, paragraphs 33 and 80.

[60] It is nevertheless clear from the authorities that the above noted principle of prospective ratemaking cannot bar the use of two widely used

regulatory tools authorized by applicable legislation though the same may be thought to have an element of retrospectivity. These two are interim rates and deferral accounts. See *Bell Canada v. Canada (Canadian Radio-television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 *(Bell Canada 1989); Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 *(Bell Canada 2009).*

[61] The power of the Board to authorize interim rates is granted in s. 75 of the *PUB Act.* That section allows the board to set rates expeditiously without full evidence and submissions, such rates being subject to review and possible modification in the final order of the Board, as is expressly provided for in subsections 75(2) and (3). Depending on the nature of the final order of the board it may have a retroactive or retrospective effect. In *Bell Canada 1989*, Gonthier J. stated:

> The statutory scheme established by the *Railway Act* and the *National Transportation Act* is such that one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. I hasten to add that the words "further directions" do not have any magical, retrospective content. Under the *Railway Act* and the *National Transportation Act*, final orders are subject to "further [prospective] directions" as well. It is the interim nature of the order which makes it subject to further retrospective directions.
>
> (p. 1752)
>
> ...The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in *obiter* in *Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission* (1978), 87 D.L.R. (3d) 727 (B.C.C.A.), with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final

> decision for the period during which they are in effect so as to achieve just and reasonable rates throughout that period.
>
> (p. 1761)

[62] The statutory scheme of the *PUB Act* is to the same effect, as noted in the *Stated Case* as follows:

> [87] The scenario contemplated by Questions 3 & 4 is unlike the situation which arises where an interim order setting rates, tolls and charges is subsequently superseded by a final order, resulting in excess revenue being earned in the intervening period because the rates, tolls and charges charged in that period pursuant to the interim order were higher than those which were ultimately found to be justified in the final order. In that situation, if the final order is treated as being operative as and from the date of the interim order that was superceded, the final order will, indeed, have a retroactive effect. In the context of the Newfoundland legislation, that situation is specifically contemplated and authorized by s. 75(3) of the **Act**.

[63] The operation of deferral accounts is permissible under the existing regulatory scheme in this province regardless of whether it might be argued they incidentally have retrospective or retroactive effect. Deferral accounts are utilized in public utility regulation to deal with the effects of uncertain or volatile costs in a manner that ensures that rates are reasonable, not unjustly discriminatory and that the utility earns a just and reasonable return. They permit the recovery or rebate in a subsequent period of any deficiency or excess between forecast and actual costs. Regulatory regimes generally permit the operation of deferral accounts. See *Bell Canada 2009* at paras. 54-55; *Atco Gas* at paras. 33-44; *City of Edmonton v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 at p. 406. It was properly acknowledged by all parties that the *PUB Act* authorizes the utilization of deferral accounts. See *Stated Case* at paras. 93-98.

[64] In *Bell Canada 2009* the use of deferral accounts to ensure that rates return to a utility the actual - not forecast - costs,was held to preclude a finding of retroactivity or retrospectivity:

> [63] In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. <u>They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning.</u> These funds can properly be characterized as encumbered revenues, because the rates *always* remained subject to the deferral

> accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting (*EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281, at para. 12, and *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).
>
> (Emphasis added.)

[65] As stated, funds in a deferral account can properly be characterized as encumbered revenues as the rates are subject to the deferral account mechanisms established by the regulatory authority.

(b) The Regulatory Context

[66] This appeal concerns the legal authority of the Board respecting the disposition of amounts accumulating in a deferral account, Hydro's RSP, while interim orders were in effect from January 1, 2008.

[67] Final rates for the Industrial Customers were last approved by the Board in Order No. P.U. 8 (2007) effective January 1, 2007. In the same year final rates for Newfoundland Power were established by Order No. P.U. 11 (2007) effective July 1, 2007. In the following years prior to the next GRA under the current RSP Hydro would have been expected to make annual applications to the Board to reflect the appropriate RSP adjustments to the rates. As noted previously, for the Industrial Customers the RSP adjustment would take effect as of January 1st each year and for Newfoundland Power the adjustments would take effect as of July 1st each year.

[68] Those adjustments have not been made for the Industrial Customers since July 1, 2007. For the stated reason of needing to assess the effect of significant changes in Industrial Customer load, Hydro applied on December 20, 2007 for the continuation on an interim basis of the Industrial Customer rates then in effect. By Order No. P.U. 34 (2007) the Board approved the required interim rates for 2008. In December 11, 2008 Hydro again applied to the Industrial Customer rates over an interim basis in view of inevitable changes to Industrial Customer load consequent upon closure of a paper mill. By Order P.U. 37 (2008) the Board approved the continuation of the rates until March 31, 2009, and subsequently under Order No. P.U. 6 (2009)

the duration of the interim order was extended to June 30, 2009. In the meantime, Newfoundland Power's rates for its customers had been made final.

[69] On June 30, 2009 Hydro applied to have the existing Industrial Customer rates made final. It was at that point that the issue of whether the Board had the legal authority to change the manner of operation of the RSP to benefit customers, other than industrial customers, in prior years when those other customers' rates had already been finalized, arose.

(c) Standard of Review

[70] As this tribunal appeal is taken from orders of the Board directly to this Court, it is necessary to apply a standard of review analysis in accordance with the principles in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and subsequent cases, to determine the scope of review that this Court may undertake.

[71] As *Dunsmuir* pointed out, it is not necessary to undertake a full standard of review analysis if prior "jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (paragraph 62). It is only when the inquiry into existing jurisprudence "proves unfruitful" that the court must proceed to a full analysis of the factors identified in *Dunsmuir* that make it possible to identify the proper standard of review.

[72] In the case of the Board, there is prior jurisprudence that has addressed the standard of review of Board decisions. In *Labrador City,* Cameron J.A. concluded on an application for leave to appeal, that the issues to be dealt with on the appeal, if leave were to be given (whether a common rate policy for electrical customers in Labrador was non-discriminatory; and whether the Board erred in failing to consider certain arguments submitted to it) should be reviewed on a standard of reasonableness. In like manner, in *Newfoundland Power*, Cameron J.A. held, on another application for leave, that an issue involving a contextual interpretation of a previous Board order, while involving a question of law, should nevertheless be reviewed on a standard of reasonableness. In both of these cases, the judge had to consider whether, as a condition of granting leave, the proposed appellant had a "reasonably arguable case" and in deciding that question, consideration should be given to the standard of review to be applied by the Court, if leave were granted, "in respect of the particular issues raised" (*Newfoundland Power*, paragraph 10; and *Labrador City*, paragraph 5).

[73] We do not consider the *Newfoundland Power* and *Labrador City* cases to be determinative of the issue of the standard of review in this case because: (i) they were decided before *Dunsmuir*; (ii) they are not decisions of a full panel; (iii) they were decided in the context of applications for leave to appeal, where the need for a definitive determination of the issue of standard of review was not directly engaged; and (iv) the issues being reviewed in those cases were dissimilar from the particular issues raised in the current case. They nevertheless remain of some assistance, insofar as they express views on the general structure of the legislation and the context in which the Board operates.

[74] Accordingly, it is necessary to engage in an analysis of the factors that have been identified in other cases to determine the proper standard of review (correctness or reasonableness) in this particular case.

[75] There are two statutory mechanisms whereby issues dealt with by the Board can be considered by this Court. They are contained in sections 99, 101 and 102 of the *PUB Act*:

> 99.(1) An appeal lies to the Court of Appeal from an order of the board upon a question as to its jurisdiction or upon a question of law ...
>
> 101. The board may of its own motion or upon the application of a party, ...state a case in writing for the opinion of the Court of Appeal upon a question which in the opinion of the board is a question of law and a similar reference may also be made at the request of the Lieutenant-Governor in Council.
>
> 102. The Court of Appeal shall hear and determine the question of law arising in a case stated under section 101 and remit the matter to the board with the opinion of the court attached.

[76] In matters brought before the Court under both s. 99 and s. 101, the focus is on considerations involving "a question of law". In s. 99, there is the additional focus on "a question as to [the board's] jurisdiction" but that is a specialized form of legal question as well. In references under s. 101, in which the Court's opinion is sought on questions of law, the Court is obligated, pursuant to s. 102, to provide its own view on what it considers to be the "correct" answer to the question posed, as was done in the *Stated Case*. By enacting ss. 101 and 102, the legislature has determined it appropriate for the Board to defer to the Court's opinion on questions of law, rather than the Court deferring to the expertise of the Board in determining those types of questions.

[77] On an appeal brought under s. 99 where the focus is also on "a question of law", the question arises as to whether the same standard for determining questions of law should be applied or whether something more restrictive – involving a degree of deference to the original decision-maker – should be employed. On one viewpoint, it could be said that if the legislature intended, in its similar characterization of the types of questions that could be raised under s. 99 and s. 101, that there should be more deference accorded under s. 99, it could have said so, but it did not. On the other side, it could be said that the process under s. 99 is different, involving as it does, a challenge to decisions of the Board that the Board believes are correct and does not involve the Board itself questioning its own view. In such situations, more deference might be justifiable.

[78] That said by way of preliminary observation, it is now necessary to turn to a consideration of the "contextual guideposts" (per Fish J. in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 at paragraph 41) that are to be applied to assist in determining the scope of review. The basic factors to consider were re-iterated in *Dunsmuir* to include: (i) the presence or absence of a privative clause; (ii) the purpose of the tribunal as determined by interpretation of its enabling legislation; (iii) the nature of the question at issue; and (iv) the expertise of the tribunal (paragraph 64). These factors are non-exhaustive: *Nor-Man* at paragraph 40.

[79] It should be noted at the outset that the contextual factors are designed to assist in determining the intention of the legislature as to the intended scope of review. In the end, what is sought is to discern whether the legislature intended to limit the degree of scrutiny of the tribunal's decision by the court.

[80] Turning to the first guidepost – the presence or absence of a privative clause – the restriction placed by s. 99 on the Court by limiting appeals to questions of jurisdiction and law and effectively excluding appeals respecting factual matters and inextricably intertwined questions of mixed law and fact is effectively a privative clause regarding those factually-related matters. On the other hand, inasmuch as the legislation allows appeals on jurisdiction and law, it is not a privative clause in respect of those matters.

[81] In *Barrie Public Utilities v. Canadian Cable Television Association*, 2003 SCC 28, [2003] 1 S.C.R. 476 at paragraph 11, Gonthier J., for the majority , observed that: "While the presence of a statutory right of appeal is not decisive of a correctness standard ... it is a factor suggesting a more

searching standard of review". See also, Michel Bastarache, "Modernizing Judicial Review" (2009), 22 C.J.A.L.P. 227 at p. 234. It must also be recognized, however, that the absence of a privative clause does not necessarily lead to the conclusion that a high level of scrutiny is necessarily intended "where other factors bespeak a low standard" (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998]1 S.C.R. 982, per Bastarache J. at paragraphs 30, 37). That said, in the context of the legislative scheme involved in this case, this first factor, considered alone, points towards a correctness standard rather than a deferential one on issues of law and jurisdiction.

[82] As to the second guidepost – the purpose of the tribunal – Cameron J.A. observed in *Labrador City* that:

> [17] The Board is comprised of full and part-time members who have different backgrounds. This would include engineers and accountants, for example. It has a professional staff. Its role is a many-faceted one, including the supervision of all public utilities and the regulation of rates, tolls and charges. Policy, both that imposed by legislation and that developed by the Board, plays a major role in the Board's performance of its duties. Some of those policies are developed over time. There can be no doubt that the Board is a specialized tribunal with expertise in matters related to the regulation of electrical utilities. In questions related to the determination of rates, which involve the application of industry practice, the Board is clearly in a position superior to that of the Court. This would suggest a more deferential standard of review.
>
> ...
>
> [19] ... The *Public Utilities Act* and the *Electrical Power Control Act, 1994* provide a scheme for the regulation of electrical utilities which requires the Board to address policy issues and to balance interests. They operate in tandem. This factor suggest[s] a more deferential standard to the Board's decisions.

These observations are equally applicable today. I would add the caveat, however, that the deference to be shown is in relation to the area that is entrusted to the Board for regulation and where the Board's superior expertise in the understanding, development and application of policy and the application of regulatory legal standards and balancing of interests exists.

[83] In *Council for Licensed Practical Nurses v. Walsh*, 2010 NLCA 11 Welsh J.A. at paragraph 11 pointed out that the existence of a right of appeal does not automatically mean that a standard of correctness will apply where the nature of the question (in *Walsh*, one of mixed law and fact) engages the

expertise of the tribunal. That brings us to the two remaining factors to be considered: nature of the issue and tribunal expertise.

[84] With respect to the third factor – the nature of the issue – it is important to appreciate that "different standards of review will apply to different legal questions depending on the nature of the question to be determined and the relative expertise of the tribunal in those particular matters." (per Major J. in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.,* 2011 SCC 36, [2001] 2 S.C.R. 100 at paragraph 27.

[85] It is now recognized that deference should be shown to many types of tribunal decisions even though they involve a question of law. This is especially so where a specialized tribunal, in the course of carrying out its statutory duties, is interpreting its "home statute" within its area of expertise. See, *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, per Fish J. at paragraph 37; *Celgene Corp v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 per Abella J. at paragraph 34. In fact, in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 S.C.R. 654, Rothstein J., writing for the majority, went so far as to say, at paragraph 39, that: "[w]hen considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness."

[86] That said, there must remain, if the rule of law is to be given effect, an area where a statutory delegate must be required to make decisions that, on review by the superior courts, must be correct. In *Alliance Pipeline*, Fish J., writing for a majority of eight, identified the following areas where correctness still has application:

> [26] ... The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" ...; (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*" ...

[87] In the *Alberta Teachers' Association* case, the Supreme Court again recognized that the principle that deference will be shown to tribunal decisions interpreting their home statutes applies "unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply" (paragraph 30), i.e. the four categories identified by Fish J. in *Alliance Pipeline*.

[88] *Alberta Teachers' Association* also stresses that the category of "true questions of jurisdiction or *vires*" is a very narrow one (paragraph 33) and that Courts should not be too quick to brand a legal question as jurisdictional and thereby revert to the interventionist attitudes towards judicial review that obtained prior to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. Rothstein J. explained:

> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on a particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction... [I]t is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity", should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[89] Nothing written in *Alberta Teachers' Association* has eliminated true questions of jurisdiction or *vires* – narrow though that category may be – as attracting a correctness standard of review. The real question is what in essence constitutes a true question of jurisdiction or *vires*? Although Rothstein J. confessed in *Alberta Teachers' Association* that he was "unable to provide a definition of what might constitute a true question of jurisdiction" (paragraph 42), reference to *Dunsmuir* is nevertheless helpful. There, Bastarache and Lebel JJ. stated:

> [59] ... "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.

[90] In the instant case, it was the Board that determined that before it could hear Hydro's rate application (something that was clearly within its jurisdiction to hear) a "preliminary hearing" had to be held to determine the question set out previously in paragraph 32 of this decision. The formulation specifically raised the question:

> Does the Board have *jurisdiction* to issue an order which changes how the Rate Stabilization Plan (RSP) operated before the date of the order and, if so, does this

> *jurisdiction* extend to any aspect of the operation of the RSP, including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes?
>
> (Emphasis added.)

[91] In its Decision, the Board described the preliminary hearing as follows:

> The preliminary hearing was held to receive submissions from the parties on the question of whether the Board has the *jurisdiction* to change the manner in which the RSP operated, including the rates charged, the determination of the balance(s) in the RSP and how these balances are allocated to customer classes. This question of *jurisdiction* is raised in the context of the interim orders issued by the Board for Industrial Customer rates since December 2007.
>
> (Emphasis added.)

[92] The parties at the preliminary hearing divided as to whether the Board had legal authority to make an order dealing with the money in the RSP that would include residential customers, as well as industrial customers, as beneficiaries. The Board described the difference as follows:

> All parties agree that the Board has the *jurisdiction* to set final rates for the Industrial Customers as of January 1, 2008. Hydro, Newfoundland Power and the Consumer Advocate submit that, in establishing those rates, *the Board also has jurisdiction* to deal with the manner of how those rates, and in particular the RSP rates, are calculated as of the date of any interim order, including the disposition of any balances in the RSP arising. The Industrial Customers submit that *s. 75 of the Act only allows the Board to set interim rates* and that the rules and regulations affecting those rates cannot be made interim. The Industrial Customers argue that the Board's *jurisdiction* with respect to the disposition of any balances in the RSP is confined to the existing RSP rules and regulations.
>
> (Underlining added.)

Noting that the RSP was a type of "deferral account", the Board approached this issue by reference to, amongst other things, the scope of the authority granted by s. 75 of the *PUB Act*, as well as the underlying principles of utility regulation, derived in part from this Court's decision in the *Stated Case* as well as other jurisprudence.

[93] The Board's conclusions, reproduced in paragraph 43 of this decision, were also stated in jurisdictional terms. In particular, note is taken of the statement, "... *the Board does not have jurisdiction* to change how the

Newfoundland Power RSP operated in prior years, either in terms of the rates charged or the resulting balances" (Italics added.). While it is true that in the elaboration of its reasons leading to this conclusion the Board purported to rely on underlying principles and policies of utility regulation – matters with which it has great familiarity and some expertise – in the end the conclusion reached was that the Board had no jurisdiction, in the sense of legal authority, to distribute deferral account balances, and in particular the RSP in question, to customers other than industrial customers or to otherwise benefit them in the context or orders setting interim rates.

[94] We agree with counsel for Newfoundland Power, who submitted:

> The issue that the Board stated for itself was a true question of jurisdiction or *vires*. It engaged the question of what the Board had the legal power and authority to do, not what the Board should do as a matter of regulatory judgment and decision-making. The issue was engaged on a preliminary hearing before the Board proceeded to a hearing on the merits.
>
> (Paragraph 122, Newfoundland Power's Factum.)

[95] If the Board is incorrect on this issue, its decision in effect would amount to declining to exercise an authority it has by law (i.e. a "wrongful decline of jurisdiction", as referred to by Bastarache and Lebel JJ. in *Dunsmuir*, quoted above). The result, if incorrect, would be the shutting out of a large class of power consumers from the benefits of the legislative scheme being administered by the Board. The issue, therefore, of the authority of the Board to benefit customers other than industrial customers through regulating a deferral account like the RSP under s. 75 in the context of interim orders has all the hallmarks of a true question of jurisdiction.

[96] In *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2010 ABCA 236, which dealt with a statutory appeal from a decision of the Alberta Energy and Utilities Board on questions of law and jurisdiction, the court confirmed that despite the general expertise of the Board and regulatory purpose of the legislation, the "key factor" was the nature of the questions raised on the appeal (whether the Board should have referred to investigate and hold a hearing into a complaint and, instead, summarily dismissed it). The court concluded that the question of law relating to the right of the Board to refuse to investigate or hold a hearing was an important question of law that did not engage the specialized expertise of the Board. The Court stated:

> [29] ... [T]he legislation provides for a right of appeal on questions of law and, in our view, because this is a question of the proper interpretation of the Board's right to refuse to act on a complaint, the Board must be correct.

[97] In similar manner in the instant case, because this is a question of the proper interpretation of the Board's right to decline, according to law, to deal with a deferral account, in the context of interim rates, for the benefit of certain classes of customers, the Board should also be correct because the matter involves the jurisdiction of the Board.

[98] Counsel for the Board submitted, however, that a key consideration differentiating the Board's decision in this case from a true question of jurisdiction is the statutory direction in the *Electrical Power Control Act, 1994*, s. 4 to apply "generally accepted sound public utility practice" to the implementation of the power policy of the province, something that falls within the expertise of the Board. That argument, however, has no application to the issue in this case. This is not a case where the Board purported to make a determination that, as a matter of sound public utility practice, it *should not* exercise its powers in a certain way; rather, it is a case where the Board purported to determine that it *could not* do so.

[99] To determine whether the Board *could* exercise its authority in the circumstances of this case, the Board had to interpret s. 75 in light of the underlying principles of utility regulation (such as the principle against retroactivity). There is nothing in s. 75 of a technical nature that requires the Board's expertise in its construction. Indeed, the underlying principles which the Board purported to apply are those which were pronounced upon by this Court in the *Stated Case*. As noted previously, the results of stated cases brought under s. 101 require the Board to defer to the view of the Court rather than the other way around. That would include the Court subsequently pronouncing on the meaning of what it said in earlier jurisprudence. The Court is therefore in as good a position as the Board to determine the scope of s. 75 insofar as it confers legal authority on the Board.

[100] In *Bell Canada 1989*, which involved a statutory appeal from the Canadian Radio-Television and Communications Commission to the Federal Court of Appeal on questions of law or jurisdiction, where the issues, as ultimately stated by the Supreme Court of Canada, were whether the Commission had the "legislative authority" to review revenues made by Bell Canada during a period when interim rates were in force and whether the Commission had "jurisdiction" to make an order compelling Bell to grant a one-time credit to its customers, the Court, recognizing that deference

should be given to the Commission's decisions on issues which fell within its area of expertise, nevertheless held that the issues at play were jurisdictional and were not within the Commission's area of expertise. Gonthier J. explained at p. 1747:

> In this case, the respondent is challenging the appellant's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the appellant when it makes interim decisions. ... It is ... a question of jurisdiction because it involves an inquiry into whether the appellant had the power to make a one-time credit order.
>
> Except as regards the choice, amongst remedies available to the appellant, of the most appropriate remedy to achieve the goal of just and reasonable rates throughout the interim period, the decision impugned by the respondent is not a decision which falls within the appellant's area of special expertise ...

[101] The decision in the foregoing case can usefully be contrasted with *Bell Canada 2009* where the issue was the appropriateness of the manner in which the Commission exercised its rate-setting jurisdiction in directing the allocation of certain funds to various purposes. In that, case, unlike the earlier *Bell Canada 1989*, the question was not whether the Commission had the legal authority to order certain dispositions but whether its choice of methodology was appropriate, something the Court held was at the "core" of the Commission's specialized expertise. As a result, a deferential standard of review was employed.

[102] The instant case is more akin to the 1989 decision. Here, the core of the dispute is the Board's decision that it did not have the jurisdiction, or legal authority, to allocate balances accrued under RSP rules to other classes in circumstances where industrial customers' rates were interim.

[103] We conclude, therefore, that the issue before the Board, as stated in its decision to hold a preliminary hearing, in the arguments made at the hearing, in the Board's formulation of the issues in its Decision and in the conclusions it reached, was a true question of jurisdiction and should be reviewed on a standard of correctness.

[104] There is, of course, a fourth factor to be considered – the expertise of the Board. However, in light of the conclusion reached above, little more need be said. As noted in *Barrie Public Utilities*, "The proper concern of the reviewing court is not the expertise of the decision-maker in general, but its expertise relative to that of the court itself *vis-à-vis* the particular issue" (per Gonthier J. at paragraph 12).

[105] There is certainly little doubt that the Board is regarded as a specialized tribunal with expertise in the area of regulation of electrical utilities and the establishment and approval of rates, tolls and charges. As noted in the *Labrador City* case, the legislative scheme requires the Board to develop and apply policy in the course of its work. Further, s. 6 of the *PUB Act* requires the Lieutenant-Governor in Council, when making appointments to the Board, to "take into consideration the need of the board to be composed of commissioners who have expertise in law, engineering, accountancy and finance." It is clear that the legislature intended the Board to be a tribunal with specialized expertise within the field of its legislative mandate.

[106] As pointed out in the *Bell Canada 1989* decision, however, the Board is not to be regarded as superior to the Court in respect of questions of a true jurisdictional nature. With respect to the issues engaged in this appeal, therefore, the fact that the Board is a specialized tribunal within the area of its mandate does not call for deference to its decisions relating to true jurisdictional matters.

[107] Taking all factors together, there should be appellate review of the Decision on a correctness standard.

(d) The Board's Approach

[108] In the context of an application by Hydro that previously-approved interim rates for certain industrial customers be made final, the Board determined that, by way of preliminary hearing, the parties should first address whether the Board had "jurisdiction to issue an order which changes how the ... RSP operated before the date of the order and, if so, does this jurisdiction extend to any aspect of the RSP, including ... how these balances are allocated to customers or customer classes."

[109] The Board appeared to be concerned, amongst other things, that a change to the RSP that could involve customers, other than industrial customers, potentially benefiting from any change in the RSP rules even though those other customers' rates were, for the relevant period, no longer interim, was not permissible. The Board was also concerned with whether exercising such a jurisdiction, if it existed, might offend the presumption against retroactivity.

[110] The Board described the position of Hydro, Newfoundland Power and the Consumer Advocate as follows:

> Hydro, Newfoundland Power and the Consumer Advocate submit that, in establishing these final rates, the Board also has the jurisdiction to deal with the manner of how those rates, and in particular the RSP rates, are calculated as of the date of any interim order, including the disposition of any balances in the RSP arising.
>
> (p.7)

[111] By contrast, the Industrial Customers took the position, in the view of the Board, that although the Board could set interim rates, "the rules and regulations affecting those rates cannot be made interim" and that "the Board's jurisdiction with respect to the disposition of any balances in the RSP is confined to the existing RSP rules and regulations". Put another way, it meant that the balances in the RSP could not be distributed to anyone other than the Industrial Customers under the guise of making interim rates for Industrial Customers final when other customers' rates had already been made final.

[112] The Board restated the "fundamental question" as follows: "how an established deferral account, such as the RSP, should be treated by the Board in the context of interim orders affecting the balances in the account" (p.7)

[113] The Board's approach to the questions it had posed for preliminary decision essentially involved a consideration of three matters:

1. The nature of deferral accounts generally and how they could be disposed of;

2. The impact of interim decision-making on the disposition of deferral accounts;

3. The impact of how, procedurally, the issue had been brought before the Board.

Although interrelated, it is necessary to consider each of these matters in turn. In fact, the procedural issues in item three cut across the Board's consideration of the other two items as well.

(i) Deferral Accounts

[114] A deferral account in utility regulatory practice is an accounting practice whereby a separate account is used to

> [54] ... "[e]nable a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year". They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another.
>
> (Bell Canada 2009.)

[115] As discussed previously, use of such accounts helps to smooth out the occurrence of unexpected or currently unknown costs or revenues and to provide rate stability to customers. Deferral accounts are regarded as "accepted regulatory tools" to be operated as part of rate-setting powers: *Bell Canada 2009*, paragraph 54. As noted earlier, the proper use of deferral accounts does not involve violation of the principle against retroactivity or retrospectivity.

[116] Implicit in the creation of deferral accounts is the power of the regulator to order the disposition of the funds contained in them: *Bell Canada 2009*, paragraph 56. In *Bell Canada 2009,* for example, the Supreme Court held that deferral account balances representing the difference between certain telephone rates actually charged by local exchange carriers and those determined by a price-cap formula ordained by the regulator could be used to expand high-speed broadband internet services in remote and local communities, to improve accessibility for individuals with disabilities and to give a one-time credit to certain residential subscribers.

[117] The Board determined that the RSP was a form of deferral account because it "allows for the accumulation of balances which are subsequently collected from or refunded to customers". This determination was accepted by all parties.

[118] The RSP is arguably more complex than the normal type of deferral account such as the one which was the subject of discussion in *Bell Canada 2009*. In that case, the deferral account was used to record the difference between the revenues derived from certain residential telephone services that were actually charged, and the revenues that would otherwise have been derived from rates determined by a "price caps" formula designed to limit prices in accordance with inflation. In the instant case, however, the amount that accumulates in the RSP is determined by a number of factors, some of which may work against others in their ultimate effect. The amounts that accrue result not only from increases or decreases in cost – which could be said to relate to only the Industrial Customers operations – but also from

increases or decreases in load variation. In fact, this factor swamps the other factors in terms of magnitude.

[119] The Board, correctly, concluded that the use of deferral accounts is "consistent with prospective regulation" and does not violate the anti-retroactivity principle (p. 7). However, it went on to state that although it had "jurisdiction" in relation to deferral accounts, the use of such accounts is "an extraordinary measure" and that its jurisdiction was "limited by the principles of predictability and fairness ... and does not necessarily extend to changing how balances are calculated and allocated in the past" (p. 8; underlining added).

[120] It is apparent that in the foregoing passages, the Board is commingling two different concepts. The first reference to "jurisdiction" is to the existence of a legal authority for the establishment of deferral accounts. This is a correct use of the notion of jurisdiction. The second reference, on the other hand, is to the manner in which the jurisdiction, or authority, should be exercised – as an extraordinary measure, limited by certain rate-making principles, etc. This analysis does not go to the notion of jurisdiction, as legal authority, but to the manner in which the jurisdiction is to be exercised. This is evident from the observation of the Board that the use of deferral accounts does not "necessarily" extend to changing how balances were allocated in the past, thereby recognizing that these principles do not define the jurisdictional parameters of the operation of deferral accounts but would merely have an influence on the decision, in a given case, as to how a deferral account should be regulated.

[121] By intruding into the area of how the Board's jurisdiction with respect to the operation of a deferral account should be exercised, in the context of an examination of the true jurisdictional question it posed for itself, the Board committed legal error.

[122] In support of its analysis, the Board then referred to past practice of the Board. It stated at p. 8:

> While the Board acknowledges that the RSP has been used creatively over the years to address a variety of issues it is also clear that changes to the established RSP rules have always been made on a prospective basis.[1]

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[1] In support of this proposition, the Board cited a portion of Hydro's written submission to the Board, as follows:

> Barring an intervening order of the Board, which can be either a final order changing the way the collection or disbursement of amounts occur through rate setting of for future energy

While past Board practice may be relevant as to how the Board ought to exercise its jurisdiction in a given case, it cannot be used to determine the jurisdictional parameters of the legal authority which the Board has. In relying on past practice in this regard, the Board erred in its analysis.

[123] The Board then stated a conclusion which obviously drew upon its previous conclusions about exercising its jurisdiction only in "extraordinary" circumstances, not "necessarily" changing how balances were calculated or allocated in the past, and about the influence of past practice:

> In the Board's view changing how the RSP operated in prior years would be analogous to the situation that Mr. Justice Green suggested might constitute retroactive regulation in [the *Stated Case*]
>
> (p. 9)

Because the premises supporting this conclusion are, for the reasons given above, not valid when dealing with the jurisdiction of the Board to deal with deferral accounts, as opposed to the question of how that jurisdiction should be exercised in a given case, the conclusion that changing how the RSP operated in prior years might amount to retroactive regulation is severely weakened.

[124] Furthermore, it was of questionable utility for the Board to have stated this conclusion at this stage in its analysis, when it was only commenting on deferral accounts without reference to the effect of interim orders. The questions posed by the Board, set out in paragraph 32 above, were meant to address the Board's power of disposition over balances in the RSP which accumulated during the currency of interim orders. A conclusion that the RSP, as a deferral account, could not be changed relative to its operation in prior years, without considering the fact that what was being dealt with was in the context of interim orders, was therefore premature. We will come back to the issue of interim orders later in these reasons.

> consumption, or an interim order signaling a potential change in the rate for consumption that occurs after the interim order is issued, the customer can expect to rely upon the rate structure to provide an outcome which will be calculated in manner which has already been set.

This statement does not in fact support the Board's statement in the text. Hydro's submission contained the relevant qualification that the general proposition would not be applicable if there had been an interim order. It was therefore illogical for the Board to offer Hydro's statement as support when it was qualified by the reference to an interim order, clearly applicable to the matter under consideration.

[125] Finally, in the context of its discussion of deferral accounts, the Board made reference to a procedural consideration which appeared to affect its jurisdictional analysis.

[126] The Board noted that Hydro's applications for the interim rates for its Industrial Customers and its 2009 GRA had not sought any changes to the RSP rules, nor had Hydro filed any application for RSP reviews prior to the end of 2009 as had been indicated in the covering letter to its 2009 application. In the absence of an application, the Board declined "to consider suspending the operation of the load variation allocation rules as suggested by Hydro in its correspondence" (p. 9).

[127] The phraseology of that portion of the decision suggests that either the Board believed it could not act on that matter without an application or that the absence of an application was a sufficient reason for the Board not to exercise its jurisdiction. It is not clear which. With respect to the first possible interpretation, in our view the *PUB Act*, including s. 82, confers broad powers upon the Board to investigate rates and take remedial action if appropriate. Exercise of such powers is not dependent upon receipt of an application. Procedure cannot determine jurisdiction. It may affect its exercise but not its existence. With respect to the second interpretation of the Board's statement we consider the statement to be conclusory only, lacking an explanation of why the stated factor would be sufficient.

(ii) Interim Orders

[128] Section 75 of the *PUB Act* gives broad powers to the Board to make orders approving rates, tolls and charges on an interim basis until a final order of the Board is made. When made, the final order is treated as having been made as of the date of the interim order: *Stated Case*, paragraph 87. If therefore, the rates, tolls and charges collected pursuant to the interim order were higher than those finally approved, it is necessary to deal with the excess that, in accordance with the final order, should not have been collected.

[129] Subsection 75(3) provides, in broad terms, that the Board may order that excess revenue earned pursuant to an interim order be dealt with, not only by refunding it to the customers of the public utility concerned, but also by placing it in a reserve fund "for the purpose that may be approved by the board." This provides considerable flexibility to the Board to dispose of excess revenue earned as a result of an interim order, that is not confirmed in

the final order, in a variety of ways that may or may not involve the customers of the utility who contributed to the excess benefiting directly through a refund. As was noted in the *Stated Case*, "[t]he Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy" (paragraph 36, item 2). In so doing, the Board must "balance the interests, as identified in the legislation, of the utility against those of the consuming public" (paragraph 36, item 4).

[130] Indeed, as noted in the *Stated Case*, paragraph 94, "[t]he power to deal with excess revenue is inherent in the nature of the regulatory scheme the Board is required to administer" even if there is no express statutory provision dealing with the type of excess revenue under consideration. The manner in which the Board can deal with excess revenue is limited only by the broad purposes of the legislative regime as it is perceived by the Board to apply in a given case.

[131] The Board rejected the submission of Hydro, with the support of Newfoundland Power and the Consumer Advocate, that, as the Industrial Customers had been subject to interim orders since January 1, 2008 under s. 75 of the *PUB Act*, the Board's power to determine the appropriateness of rates since January 1, 2008 included the power to determine the disposition of any accumulated balance in the RSP on a prospective basis to all customer groups, not just the Industrial Customers. Instead, the Board accepted the argument of the Industrial Customers that, although the rates applicable to the RSP could be changed back to the date of the last interim order, the balance in the RSP attributed to the Industrial Customer group had to be distributed only for the benefit of that group.

[132] In *Bell Canada 1989*, Gonthier J. stated at p. 1761:

> The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order.
>
> (Emphasis added.)

[133] The Consumer Advocate relied on this passage to submit that if the Board is dealing with interim rates, the whole rate structure is "up for revision". The Board stated that it accepted the proposition in *Bell Canada*

1989 that "the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order" but interpreted that proposition restrictively:

> ... The Board does not believe that an interim rate order for one group of customers empowers the Board to change the utilities' entire rate structure. This interpretation would not be in keeping with the principles of predictability and fairness cited by the Alberta Court of Appeal in the 2010 ATCO decision or with the specific language of the Supreme Court of Canada in [Bell Canada 1989] where the Court states at para. 39:
>
> > "Thus, the question before this Court is whether the appellant has jurisdiction to make orders for the purpose of remedying the inappropriateness of rates which were approved by it in a previous interim decision."
>
> (p. 11; Emphasis added.)

[134] The above passage from *Bell Canada 1989* referenced by the Board was part of a paragraph in which Gonthier J. was describing the matter that was then before the Supreme Court of Canada and it should not be taken as a legal proposition that the powers of a regulatory authority in the context of interim orders are limited to that single defined situation. The propositions stated by Gonthier J. after a review of the applicable legislation and authorities are the legal principles established by *Bell Canada 1989* respecting the powers accruing to a regulatory authority which is authorized to make interim orders – see paragraph 61 above. In restrictively interpreting the general principles enunciated in *Bell Canada 1989* as it did, the Board erred.

[135] In like manner, the Board interpreted s. 75 restrictively to enable it to reject the proposition advanced by the Consumer Advocate that s. 75, by its language, allowed the Board, in its words, "to place any excess revenue paid by the Industrial Customer group as a result of the interim rates into an account for the possible benefit of [some] other customer group" (p. 11). The Board reasoned as follows:

> ... This interpretation would not appear to be consistent with the scheme of the legislation generally or with generally accepted sound public utility practice which requires that rates be just and reasonable and not unjustly discriminatory.
> ...

> Reading s. 75 in the overall context of the legislation and regulatory structure the Board believes that a purposeful interpretation would require that the refund or the reserve fund must, to the extent possible, be for the benefit of the customer group which was found to have paid the excess revenue. There may be times when it is not practical to refund to the customers that paid the excess, for example where the amount is nominal or the customers cannot be found. The Board believes that, in the absence of extraordinary circumstances, a finding that interim rates for a group of customers were in excess of reasonable rates would require that the same customer group be effectively charged the reasonable rates through a refund or the use of a reserve account.
>
> (pp. 11-12)

[136] In this passage the seeds of error are evident. Although commencing to interpret s.75 in accordance with the scheme of the *Act* and basic principles of utility regulation with a view to determining whether it had the legal authority to do what Hydro, Newfoundland Power and the Consumer Advocate submitted it *could* do, the Board's analysis morphed into determining what it *should* do in accordance with sound utility practice. This is evident from the conclusion that there "may be times when it is not practical to refund to the customers that paid the excess", thereby recognizing that other groups could in "exceptional circumstances" benefit. This analysis recognizes the Board was determining its jurisdiction according to what it considered, as a general rule, it *should* do, in a given case, not what it had, as a matter of law, authority to do.

[137] Noting that Newfoundland Power's rates had already been made final, the Board nevertheless concluded that s. 75 "does not ... contemplate a wholesale review of the rate structure of all the customers of the utility where only one group of customers has interim rates" and that "[t]his is the only reading ... which is consistent with fair and reasonable rates and the principles of predictability and fairness" (p. 12). While this might be an appropriate result in a given case, it does not follow that such an interpretation is the "only" appropriate reading. As the Board itself noted, there may well be circumstances where it would not be appropriate or possible to benefit only the group who paid the excess revenue. The Board has to have the authority to make other dispositions of that revenue. Its jurisdiction must therefore extend to such situations.

3. Procedural Considerations

[138] Reference has already been made to how the Board's perceptions of how the matter came before it procedurally appeared to affect the Board's jurisdictional analysis. See, paragraphs 125-127 above in relation to deferral

accounts. The Board also gave consideration to what it considered to be procedural problems when dealing with its analysis relating to interim orders.

[139] The Board placed great emphasis in its analysis on the fact that Hydro had not, in its applications for interim rates for the Industrial Customers, requested changes to the RSP rules or refunds of excess revenue to other customer groups:

> In its applications for interim rates for the Industrial Customers, Hydro did not request changes to the RSP rules and did not ask that any excess revenue be refunded to the benefit of other customer groups.
>
> (p. 12)

> The interim rate applications put the Industrial Customers on notice that the Board would be reviewing the Industrial Customers rates for reasonableness and that it may set different rates and a different method of calculating the Industrial Customers' RSP balances and rates. Hydro did not provide notice that anyone other than the Industrial Customers may be affected and did not put the Industrial Customers on notice that the accumulating balances in the RSP may be transferred to the benefit of other customer groups. The potential for a review of Hydro's rate structures or that any excess revenue as a result of the interim rates could be put to the benefit of other customer groups was not made clear. This result would not be consistent with the historical operation of the RSP and would be unprecedented in the context of an interim rate order in this province and therefore could not reasonably have been anticipated by the Industrial Customers.
>
> (p. 13)

[140] Accepting the foregoing paragraph as factually correct, its significance in our view was not properly explained. There was no finding that the Industrial Customers had to date suffered any actual detriment owing to the absence of prior notice of the possible disposition of the RSP balance other than for their exclusive benefit. The observation that Hydro's current proposal is unprecedented may be pertinent but of itself is of no significance on the jurisdictional issue. The jurisdictional issue cannot be resolved by reference to past practice or procedural issues of notice. References to sound utility practice may be relevant to making a decision within jurisdiction but not to whether jurisdiction exists in the first place.

[141] The Board did accept that it has the power to modify the entire rate structure for the Industrial Customer Group, including the RSP rules. It stated:

> The interim orders clearly provide the Board with the full jurisdiction to, in the words of the Supreme Court of Canada, "*modify in its entirety the rate structure*" for the Industrial Customer group, which includes all aspects of the Industrial Customers' rate, including the RSP rate. The Board does not accept the position of the Industrial Customers that the Board has no power to change the rules and regulations affecting the RSP. The Industrial Customers argue that because there is one set of RSP rules which apply to both the Industrial Customers and Newfoundland Power and because there was no interim order in relation to Newfoundland Power then the rules could not have been made interim. The Board notes, as referenced by the Consumer Advocate, that the Industrial Customers' rate sheet specifically states that the RSP adjustment reflects the operation of the RSP. The Board agrees with Hydro when it states "*The RSP rules are just a means of calculating a rate. That's their only role.*" (Transcript, June 12, 2010, pg.32 18/7-8) The Board finds no distinction between the rates and the RSP rules used to calculate the rates.
>
> The Board finds that it has the jurisdiction to set reasonable rates for the Industrial Customers for the period beginning on January 1, 2008 but it does not have the jurisdiction to make a comprehensive assessment of the reasonableness of Hydro's entire rate structure. Had there been an application for a change to the RSP along with an application for interim rates for Hydro's other customers or a request that any excess go to the benefit of other customer groups the Board may have taken a different view of the Application. ...
>
> (p. 13; Underlining added.)

[142] The Board was obviously concerned that the issue of the disposition of the RSP account should have been brought before it by Hydro in a different manner and at an earlier time. It stated:

> The Board is frankly disappointed with Hydro's handling of this matter, both substantively and procedurally. Hydro was in the best position to know the impacts of the anticipated significant load changes. Major changes in load will not only impact the operation of the RSP but may also potentially impact significantly the cost of service and base rates that were set in the last general rate application. The Board would expect that, in light of such major changes from test year forecasts and the resulting impact on Industrial Customer rates, Hydro would have filed a general rate application. Such major changes could only have been addressed through a general rate application or, alternatively, perhaps an application which sought a review of its rate structure, changes to the RSP and interim rates for all potentially affected customers. Such an application should have set out specific proposals in relation to the excess so that all affected customers understood what was at stake. In addition, the Board would have expected Hydro to address these load changes promptly to avoid the complications which have now arisen as a result of the passing of two years. Hydro failed to take timely appropriate steps in the circumstances so that the

> matter could be effectively addressed, ensuring that all stakeholders understood the issues.
>
> (p. 14)

[143] The significance of that concern was emphasized in the Board's "Conclusion" which stated:

> The Board finds that in the circumstances its jurisdiction to make orders in relation to how the RSP operated in prior years is limited. Given the manner in which this matter was brought forward the Board does not have the jurisdiction to change how Newfoundland Power's RSP operated in prior years, either in terms of the rates charged or the resulting balances. The Board does have the jurisdiction to issue an order which sets just and reasonable rates for the Industrial Customers for 2008 and 2009, including the Industrial Customers' RSP rates and how the Industrial Customers RSP operated for those years. The Board also finds that it has jurisdiction to determine whether any overpayment as a result of the interim rates is to be refunded to the Industrial Customer group or placed in a reserve account to the benefit of the Industrial Customer group. ...
>
> (Emphasis added.)

[144] For the reasons already expressed, procedural considerations cannot define the Board's jurisdiction. In allowing itself to be influenced by such matters, the Board erred.

(e) Conclusion

[145] The reasoning articulated by the Board does not justify the conclusions reached. The Board determined that as interim orders had been in effect it had the jurisdiction to modify, in its entirety, the rate structure for the Industrial Customers including the RSP rates and the RSP rules used to calculate that rate. That determination was not challenged on this appeal and we agree that it gave proper effect to the jurisprudence respecting interim orders. Our concerns are that the full implications of that determination were not recognized, that the Board failed to recognize the extent of the power conferred upon it by the *PUB Act*, and that it was unduly affected by procedural aspects whose effect upon jurisdiction was unexplained.

[146] It is apparent from the Board decision that it considered the load variation balances in the RSP to be "excess revenue" as contemplated by subsection 75(3) of the *PUB Act*. There was no explanation for that conclusion. We agree with the submission of Newfoundland Power that this was an error. "Excess revenue" in that subsection refers to the difference between the revenue received under the interim rates and the revenue

authorized to be received under the final rates. The subsection addresses revenue that was earned by a public utility. However, balances in the RSP are not revenue earned by the utility. They are encumbered revenues in a deferral account which are to be disposed of in accordance with an order of the Board pursuant to the RSP rules.

[147] The Board concluded that it had the power to modify the RSP rules and consequential rates for the Industrial Customers with effect from January 1, 2008. (We note that it was undisputed that there is one set of rules for the RSP which applies both to the Industrial Customers and Newfoundland Power.) It follows that it could modify the RSP rules pertaining to the method of allocating the cost effects of load variations if such modification were in accordance with generally accepted sound public utility practice. The Board did not appear to recognize the implications of its power to modify the RSP rules in that manner. The existing RSP rules apply a "class assignment approach" which means that the cost savings accruing to Hydro because of industrial shutdowns were allocated to the Industrial Customers' side of the RSP ledger. Clearly that is not the only possible approach to the allocation of such costs as witnessed by the operation of the RSP prior to the 2003 GRA. A modification of the RSP rules for the Industrial Customers, which the Board accepts is within its power, could therefore encompass a change from the class assignment approach with consequential effects upon the final rates for the Industrial Customers from January 1, 2008 and upon the appropriateness of contemplated prospective distributions of any balances in the RSP.

[148] The consequential effect of any modification of the RSP rules upon rates, upon the revenue authorized to be earned by Hydro and upon the accumulated balances in the RSP then fall to be addressed by the Board pursuant to the *PUB Act*, including but not limited to subsection 75(3).

[149] Subsection 75(3) authorizes an order that excess revenue be "refunded to the customers of the public utility" or "placed in a revenue fund for the purpose to be approved by the Board". The statutory language pertaining to the reserve fund confers a broad jurisdiction on the Board to deal with excess revenue which jurisdiction should be exercised "to achieve the purposes of the legislation and to implement provincial power policy". *Stated Case*, para. 36. The Board found that it was constrained to ensure that "excess revenue" be disposed of solely for the benefit of Industrial Customers. Clearly that constraint did not arise from the express statutory language of subsection 75(3). There was no analysis from the Board explaining how the scheme or purpose of the *PUB Act* required an

interpretation of that subsection that constrained the power of the Board to deal with reserve funds.

[150] The Board indicated that the constraint arose from "generally accepted sound public utility practice which requires that rates be just and reasonable and not unjustly discriminatory". While application of such practice considerations might (but not necessarily) justify a conclusion to limit disposition of reserve funds to industrial customers in a given case, it does not justify giving a restrictive interpretation to the broad language of subsection 75(3), thereby foreclosing its use and application for all such cases. As noted above, the Board approached this aspect on the basis that the RSP balances should be treated as excess revenue to Hydro. However, on that basis and given the magnitude of the anticipated RSP balances it is apparent that the constraint stated by the Board could adversely affect the ability to establish reasonable and non-discriminatory rates for the Industrial Customers from January 1, 2008. See paragraphs 29-30 above .

[151] Accordingly, the decision of the Board is not capable of being derived from its statement respecting the effect of public utility practice and its conclusion respecting subsection 75(3) is without support.

[152] Furthermore as stated earlier it follows from *Bell Canada 1989* and *Bell Canada 2009* that the balances in the RSP, which would be determined in the process of establishing final rates for the Industrial Customers, would be subject to disposition by the Board in accordance with the RSP rules which are subject to modification by the Board in the application before it.

[153] The Board made repeated reference to procedural considerations as affecting its decision. These procedural concerns do not logically justify the stated conclusion as to jurisdiction. We agree with the submission of the Consumer Advocate that:

> ... First, by virtue of the interim orders and as a matter of law, everything about the Industrial Customers' rates, including the rules pertaining to load variation and the normal load variation allocation rules were made interim and therefore are inherently subject to subsequent review and modification on a retrospective basis. To further insist that Hydro was required to state that which was already the case by operation of law in order for the Board to assume its jurisdiction, is not logical or sustainable.

[154] The Board was presented with an application for Hydro to set final rates for the Industrial Customers effective January 1, 2008. The accompanying letter stressed concern with "the appropriateness of the current mechanism for allocating the impact of the load variation in the

RSP". That was consistent with a concern raised by Hydro in its initial application for interim rates in December, 2007. We note that the record before this Court indicates that since Hydro's application for final rates for the Industrial Customers, all parties (excluding, of course, the Board) set forth their positions respecting the RSP in the course of an interrogatory process and the filing of expert evidence on that issue. The Board did not explain the necessity of a formal application for a change to the RSP in those circumstances, nor did it advert to subsection 3(4) of the *Board of Commissioners of Public Utilities Regulations, 1996*, which would permit the Board to direct Hydro to file a formal application if it considered it necessary for the proper consideration and disposition of an issue.

[155] As stated earlier, exercise of the Board's jurisdiction was not contingent upon the wording of Hydro's application. The Board had the jurisdiction to set final rates and consequently to address the appropriate disposition of balances in the RSP that accumulated during the currency of the interim orders.

[156] In summary, the Board erred in:

1. allowing its determination of its jurisdiction to be arbitrarily limited by the manner in which the issue was brought before it; procedure cannot trump jurisdictional substance;

2. not concluding, in accordance with *Bell Canada 1989*, that, in respect of interim orders, all aspects of rates, including RSP rules, were made interim and therefore inherently subject to subsequent review and possible modification, on an application to make interim rates final; and

3. concluding that the *PUB Act*, properly interpreted, restricted the manner in which deferral accounts could be dealt with and in particular, restricted the classes of beneficiaries of such accounts. See *Bell Canada 2009*.

[157] We conclude that the Board has jurisdiction to deal with and dispose of remaining amounts in the RSP in accordance with the broad powers contained in the legislation, which include, but are not limited to, refunding it to the Industrial Customers. But these powers are not necessarily confined to disposing of the RSP fund balances solely to the benefit of one class of customers, in this case the Industrial Customers. This is not to say, of course, that the Board should include customers other than the Industrial

Customers as beneficiaries, only that the Board has the jurisdiction and authority to, and should, consider the submissions of all interested parties on this issue, taking into account generally accepted sound public utility practice and the imperative of setting just and reasonable rates that are non-discriminatory.

SUMMARY AND DISPOSITION

[158] For the foregoing reasons the decision of the Board declining jurisdiction is incorrect. The appeals are allowed. Order No. P.U. 25 (2010) is set aside. The matter is remitted to the Board for hearing and determination on the merits in accordance with this decision.

[159] The matter of costs not having been fully addressed by all parties, leave is given to any party to apply within 15 days of the release of this judgment for a determination of costs on the appeal. In the absence of such an application, an order will go directing that each party shall bear its own costs.

J. D. Green C.J.N.L.

K. J. Mercer J.A.

M. F. Harrington J.A.

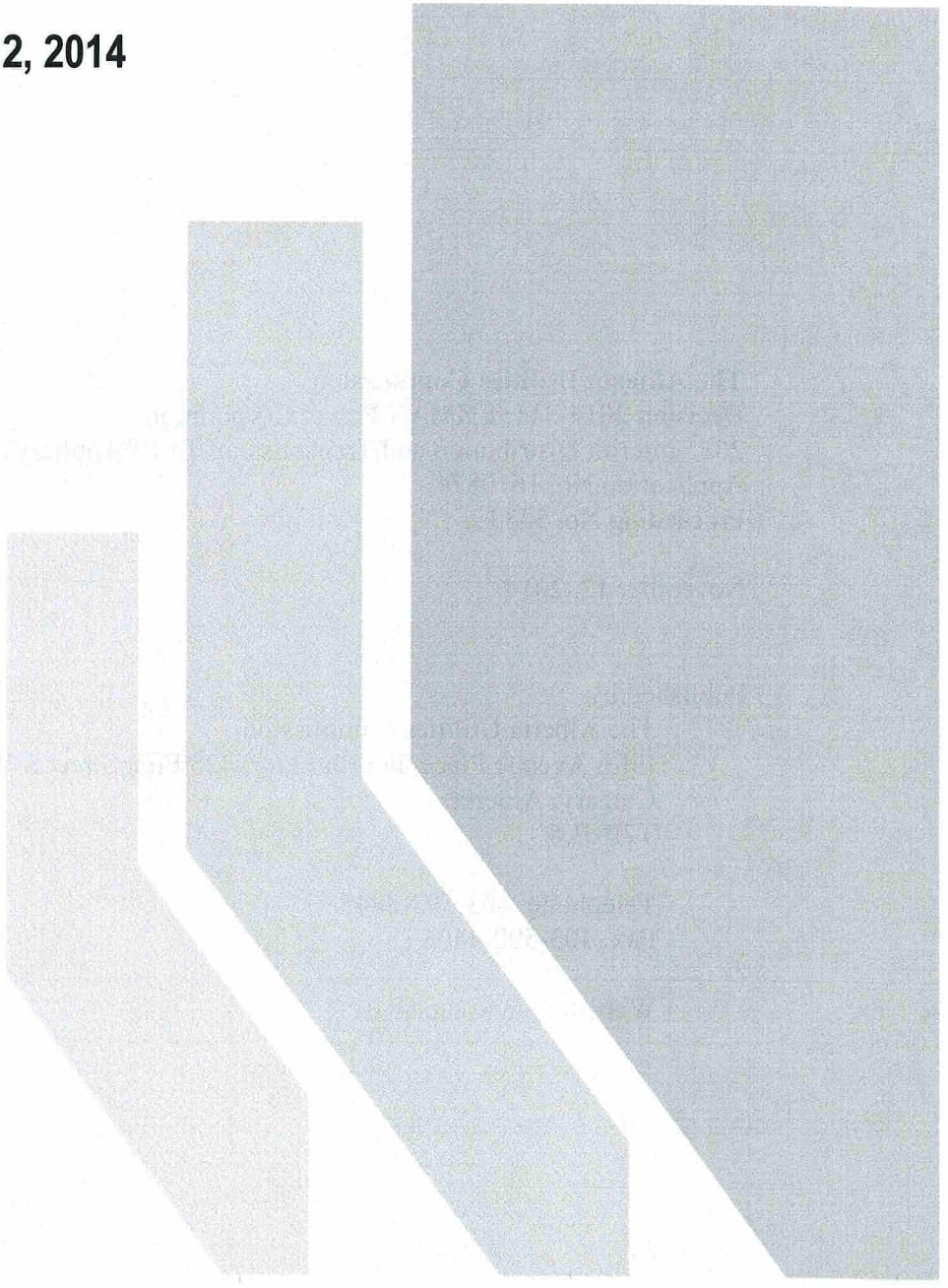
Decision **2014-311**

AUC
Alberta Utilities Commission

ENMAX Power Corporation

2015 Interim Distribution and Transmission Tariff Application

November 12, 2014



The Alberta Utilities Commission
Decision 2014-311: ENMAX Power Corporation
2015 Interim Distribution and Transmission Tariff Application
Application No. 1610874
Proceeding No. 3433

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1 Introduction

1. On September 25, 2014, ENMAX Power Corporation (EPC) submitted an application (application) to the Alberta Utilities Commission (AUC or Commission), pursuant to sections 37, 102, 119 and 124(2) of the *Electric Utilities Act*, SA 2003, c. E-5.1, applying for the following:

(i) Approval to implement 2015 distribution access service (distribution) rates on an interim basis, as described in Section 3 of the application,[1] calculated in Appendix 1[2] and set out in the rate schedules provided in Appendix 2,[3] effective January 1, 2015.

(ii) Approval to implement 2015 transmission rates on an interim basis, as described in Section 4 of the application, calculated in Appendix 3[4] and set out in the rate schedules provided in Appendix 4,[5] effective January 1, 2015.

2. On September 29, 2014, the Commission issued a notice of application advising interested parties to file a statement of intent to participate (SIP) to the Commission no later than October 9, 2014. In the SIPs, parties were asked to indicate whether they supported or objected to the application, provide reasons for their positions and comment on the need for further process and the supporting rationale.

3. The following parties registered in the proceeding by the specified deadline:

- FortisAlberta Inc.
- ATCO Electric Ltd.
- Alberta Electric System Operator (AESO)
- EPCOR Distribution & Transmission Inc.

4. None of the above-listed parties objected to the application or requested further process.

5. On October 21, 2014, the Commission issued a process letter classifying the proceeding as a *notice-only process* proceeding and advising that the Commission had two questions for EPC. On October 22, 2014, EPC filed its responses to the Commission's questions.[6]

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1 Exhibit No. 3, application.
2 Exhibit No. 5, application, Appendix 1.
3 Exhibit No. 6, application, Appendix 2.
4 Exhibit No. 7, application, Appendix 3.
5 Exhibit No. 8, application, Appendix 4.
6 Exhibit No. 14.01, Commission process letter; Exhibit No. 15.01, Commission information request; Exhibit No. 16.01, EPC responses to information request.

6. The Commission considers that the record for this proceeding closed on October 22, 2014.

7. In reaching the determinations set out within this decision, the Commission has considered all relevant materials comprising the record of this proceeding. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

2 Details of the application

8. On July 24, 2013, EPC filed an application with the AUC requesting approval of EPC's 2014 Phase I Distribution Tariff Application (DTA) and 2014-2015 Transmission General Tariff Application (GTA) (collectively Proceeding No. 2739).[7] According to EPC, even if a decision for Proceeding No. 2739 is issued in December 2014, given the likely timing of a compliance filing, it is unlikely that final 2014 rates will be approved before the end of 2014, and therefore final 2014 rates will not be available to be used as the basis of interim 2015 rates by January 1, 2015.[8]

9. EPC's current distribution and transmission tariffs were approved on an interim basis in Decision 2013-436[9] and have been in place on an interim basis since January 1, 2014. If existing 2014 interim rates continue for 2015, EPC forecasted a total revenue shortfall of $10.229 million for distribution and $14.260 million for transmission.[10]

10. EPC stated that the shortfall amount is significant. To reduce the impact of the rate increase that will be required when the final 2015 distribution and transmission rates are implemented, EPC requested approval of interim distribution and transmission rates to be effective January 1, 2015 and continuing until such time as the AUC approves revised interim or final 2015 distribution and transmission rates. EPC advised that, once matters in Proceeding No. 2739 have been decided by the Commission, EPC will make the required adjustments or applications to set final 2015 distribution and transmission rates.[11]

2.1 Distribution

11. EPC submitted that its forecast distribution revenue for 2015, included in Appendix 1 to the application, is $192.571 million based on current interim distribution rates. EPC's forecast distribution revenue requirement is $202.800 million, as determined by escalating the 2014 DTA revenue requirement by the placeholder performance-based regulation (PBR) formula described in Section 3 of the application. Consequently, if the 2014 DTA is approved as applied for, and no

[7] Application for Approval of 2014 Phase I Distribution Tariff Application and 2014-2015 Transmission General Tariff Application, Exhibit No. 3, Application 1609784, Proceeding No. 2739.
[8] Exhibit No. 3, application, paragraph 2.
[9] Decision 2013-436: ENMAX Power Corporation, 2014 Interim Distribution and Transmission Tariff Application, Application No. 1610012, Proceeding ID No. 2886, December 11, 2013.
[10] Exhibit No. 3, application, paragraph 4.
[11] Exhibit No. 3, application, paragraphs 3 and 20.

interim rate adjustment is made effective January 1, 2015, there will be a distribution revenue shortfall of $10.229 million from January 1, 2015 to December 31, 2015.[12]

12. In order to calculate its distribution revenue shortfall calculations, EPC adopted the PBR formula established in Decision 2012-237 (first generation PBR) for other utilities to adjust their distribution base rates on an annual basis:[13]

$$R_t = \underbrace{BR_{t-1} * (1+ (I-X))}_{\text{Base rates } (BR_t)}$$

Where:

R_t = Upcoming year's rates for each class

BR_{t-1} = Current year's base rates for each class

I = Inflation Factor ("I factor")

X = Productivity Factor ("X factor")

13. For its 2015 interim rate calculations, EPC adopted the first generation PBR formula using EPC's proposed 2014 DTA revenue requirement as BR_{t-1}.[14]

14. EPC requested the following first generation PBR placeholders for interim distribution rate setting purposes only:

(i) I factor placeholder of 2.93%, where the I factor placeholder is calculated the same as the first generation PBR I factor approved in Decision 2012-237, using the Alberta Average Weekly Earnings ("AWE") from July 2012 to June 2014 with a weighting of 55%, and the Alberta Consumer Price Index ("CPI") from July 2012 to June 2014 with a weighting of 45%. The Statistics Canada data for each index showing the placeholder I factor calculation is provided in Appendix 1, Schedule 1.2; and

(ii) X factor placeholder of 1.16%, where the X factor placeholder is the same as the first generation PBR X factor of 1.16% approved in Decision 2012-237.[15]

15. In response to a Commission information request, EPC revised the data used in calculating the I factor and calculated a new 2015 I factor of 2.65 per cent. EPC also provided revised 2015 interim distribution rate calculations and tariffs.[16]

---

12 Exhibit No. 3, application, paragraph 12; Appendix 1, schedules 1.1 and 1.5; 2014 Phase I DTA and 2014-2015 Transmission GTA; Exhibit No. 106.6, Schedule 12-1, Retail Sales of $310.888 (Line 21) less the cost of Sales of $111.615 million (Line 9), Application No. 1609784, Proceeding ID No. 2719.

13 Exhibit No. 3, application, paragraph 6; Decision 2012-237: Rate Regulation Initiative, Distribution Performance-Based Regulation, Application No. 1606029, Proceeding ID No. 566, September 12, 2012, at paragraph 963.

14 Exhibit No. 3, application, paragraph 7.

15 Exhibit No. 3, application, paragraph 8.

16. EPC noted that its proposal to use first generation PBR placeholders is for convenience, and does not necessarily mean that it will propose these factors in its forthcoming second generation PBR application, or that it accepts these factors would be reasonable for the same. EPC submitted that the use of first generation PBR placeholders is reasonable and conservative for the purposes of determining 2015 interim distribution rates.[17]

17. EPC's distribution rates would require an increase of 5.31 per cent to collect the forecast 2015 distribution revenue requirement of $202.800 million. However, EPC's proposed interim rate adjustment will result in an increase to distribution rates of 3.19 per cent, which will enable EPC to recover 60 per cent of its revenue shortfall and collect $198.710 million in 2015 distribution revenue. This will reduce the forecast 2015 distribution revenue shortfall from $10.229 million to $4.090 million.[18]

18. EPC also proposed that the requested interim distribution base rate increase of 3.19 per cent be applied to all rate classes on an across-the-board basis, therefore maintaining the currently approved rate structure based on EPC's last approved Phase II cost of service study.[19]

19. Subsequent to receiving a decision in Proceeding No. 2739, EPC plans to file for approval of a capital tracker, or K factor, in 2015 as part of the second generation PBR application or as a separate filing. While EPC did not propose a K factor placeholder in the application, EPC indicated that it will request approval to adjust the 2015 interim distribution base rates subsequent to the filing of its capital tracker application.[20]

20. In the application, EPC referred to its 2015 billing determinant forecast:

> EPC's forecast 2015 Distribution revenue is $192.571 million if the existing 2014 interim Distribution rates are continued in 2015 without an adjustment, based on the 2015 billing determinant forecast.[21]

21. In response to a Commission information request on the 2015 billing determinant forecast, EPC:

- confirmed that the forecast is a new forecast that has not been previously approved by the Commission
- explained that the forecast is based on the same methodology used in EPC's 2014 DTA but with updated historical data and key economic indicators
- submitted that it considers the forecast to be interim and will be including the forecast for full testing in its forthcoming PBR application[22]

---

16 Exhibit No. 16.01, AUC-EPC-1; Exhibit No. 16.02, Appendix 1, revised 2015 interim distribution rate calculations; Exhibit No. 16.03, Appendix 2, revised 2015 interim distribution tariffs.
17 Exhibit No. 3, application, paragraphs 9 and 10.
18 Exhibit No. 3, application, paragraphs 13 to 15.
19 Exhibit No. 3, application, paragraph 16.
20 Exhibit No. 3, application, paragraph 17.
21 Exhibit No. 3, application, paragraph 12.
22 Exhibit No. 16.01, AUC-EPC-2.

2.2 Transmission

22. EPC submitted that its forecast transmission revenue for 2015, included in Appendix 3 to the application, is $61.708 million based on current interim transmission rates. EPC's forecast transmission revenue requirement for 2015 is $75.968 million, as applied for in its 2014-2015 transmission GTA. Consequently, if the 2014-2015 GTA is approved as applied for and no interim rate adjustment is made effective January 1, 2015, there will be a transmission revenue shortfall for 2015 of $14.260 million from January 1, 2015 to December 31, 2015.[23]

23. EPC's transmission revenue requirement would require an increase of 23.11 per cent to collect the forecast 2015 transmission revenue requirement of $75.968 million, as applied for in its 2014-2015 GTA. However, EPC requested approval of an interim increase to its existing transmission revenue requirement of 13.87 per cent, which will allow EPC to recover 60 per cent of its revenue shortfall. The proposed adjustment would result in 2015 transmission revenue of $70.264 million, reducing the forecast 2015 transmission revenue shortfall from $14.260 million to $5.704 million.[24]

2.3 Test to support interim tariff applications

24. In the application, as justification for its interim rates, EPC relied on the two-part test that was originally used by the Commission's predecessor, the Alberta Energy and Utilities Board, in evaluating interim rate applications, and has since been used by the Commission. The two-part test is as follows:

> The first part of the test relates to quantum and need, and includes the following considerations:
>
> i. Is the identified revenue deficiency probable and material?
> ii. Can all or some portion of any contentious items be excluded from the amount collected?
> iii. Is the increase required to preserve the financial integrity of the applicant or to avoid financial hardship to the applicant?
> iv. Can the applicant continue safe utility operations without the interim adjustment?
>
> The second part of the test relates to the public interest and includes the following considerations:
>
> i. Will the interim rates promote rate stability and ease rate shock?
> ii. Will the interim adjustments help to maintain intergenerational equity?
> iii. Can the interim rate increases be avoided through the use of carrying costs?
> iv. Are the interim rate increases required to provide appropriate price signals to customers?
> v. Is it appropriate to apply the interim rider on an across-the-board basis?[25]

3 Issues and Commission findings

25. When evaluating the merits of an interim rate application, the Commission applies the above-stated test. It weighs the potential benefits of rate stability and minimization of rate shock and intergenerational inequity that might result on approval of final rates against the costs that

[23] Exhibit No. 3, application, paragraph 19; 2014 Phase I DTA and 2014-2015 Transmission GTA, Exhibit No. 124, Application No 1609784, Proceeding ID No. 2719; Appendix 3, Schedule 3.1.
[24] Exhibit No. 3, application, paragraphs 21 to 23.
[25] Exhibit No. 3, application, paragraphs 24-25.

underpin the interim rate increase, whether they be contentious or non-contentious items, the impact the revenue deficiency has on the financial welfare of the utility, and the potential impact on safe utility operations.

26. The above-listed considerations in the two-part test may be given different weighting depending on the specific circumstances of each application. The Commission has evaluated the application with these considerations in mind.

27. The Commission has reviewed the transmission and distribution revenue shortfall calculations included in appendices 1 and 3 of the application, including the revised I factor calculations, and is satisfied that they are accurate.

28. In respect of the 2015 billing determinant forecast, the Commission accepts EPC's explanation and is satisfied that the forecast, using previously approved methodologies and updated historical data and key economic indicators, is sufficient for the purposes of 2015 interim distribution rates based on 60 per cent of EPC's applied-for 2014 DTA. The 2015 billing determinant forecast will be tested in EPC's upcoming PBR proceeding. The Commission will make a determination at that time on the reasonableness of the forecast.

29. The Commission considers that the forecast distribution revenue shortfall of $10.229 million and transmission revenue shortfall of $14.260 million, amounting to a total revenue deficiency of $24.289 million, is a material amount if the entire amount had to be collected from customers.

30. The Commission is also cognizant of the financial hardship that such a material deficiency could have on EPC, as it stated in its application, "[t]hese deficiencies will reduce cash flow, which will in turn require increased short-term borrowing. Long-term borrowing may also be impacted, if the existing rates will be in place for the majority of 2015."[26]

31. The Commission also notes EPC's arguments that it has experienced load growth and system infrastructure expansion over the formula-based ratemaking (FBR) term of 2007 to 2013, while revenues were decoupled from costs. Consequently, EPC submitted that its distribution rate base grew significantly, and the cost of providing service has increased beyond the difference between the approved FBR inflation and productivity factors.[27]

32. To understand the impact of EPC's proposed interim rate increases on typical customer bills, the Commission has reviewed the bill comparison submitted by EPC.[28] The Commission has used the bill comparison information to prepare Table 1 below which illustrates that the interim rate increase will promote rate stability for customers.

[26] Exhibit No. 3, application, paragraph 31.
[27] Exhibit No. 3, application, paragraph 27.
[28] Exhibit No. 5, application, Appendix 1, Schedule 1.8.

Table 1. Bill impacts

Rate Class	Total charges		
	Without interim rates	With interim rates	
	2015 PBR base rates January 1, 2015 (per cent)	2015 interim rates January 1, 2015 (per cent)	2015 PBR base rates January 1, 2015 (per cent)
Residential rate D100	4.0	0.6	1.6
Small commercial rate D200	2.9	0.4	1.2
Medium commercial rate D300	3.7	0.6	1.5
Large commercial - secondary rate D310	2.3	0.4	0.9
Large commercial - primary rate D410	1.0	0.2	0.4

33. Given the magnitude of the potential revenue shortfall and resultant financial impact to EPC and rate shock to customers' bills as demonstrated in Table 1 above, the Commission considers that some degree of interim rate adjustment should be made. The Commission is aware that the financial hardship to EPC could be mitigated by the award of carrying costs; however, it will not mitigate the risk of potential rate shock to customers. The Commission finds that approval of an interim increase to EPC's distribution rates will provide a gradual and stable transition to EPC's final 2015 distribution rates.

34. The Commission recognizes that while EPC's transmission tariff initially only applies to a single customer, the AESO, the increases to EPC's transmission tariff will flow-through to EPC's customers by way of EPC's system access service (SAS) rates and transmission access charge (TAC) deferral account riders. Consequently, the Commission accepts EPC's submission that "the proposed interim Transmission rates will help levelize the transmission Tariff throughout 2015, reducing the magnitude of the increase once final 2015 Transmission rates are approved"[29] and finds that, given the magnitude of the potential shortfall, an interim increase to its transmission rates will enable a more gradual transition to final 2015 transmission rates.

35. To better provide for both a gradual increase and a transitional rate level, the Commission considers that it is preferable to have an interim increase that reflects an intermediate position between the current rates and the proposed final rates. The Commission notes that for the period from January 1, 2014 to August 1, 2014, EPC estimated a distribution revenue shortfall of $20.175 million and a transmission revenue shortfall of $11.748 million.[30] The Commission approved EPC's request to collect 60 per cent of EPC's shortfall, reducing the forecasted shortfall to $8.069 million of revenue for distribution and $4.699 million of revenue for transmission.

36. In determining the reasonableness of the requested amount, the Commission notes that it received no objection from interveners on this application and accepts EPC's submission that a collection of 60 per cent of both its forecast distribution and transmission revenue deficiencies is

[29] Exhibit No. 3, application, paragraph 40.
[30] Decision 2013-436, paragraphs 7 and 11.

sufficient to account for any potentially contentious elements of EPC's 2014 DTA and 2014-2015 GTA. The Commission recognizes that the combined shortfall of $24.489 million is approximately $7.5 million lower than the combined shortfall than requested in EPC's 2014 Interim Distribution and Transmission Tariff Application. The Commission finds that as the proposed rate increases are requested on an interim basis, rates will be trued up once the final 2015 rates for distribution and transmission are approved.

37. The Commission also considers that applying the interim distribution rate increase to all rate classes on an across-the-board basis continues to be a reasonable method that is simple and cost effective to apply, and preserves the currently approved rate structure based on EPC's last approved Phase II cost of service study.

38. Accordingly, the Commission finds that the collection of 60 per cent achieves a reasonable balance in recognition of rate stability and minimization of rate shock that might result on approval of final rates against the costs that underpin the interim rate increase, contentious or non-contentious items, the impact the revenue deficiency has on the financial welfare of the utility, and the potential impact on safe utility operations. Consequently, the Commission approves the interim distribution and transmission rates as filed in this application effective January 1, 2015. The Commission approves:

- A 3.19 per cent interim increase to the distribution revenue requirement which represents 60 per cent of the 5.31 per cent applied for shortfall in the interim distribution revenue requirement. This interim increase is designed to decrease the forecast 2015 revenue shortfall from $10.229 million to $4.090 million; and

- An interim increase to the interim transmission revenue requirement of 13.87 per cent which represents 60 per cent of the 23.11 per cent applied for shortfall in the interim transmission revenue requirement. This interim increase is designed to decrease the forecast 2015 revenue shortfall from $14.260 million to $5.704 million.

39. In determining the level of interim rates for EPC, the Commission is not making any finding or determination with respect to any of the matters in EPC's 2014 DTA and 2014-2015 GTA, which is currently pending before the Commission.

40. The Commission has attached appendices 2 and 3 to this decision showing the interim distribution and transmission rates to be applicable on and after January 1, 2015, until replaced by subsequent decisions or orders of the Commission.

4 Order

41. It is hereby ordered that:

(1) The interim distribution tariff rates schedules attached as Appendix 2 to this decision are approved on an interim basis effective January 1, 2015.

(2) The interim transmission tariff attached as Appendix 3 to this decision is approved on an interim basis effective January 1, 2015.

Dated on November 12, 2014.

The Alberta Utilities Commission

(original signed by)

Bill Lyttle
Commission Member

Appendix 1 – Proceeding participants

Name of organization (abbreviation) counsel or representative
ENMAX Power Corporation (EPC) T. Carle R. Lottermoser
ATCO Electric Ltd. (AE) B. Yee L. Kerckhof
Alberta Electric System Operator (AESO) J. Martin R. Sharma
EPCOR Distribution & Transmission Inc. (EPCOR) J. Baraniecki G. Zurek N. Lamers
FortisAlberta Inc. (Fortis) T. Dalgleish J. Croteau M. Stroh J. Walsh

The Alberta Utilities Commission Commission Panel B. Lyttle, Commission Member Commission Staff G. Bentivegna (Commission counsel) P. Howard C. Runge J. Graham

Appendix 2 – Interim distribution tariff

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Appendix 2 - Interim distribution tariff

(consists of 18 pages)

Appendix 3 – Interim transmission tariff

(return to text)

Appendix 3 - Interim transmission tariff

(consists of 1 page)

ENMAX POWER CORPORATION ("EPC")

DISTRIBUTION TARIFF

RATE SCHEDULE

RATES IN EFFECT AS OF JANUARY 1, 2015

EPC DISTRIBUTION TARIFF RATE SCHEDULE

DISTRIBUTION TARIFF

RESIDENTIAL

RATE CODE D100

Rate Schedule for the provision of Electricity Services to residential Customers of a Retailer.

ELIGIBILITY

1. Sites which use Electricity Services for domestic purposes in separate and permanently metered single family dwelling units with each unit either metered separately or incorporated into a common building with other units.
2. As a single phase or three phase wire service supplied at a standard voltage normally available.
3. Sites eligible under 1 and 2 that qualify as a Micro-Generator under the Micro-Generation Regulation.

RATE

COMPONENT TYPE	UNIT	PRICE
DISTRIBUTION CHARGE FOR DISTRIBUTION ACCESS SERVICE		
Service and Facilities Charge	per day	$0.427587
System Usage Charge	per kWh	$0.008896
TRANSMISSION CHARGE FOR SYSTEM ACCESS SERVICE		
Variable Charge	per kWh	$0.019463

INVOICE PERIOD

Monthly, from the date of the last invoice to the date of the current invoice.

TERMS AND CONDITIONS

The Terms and Conditions of the EPC Distribution Tariff form part of this Rate Schedule and apply to all Electricity Services supplied under this Tariff.

OTHER

1. No more than one additional unit of living quarters within a single family dwelling, such as a basement suite equipped with cooking facilities, may be provided Electricity Services through one Meter under Rate Code D100. If the dwelling contains more than one additional self-contained unit of living quarters, a Commercial Rate will apply unless a separate Meter is installed for each unit.

   All new construction in R2 or higher density areas shall have a separate Meter for each suite, or alternatively the Electricity Services may be invoiced at the appropriate commercial rate.

2. If a Residential Site has a garage with a separate meter, the garage will be assigned a commercial rate.

3. If a Site qualifies as a Micro-Generator, rate charges will only apply to energy inflow into the Site (i.e. no outflow charges).

LOCAL ACCESS FEE (LAF)

The LAF is a surcharge imposed by the City of Calgary and is not approved by the Alberta Utilities Commission. The LAF is collected by EPC on behalf of the City for all Sites located within the municipal boundaries of the City of Calgary.

DISTRIBUTION TARIFF

SMALL COMMERCIAL

RATE CODE D200

Rate Schedule for the provision of Electricity Services to small commercial Customers of a Retailer.

ELIGIBILITY

1. Commercial Sites where the Energy consumption is less than 5,000 kWh per month (includes all unmetered services that are not Rate Code D500).

2. Sites eligible under 1 that qualify as a Micro-Generator under the Micro-Generation Regulation.

RATE

COMPONENT TYPE	UNIT	PRICE
DISTRIBUTION CHARGE FOR DISTRIBUTION ACCESS SERVICE		
Service and Facilities Charge	per day	$0.979551
System Usage Charge	per kWh	$0.007632
TRANSMISSION CHARGE FOR SYSTEM ACCESS SERVICE		
Variable Charge	per kWh	$0.015905

INVOICE PERIOD

Monthly, from the date of the last invoice to the date of the current invoice.

TERMS AND CONDITIONS

The Terms and Conditions of the EPC Distribution Tariff form part of this Rate Schedule and apply to all Electricity Services supplied under this Tariff.

OTHER

1. Temporary Construction/Service

   Construction and rental costs for necessary transformers and equipment required for any temporary Electricity Services (whether single or three phase, or

whether served from an overhead or underground source), shall be payable by the Customer to EPC in advance and based on an EPC estimate. Construction costs include costs associated with:

(a) up and down labour;

(b) unsalvageable material;

(c) vehicles; and

(d) equipment.

2. Temporary Connection Service

   Where applied-for Connection Services are to be used for temporary purposes only, the Customer will pay EPC, in advance of the installation:

   (a) EPC's total cost of installation and removal of the Facilities required for the temporary service; and

   (b) the cost of unsalvageable material.

3. Unmetered Services

   For unmetered services where individual energy consumption is small and easily predicted, estimated consumption will be based on equipment nameplate rating and operational patterns.

4. If a Site that qualifies as a Micro-Generator, rate charges will only apply to energy inflow into the Site (i.e. no outflow charges).

LOCAL ACCESS FEE (LAF)

The LAF is a surcharge imposed by the City of Calgary and is not approved by the Alberta Utilities Commission. The LAF is collected by EPC on behalf of the City for all Sites located within the municipal boundaries of the City of Calgary.

DISTRIBUTION TARIFF

MEDIUM COMMERCIAL

RATE CODE D300

Rate Schedule for the provision of Electricity Services to medium commercial Customers of a Retailer.

ELIGIBILITY

1. For Sites whose Energy consumption is equal to or greater than 5,000 kWh per month for at least six of the last 12 invoice periods, provided a peak demand greater than 150 kVA was not registered twice in the previous 365 days.

2. Sites eligible under 1 above that qualify as a Micro-Generator under the Micro-Generation Regulation.

RATE

COMPONENT TYPE	UNIT	PRICE
DISTRIBUTION CHARGE FOR DISTRIBUTION ACCESS SERVICE		
Service Charge	per day	$5.539776
Facilities Charge	per day per kVA of Billing Demand	$0.037608
System Usage Charge	per kWh	$0.004081
TRANSMISSION CHARGE FOR SYSTEM ACCESS SERVICE		
Demand Charge	per day per kVA of Billing Demand	$0.118081
Variable Charge	per kWh	$0.004047

Where

kVA of "Billing Demand" is defined as the greater of "Metered", "Ratchet" or "Contract" Demand:

(a) "Metered Demand" is the actual metered demand in the Tariff bill period;

(b) "Ratchet Demand" is 90% of the highest kVA demand in the last 365 days ending with the last day of the Tariff bill period; and

(c) "Contract Demand" is the kVA contracted for by the Customer.

INVOICE PERIOD

Monthly, from the date of the last invoice to the date of the current invoice.

TERMS AND CONDITIONS

The Terms and Conditions of the EPC Distribution Tariff form part of this Rate Schedule and apply to all Electricity Services supplied under this Tariff.

OTHER

1. Non-Standard Residential "Bulk-Metering".

2. Bulk Metering is the metering of multiple-unit residential occupancies under one corporate identity, (e.g., town housing, apartments, mobile home parks). Where bulk-metering exists, the Customer shall not re-sell electricity, but may include electricity as part of the rental charge and not separate therefrom.

3. Includes Medium Commercial Sites served at primary voltage that existed prior to November 2004 rate class changes.

4. If a Site qualifies as a Micro-Generator, rate charges will only apply to energy inflow into the Site (i.e. no outflow charges).

5. D300 Primary Voltage Service Customers

    a. For locations or buildings that receive primary voltage service, there will be a transformation credit of $1.335496 per day applied to the Service Charge, and a transformation credit of $0.009234 per day per kVA of Billing Demand applied to the Facilities Charge.

    b. The transformation credit is applicable only to D300 sites receiving primary voltage service prior to January 1, 2009.

LOCAL ACCESS FEE (LAF)

The LAF is a surcharge imposed by the City of Calgary and is not approved by the Alberta Utilities Commission. The LAF is collected by EPC on behalf of the City for all Sites located within the municipal boundaries of the City of Calgary.

DISTRIBUTION TARIFF

LARGE COMMERCIAL - SECONDARY

RATE CODE D310

Rate Schedule for the provision of Electricity Services to large commercial (secondary) Customers of a Retailer.

ELIGIBILITY

1. For Electricity Services that registered a monthly peak demand greater than 150 kVA twice in the previous 365 days and served at secondary voltage.
2. Sites eligible under 1 that qualify as a Micro-Generator under the Micro-Generation Regulation.

RATE

COMPONENT TYPE	UNIT	PRICE
DISTRIBUTION CHARGE FOR DISTRIBUTION ACCESS SERVICE		
Service Charge	per day	$16.089680
Facilities Charge	per day per kVA of Billing Demand	$0.098202
System Usage Charge On Peak	per kWh	$0.006604
System Usage Charge Off Peak	per kWh	$0.000000
TRANSMISSION CHARGE FOR SYSTEM ACCESS SERVICE		
Demand Charge	per day per kVA of Billing Demand	$0.138805
Variable Charge On Peak	per kWh	$0.004574
Variable Charge Off Peak	per kWh	$0.003573

Where

kVA of "Billing Demand" is defined as the greater of "Metered", "Ratchet" or "Contract" Demand:

(a) "Metered Demand" is the actual metered demand in the Tariff bill period,

(b) "Ratchet Demand" is 90% of the highest kVA demand in the last 365 days ending with the last day of the Tariff bill period,

(c) "Contract Demand" is the kVA contracted for by the Customer.

"On Peak" is all Energy consumption from 8 a.m. to 9 p.m. Monday to Friday inclusive, excluding statutory holidays (as according to the ISO Rules definition),

"Off Peak" is all Energy consumption not consumed in On Peak hours.

INVOICE PERIOD

Monthly, from the date of the last invoice to the date of the current invoice.

TERMS AND CONDITIONS

The Terms and Conditions of the EPC Distribution Tariff form part of this Rate Schedule and apply to all service supplied under this Tariff.

OTHER

If a Site qualifies as a Micro-Generator, rate charges will only apply to energy inflow into the Site (i.e. no outflow charges).

LOCAL ACCESS FEE (LAF)

The LAF is a surcharge imposed by the City of Calgary and is not approved by the Alberta Utilities Commission. The LAF is collected by EPC on behalf of the City for all Sites located within the municipal boundaries of the City of Calgary.

DISTRIBUTION TARIFF

LARGE COMMERCIAL - PRIMARY

RATE CODE D410

Rate Schedule for the provision of Electricity Services to large commercial (primary) Customers of a Retailer.

ELIGIBILITY

1. For Electricity Services that are served at primary voltage.
2. Sites eligible under 1 above that qualify as a Micro-Generator under the Micro-Generation Regulation.

RATE

COMPONENT TYPE	UNIT	PRICE
DISTRIBUTION CHARGE FOR DISTRIBUTION ACCESS SERVICE		
Service Charge	per day	$19.830314
Facilities Charge	per day per kVA of Billing Demand	$0.013834
System Usage Charge On Peak	per kWh	$0.008095
System Usage Charge Off Peak	per kWh	$0.000000
TRANSMISSION CHARGE FOR SYSTEM ACCESS SERVICE		
Demand Charge	per day per kVA of Billing Demand	$0.138700
Variable Charge On Peak	per kWh	$0.004512
Variable Charge Off Peak	per kWh	$0.003525

Where

kVA of "Billing Demand" is defined as the greater of "Metered", "Ratchet" or "Contract" Demand:

(a) "Metered Demand" is the actual metered demand in the Tariff bill period,

(b) "Ratchet Demand" is 90% of the highest kVA demand in the last 365 days ending with the last day of the Tariff bill period,

(c) "Contract Demand" is the kVA contracted for by the Customer,

"On Peak" is all Energy consumption from 8 a.m. to 9 p.m. Monday to Friday inclusive, excluding statutory holidays (as according to the ISO Rules definition),

"Off Peak" is all Energy consumption not consumed in On Peak hours.

INVOICE PERIOD

Monthly, from the date of the last invoice to the date of the current invoice.

TERMS AND CONDITIONS

The Terms and Conditions of the EPC Distribution Tariff form part of this Rate Schedule and apply to all Electricity Services supplied under this Tariff.

OTHER

1. The Customer is responsible for supplying all transformers whether owned by Customer or rented.
2. "Primary Metering" shall be metering at EPC's primary distribution voltage with any subsequent transformation being the sole responsibility of the Customer.
3. Multi-Sites
   a) For Customers that have a normally used service connection (preferred service) and a second service connection used strictly as a backup service (alternate service), the demands of the two service connections will be totaled on an interval basis and charged based on Rate Code D410.
   b) For Customers that use more than one service connection on a regular basis, demands of all the service connections will be totaled on an interval basis and charged based on Rate Code D410 provided the service connections are:
      i) positioned on adjacent and contiguous locations;
      ii) not separated by private or public property or right-of-way; and
      iii) operated as one single unit.
4. If a Site qualifies as a Micro-Generator, rate charges will only apply to energy inflow into the Site (i.e. no outflow charges).

LOCAL ACCESS FEE (LAF)

The LAF is a surcharge imposed by the City of Calgary and is not approved by the Alberta Utilities Commission. The LAF is collected by EPC on behalf of the City for all Sites located within the municipal boundaries of the City of Calgary.

DISTRIBUTION TARIFF

STREETLIGHTS

RATE CODE D500

Rate Schedule for the provision of Electricity Services to Customers of a Retailer.

ELIGIBILITY

For all photo cell controlled lighting services including all streetlights, traffic sign lighting, roadway lighting and lane rental lighting. Services with photo cell controlled lighting will not be eligible for a Meter.

RATE

COMPONENT TYPE	UNIT	PRICE
DISTRIBUTION CHARGE FOR DISTRIBUTION ACCESS SERVICE		
System Usage Charge	per kWh	$0.017490
TRANSMISSION CHARGE FOR SYSTEM ACCESS SERVICE		
Variable Charge	per kWh	$0.016804

INVOICE PERIOD

Monthly, from the date of the last invoice to the date of the current invoice.

TERMS AND CONDITIONS

The Terms and Conditions of the EPC Distribution Tariff form part of this Rate Schedule and apply to all Electricity Services supplied under this Tariff.

LOCAL ACCESS FEE (LAF)

The LAF is a surcharge imposed by the City of Calgary and is not approved by the Alberta Utilities Commission. The LAF is collected by EPC on behalf of the City for all Sites located within the municipal boundaries of the City of Calgary.

DISTRIBUTION TARIFF

LARGE DISTRIBUTED GENERATION

RATE CODE D600

Rate Schedule for the provision of Electricity Services to Sites with on-site generation with a minimum export capacity of 1,000 kVA.

ELIGIBILITY

1. For services with on-site generation connected in parallel with the EPC Electric Distribution System with a minimum export capacity of 1,000 kVA.
2. For Electricity Services that are served at primary voltage.
3. For sites equipped with bi-directional interval recording metering.

RATE

COMPONENT TYPE	UNIT	PRICE
DISTRIBUTION CHARGE FOR DISTRIBUTION ACCESS SERVICE		
Service Charge	per day	$19.830314
Dedicated Facilities Charge	per day	customer specific
System Usage Charge On Peak	per kWh	$0.008095
System Usage Charge Off Peak	per kWh	$0.000000
TRANSMISSION CHARGE FOR SYSTEM ACCESS SERVICE		
ISO Costs/Credits	$	Flow through

1. The customer specific Dedicated Facilities Charge daily amount will be determined as follows:

   Dedicated Facilities Charge = ((DFA + GA) x (CRF + OMA))/365 days.

Where:

a) DFA = current cost of dedicated feeder assets

b) GA = general assets associated with DFA and equal to 10.8% of DFA

c) CRF = Capital Recovery Percentage Factor based on EPC's weighted cost of capital and approved depreciation rate.

d) OMA = Operation, maintenance and administration factor equal to 3.1% of DFA.

The customer specific Dedicated Facilities Charge daily amount will be outlined in the Interconnection Agreement which will also include the term of the Agreement and an annual inflation adjustment.

2. The System Usage Charge will be determined using the net of the energy inflow and energy outflow at the Meter(s). System Usage Charge will be waived for sites that only have dedicated facilities and do not use the EPC primary feeder system.

3. "On Peak" is all Energy consumption from 8 a.m. to 9 p.m. Monday to Friday inclusive, excluding statutory holidays (as according to the ISO Rules definition), "Off Peak" is all Energy consumption not consumed in On Peak hours.

4. Flow-Through of ISO Costs/Credits will be determined by applying the ISO DTS rate (and any applicable riders) to the difference between the POD billing determinants with and without the site(s) billing determinants.

5. An initial fee will be charged for the incremental cost of bi-directional meter(s).

INVOICE PERIOD

Monthly, from the date of the last invoice to the date of the current invoice.

TERMS AND CONDITIONS

The Terms and Conditions of EPC form part of this Rate Schedule and apply to all Electricity Services supplied under this Tariff.

OTHER

5. The Customer is responsible for supplying all transformers whether owned by customer or rented.

6. "Primary Metering" shall be metering at EPC's primary distribution voltage with any subsequent transformation being the sole responsibility of the Customer.

7. Multi-Site Locations

   c) For locations or buildings that have a normally used service connection (preferred service) and a second service connection used strictly as a backup service (alternate service), the demands of the two service connections will be totaled on an interval basis and charged on Rate Code D600.

   d) For locations that use more than one service connection on a regular basis, demands of all the service connections will be totaled on an interval basis and charged on Rate Code D600.

LOCAL ACCESS FEE (LAF)

The LAF is a surcharge imposed by the City of Calgary and is not approved by the Alberta Utilities Commission. The LAF is collected by EPC on behalf of the City for all Sites located within the municipal boundaries of the City of Calgary.

DISTRIBUTION TARIFF

TRANSMISSION CONNECTED

RATE CODE D700

Rate Schedule for the provision of Distribution Access Service to Customers of a Retailer that are connected directly to EPC Facilities at a transmission voltage.

RATE

COMPONENT TYPE	UNIT	PRICE
DISTRIBUTION CHARGE FOR DISTRIBUTION ACCESS SERVICE		
Service Charge	per day	$19.830314
TRANSMISSION CHARGE FOR SYSTEM ACCESS SERVICE		
ISO Costs	$	Flow through

INVOICE PERIOD

Monthly, from the date of the last invoice to the date of the current invoice.

TERMS AND CONDITIONS

The Terms and Conditions of the EPC Distribution Tariff form part of this Rate Schedule and apply to all Electricity Services supplied under this Tariff.

LOCAL ACCESS FEE (LAF)

The LAF is a surcharge imposed by the City of Calgary and is not approved by the Alberta Utilities Commission. The LAF is collected by EPC on behalf of the City for all Sites located within the municipal boundaries of the City of Calgary.

TRANSMISSION RATE SCHEDULE

EFFECTIVE JANUARY 1, 2015

ENMAX POWER CORPORATION
RATE SCHEDULE
INTERIM 2015 TRANSMISSION TARIFF

ELIGIBILITY

To the Alberta Electric System Operator for use of ENMAX Power Corporation's Transmission facilities for the period

RATE

The Transmission tariff charged to the Alberta Electric System Operator is:

Monthly Charge: $5,855,318.18

TERMS AND CONDITIONS

The terms and conditions of ENMAX Power Corporation form part of this rate schedule and apply to service supplied under this tariff.

M A N I T O B A

THE PUBLIC UTILITIES BOARD ACT

Order No. 49/14

May 6, 2014

Before: Régis Gosselin, B és Arts, M.B.A., C.G.A., Chair
Marilyn Kapitany, B.Sc. (Hons), M.Sc., Member,
Larry Soldier, Member

INTERIM ORDER IN RESPECT OF MANITOBA HYDRO'S APPLICATION FOR INTERIM ELECTRICITY RATES EFFECTIVE MAY 1, 2014

TABLE OF CONTENTS

1.0 Executive Summary

By this Order, the Public Utilities Board (Board) denies Manitoba Hydro's Application for an interim electricity rate increase of 3.95% to all customer classes to be effective April 1, 2014. However, the Board approves an interim rate increase for all customer classes, effective May 1, 2014 of 2.00%, to approximate the annual rate of inflation, plus a further 0.75% interim rate increase, with the revenues from the 0.75% rate increase to flow into the existing Deferral Account established in Board Order 43/13 to assist with the payment of in-service costs of the Bipole III transmission project.

According to Manitoba Hydro, the energy future for the Province of Manitoba will require significant annual rate increases to support new electricity generation, regardless of the generation option selected. Manitoba Hydro's 3.95% interim rate request is consistent with the Preferred Development Plan that the Utility is advancing in the 'Needs For and Alternatives To' (NFAT) Review Hearing that is currently before the Board in a separate regulatory proceeding. Stakeholders and the Board are currently considering the many issues and decisions that will result from that NFAT Review. The issues and decisions that result from the NFAT Review will have impacts on the rate levels that are set in future General Rate Applications for Manitoba Hydro. It would be premature to reach any conclusions as to outcome and rate impacts flowing from the NFAT Review as those matters will be the subject of future General Rate Applications that Manitoba Hydro must bring before the Board.

However, on a *prima facie* basis, (and subject to the interim rate increase being varied or finalized in the next General Rate Application to be filed in the fall of 2014) the Board is satisfied that an interim rate increase is required by Manitoba Hydro for the costs of maintaining and replacing aging infrastructure such that it continues to provide safe and reliable service. The Board also notes that Manitoba Hydro's prices for electricity exports have continued to decline, resulting in less revenue to offset the requirement for domestic rate increases.

By this Order, the Board further disagrees with Manitoba Hydro's proposal to file a three-year General Rate Application in the fall of 2014, and instead directs Manitoba Hydro to file a fully comprehensive two-year General Rate Application for electric operations, to cover the 2014/15 and 2015/16 fiscal years. Manitoba Hydro's fiscal years run from April 1 to March 31.

2.0 Manitoba Hydro's Application for Interim Rates

Overview

On March 7, 2014, the Manitoba Hydro-Electric Board (Manitoba Hydro or the Corporation) applied to The Public Utilities Board (Board), for an interim electricity rate increase to all customer classes of 3.95% effective April 1, 2014, sufficient to generate additional revenue of approximately $56 million in 2014/15.

The Board established a written hearing process, with one round of written Information Requests posed to, and answered by Manitoba Hydro, followed by written submissions of all Parties. Four interveners, namely the Consumers' Association of Canada (CAC), the Green Action Centre (GAC), the Manitoba Industrial Power Users Group (MIPUG) and the Manitoba Keewatinowi Okimakanak (MKO) issued Information Requests and made written submissions.

Manitoba Hydro's Application for interim rates parallels the Corporation's Integrated Financial Forecast IFF-13, which projected annual rate increases of 3.95% over the next 20-year time period. Manitoba Hydro based its 3.95% Interim Rate Application on five principal reasons:

1. To avoid the potential for incurring financial losses on its electric operations;

2. To limit the extent to which financial ratios are projected to deteriorate;

3. To compensate for the fact that export prices continue to be significantly less than those experienced prior to the 2009/10 fiscal year;

4. To recognize that Manitoba Hydro's infrastructure is aging and that increased costs are necessary to maintain infrastructure in a safe and reliable manner; and

5. To provide customers with rate stability and predictability and to avoid the need for higher rates in the future.

Projected Income With and Without a Rate Increase

For the fiscal year 2014/15, Manitoba Hydro is forecasting, in IFF13, a net income of $55 million from electric operations after an assumed 3.95% rate increase, effective April 1, 2014. Manitoba Hydro indicates that if the rate increase is not granted, the Corporation could lose $1 million in 2014/15.

Overall net income, accumulated to the year 2032, is forecast to be $2.6 billion lower than the net income forecast in IFF-12, for the following reasons:

- The updated IFF-13 shows a deterioration in the financial figures presented in IFF-12, partially resulting from domestic revenues decreasing by $1.2 billion by 2031. Manitoba Hydro has primarily attributed this change to a reduced domestic (Manitoba) load forecast that projects load growth at 1.5% rather than 1.6%.

- Operating expenses are forecast to be $50 million lower in 2014/15 than forecast in in IFF-12 and $611 million lower through 2032. This reduction appears based on Manitoba Hydro limiting the growth in OM&A expenditures to 1% commencing in 2015/16 and continuing at that level through 2020/21.

- Finance expense is projected to increase by $1.4 billion to 2032 due to higher projected interest rates and an increase of $2.7 billion in debt financing between IFF-12 and IFF-13.

- Depreciation and amortization expenses are forecast to increase by $514 million by 2032 due to increased capital spending and Manitoba Hydro's proposed adoption of the Equal Life Group method of depreciation.

However, due in large part to a colder than normal winter and current favourable water levels, Manitoba Hydro's most recent projected revenues from electric operations for the 2013/14 year are significantly higher than those projected in IFF-12.

Specifically, IFF-12 projected net income of $60 million for the 2013/14 fiscal year, while IFF-13 has increased this projection to $116 million, an increase of $55 million over the course of a single year. This amount approximates the projected $56 million revenue increase for the 2014/15 year, sought in Manitoba Hydro's Interim Rate Application that is the subject of this Order. Actual financial statements for the 2013/14 fiscal year, which ended March 31, 2014, have not yet been filed with the Board as they are being finalized by Manitoba Hydro.

Manitoba Hydro projects Operation, Maintenance & Administration (OM&A) costs of $485 million in 2013/14 and $494 million in 2014/15. In the first nine months of 2013/14, OM&A expenses appear to have increased by 4.9%. The largest increases are attributed to Building & Property Services, Employee Benefits (due to an actuarial re-evaluation of pension and employee benefit obligations) and Consulting and Professional Fees. Growth in these areas was partially offset by reductions in the category of Customer & Public Relations, Sponsored Memberships, and Research & Development. The single largest expenditure category in Manitoba Hydro's OM&A is Wages & Benefits, representing approximately 79% of OM&A.

For the period of 2015/16 to 2020/21, Manitoba Hydro expects to limit OM&A costs to one percent per year, targeting approximately $600 million in total savings over that time span.

In the short term, Manitoba Hydro is forecasting finance expense to reduce slightly, from $452 million in 2012/13, to $437 million in 2013/14. However, in the long term, Manitoba Hydro is projecting cumulative finance expense to be $1.4 billion higher by 2032 due to increased forecast debt levels. Specifically, between IFF-12 and IFF-13, Manitoba Hydro has revised its assumed level of long-term debt upwards by $2.7 billion.

Financial Ratios

Manitoba Hydro monitors three self-imposed financial targets, namely:

- A debt-to-equity ratio of 75:25;
- An interest cost coverage ratio of greater than 1:20; and
- A capital cost coverage ratio of greater than 1.20.

In IFF-13, Manitoba Hydro predicts a debt-to-equity ratio of 76:24 for 2013/14. With the planned spending on its Preferred Development Plan (which includes the Keeyask and Conawapa Generating Stations), Manitoba Hydro expects the ratio to deteriorate to 90:10 by 2022/23, and not recover to the 75:25 target level until 2033/34.

The 'interest cost coverage' ratio indicates Manitoba Hydro's ability to meet interest payment obligations with the net income generated by the Corporation. IFF-13 projects an interest cost coverage ratio of 1.22 for 2013/14. At this time, Manitoba Hydro expects the level to deteriorate to less than 1.0 by 2019, remain at 1.0 for two years, and then gradually return to the target level by 2028.

The capital cost coverage ratio indicates the ability to use internally generated cash flows to finance base capital expenditures. A level of 1.0 means that all base capital expenditures can be met without incurring new debt. IFF-13 predicts a capital cost coverage ratio of 1.06 in 2013/14. Manitoba Hydro predicts that the level will be less than 1.0 by 2014/15, and return to the target level by 2016/17.

Changes in Export Revenue Projections

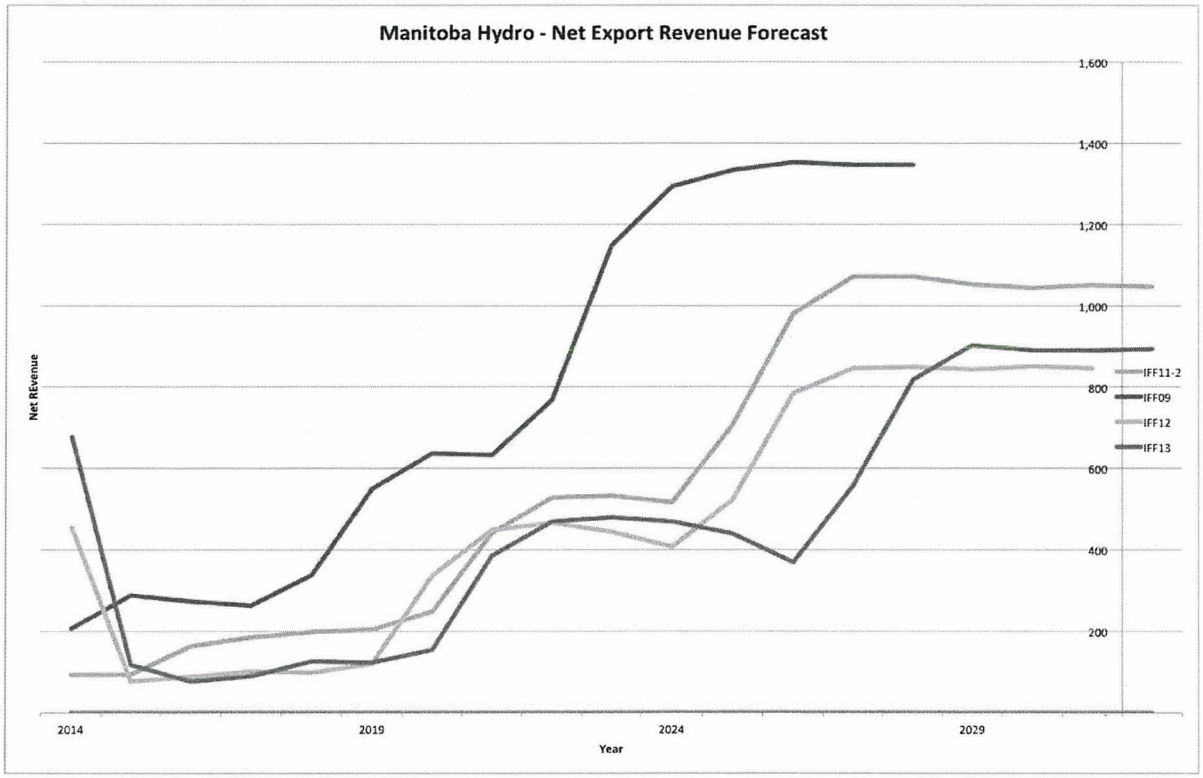
Since IFF-09 in 2009, Manitoba Hydro has repeatedly revised its export revenue projections downward. Specifically:

- For the short-term, in IFF-09, Manitoba Hydro projected gross export revenues of $615 million in 2013/14 and $590 million in 2014/15. Gross export revenue is now forecast in IFF13 to be only $408 million in 2013/14 and $383 million in 2014/15.

- For the long-term, IFF-09 projected annual export revenues to exceed $1 billion by 2020. This has now been revised downwards to $848 million.

Figure 1 illustrates the downward projections in Manitoba Hydro's export revenue forecast.

Figure 1 - Manitoba Hydro Export $ Revenue Forecast



Planned Capital Expenditures

Manitoba Hydro forecasts expenses for annual "base capital" expenditures to maintain and repair existing infrastructure, and for "major new generation and transmission" projects. Manitoba Hydro filed an updated 2013 Capital Expenditure Forecast(CEF-13) setting out Manitoba Hydro's planned 20-year capital spending. Compared to the prior forecast in CEF-12, Manitoba Hydro revised its planned expenditures on major generation and transmission projects over a 19-year timeframe upwards by $1.1 billion, and its base capital expenditures downwards by $122 million. However, from 2015 until 2018, Manitoba Hydro is now expecting a significant increase in base capital expenditure compared to the prior forecast.

The increased budget for major new generation and transmission is due to the one year deferral of the Conawapa Generating Station (now in 2026/27), the re-instatement of Electric and Gas demand side management costs in the capital forecast and the update of a number of project cost estimates. The revised in-service costs for Keeyask General Station have increased from $6.2 billion to $6.5 billion and the in-service costs for Conawapa Generating Station have increased from $10.4 billion to $10.7 billion.

The Board and Manitoba Hydro are currently engaged in a Needs For and Alternatives To (NFAT) Review into Manitoba Hydro's Preferred Development Plan, which, among other things, involves the planned construction of two new generating stations and a 750 MW U.S. transmission line. Manitoba Hydro's Preferred Development Plan, as filed August 2013, assumed annual rate increases of 3.95% over a 20-year period. However, even other alternative plans assume significant rate increases over the same timeframe.

Manitoba Hydro notes that all Canadian electric utilities are facing significant cost pressures. MH's current IFF13-1 reflects Manitoba Hydro incurring material operating losses in 2017/18 through 2021/22 which total over $245 million. The losses are attributable, in part, to the in-service revenue requirements related to Bipole III (in 2018/19) and Keeyask G.S. Rate increases to avoid these forecast financial losses

would appear to require rate increases in excess of 4% per year over the next several years. These and other forecasts, and the assumptions on which they are based, will be the subject of further review and testing at the next General Rate Application.

Next General Rate Application

Manitoba Hydro indicates that it is planning to file a three-year General Rate Application in the fall of 2014.

3.0 Intervener Submissions

Consumers' Association of Canada (Manitoba) Inc. (CAC)

The Consumers' Association of Canada (Manitoba) Inc. (CAC) opposes Manitoba Hydro's requested rate increase and considers it to be materially inflated in light of evidence that Manitoba Hydro could meet its 2014/15 financial targets without any rate increase. CAC submits that an interim rate increase should be limited to the rate of inflation. It states that Integrated Financial Forecast IFF-13 shows a forecast net income for electric operations of $116 million, which compares to only $78 million the previous year. CAC further cites several factors to suggest that actual net income for the 2013/14 fiscal year will likely be higher than projected in IFF-13.

CAC submits that Manitoba Hydro has not implemented cost control measures that would limit Operation, Maintenance & Administration (OM&A) expenditure growth to 1% per year, and only plans to do so starting in 2015/16. In CAC's view, implementing such cost constraint measures now would decrease projected OM&A costs in 2014/15 by $5 million.

CAC further states that there are several outstanding directives from Board Order 43/13 relating to the transition to International Financial Reporting Standards (IFRS), and that Manitoba Hydro has not yet performed an Asset Condition Assessment for its Generation and Transmission units.

In CAC's view, Manitoba Hydro is basing its request for a 3.95% rate increase on its planned implementation of the Preferred Development Plan, which has been challenged in the current NFAT review and may no longer be the best option.

Lastly, CAC expresses concern about Manitoba Hydro's stated intention to file a three-year General Rate Application in the fall, and suggests that any application should be limited to two years at most.

Green Action Centre (GAC)

The Green Action Centre (GAC) supports Manitoba Hydro's application, noting that capital costs for Manitoba Hydro's Preferred Development Plan have increased significantly over earlier projections. GAC further states that the costs of ongoing maintenance and the renovation of aging assets will be a reality for Manitoba Hydro in the current period as well as the future, and that an interim rate increase is required to ensure adequate resources for the safety and reliability of Manitoba Hydro's infrastructure. In GAC's view, rate increases above the rate of inflation will be required to keep Manitoba Hydro's financial status healthy or, at minimum, prevent a deterioration of the Corporation's debt-to-equity ratio over the next 15 years.

GAC further recommends that the Board should consider setting rates based on longer-term trends rather than short-term conditions, due to the inherent variability in such short-term conditions.

Manitoba Industrial Power Users Group (MIPUG)

The Manitoba Industrial Power Users Group (MIPUG) opposes Manitoba Hydro's request, and instead suggests two alternate approaches: (1) an inflationary rate increase of 2.0%, or (2) an interim increase based on the lowest-cost development plan reviewed in the NFAT. Specifically, MIPUG suggests that any interim rate increase be capped at 75% of the 3.32% even annual rate increases projected for Manitoba Hydro's All-Gas Plan, leading to an increase of 2.45%.

According to MIPUG, the proposed 3.95% rate increase is based on IFF-13, which not only includes projects that have yet to be approved, but also assumes that if the projects do not proceed, the costs incurred must be fully amortized immediately, which is inconsistent with regulatory practice.

MIPUG further states that changes to accounting procedures to comply with Integrated Financial Reporting Standards (IFRS) have not yet been fully vetted, and that if

Manitoba Hydro adopts the IFRS interim standard, rate-regulated assets will continue to be recognized. MIPUG further states that retaining the Average Service Life methodology of depreciation while eliminating the annual provision for Net Salvage would result in a $62 million benefit for the 2014/15 fiscal year, while benefiting future years by $37 million.

MIPUG further states that Manitoba Hydro has not provided cost containment details of Operating and Maintenance expenses, and that Manitoba Hydro should consider whether capital taxes relating to spending on new major projects should be capitalized, meaning they would not need to be included in rates until the respective new projects come into service.

MIPUG submits that there is a lack of urgency, as Manitoba Hydro's debt-to-equity level is close to the Corporation's 75:25 target, its capital coverage ratio remains at or above 1.0, and absent the rate increase, Manitoba Hydro is projecting only a very slight loss and does not forecast a cash shortage.

Manitoba Keewatinowi Okimakanak Inc. (MKO)

Manitoba Keewatinowi Okimakanak Inc. (MKO) submits that ideally, there should be no rate increase for Hydro-affected customers in the MKO First Nations, including customers in the four Diesel communities. Although MKO does not specifically object to the proposed rate increase, it recommends that the Board condition the current and any future rate increases on Demand-Side Management programs being made universally available and being provided to First Nations customers on a turnkey basis. MKO further seeks a direction from the Board to Manitoba Hydro requiring Manitoba Hydro to regularly report on the availability and penetration of low-income Demand-Side Management programs in the MKO communities.

MKO further submits that the Board should require Manitoba Hydro to provide rate mitigation measures, specifically the following:

1. The creation of a new class of Hydro-affected customers residing on the waterways utilized by Manitoba Hydro;

2. Specific sharing of net export revenues and a removal of mitigation costs for Hydro-affected customers;

3. An "equivalent to gas" rate for electric heat, as no MKO First Nation is connected to a natural gas distribution system, making it impossible for them to save money by switching to natural gas; and

4. An allocation of net export revenue to the Diesel communities, to be applied to the revenue requirement in the Diesel communities.

Lastly, MKO submits that any interim rate awarded in this proceeding should be subject to a rollback or refund to one or more customer classes based on sharing of net export revenues proposed by MKO.

With respect to Manitoba Hydro's proposal to submit a three-year general rate application in the fall of 2014, MKO recommends that such application do not apply to rates beyond March 31, 2016.

4.0 Board Findings

Test for Granting Interim Rates

The Board notes that Manitoba Hydro plans to file a General Rate Application in the fall of 2014, which Application would likely be heard in a public hearing in the spring of 2015. Accordingly, a General Rate Application would likely only be decided towards the end of the Corporation's 2014/15 fiscal year. Interim rate orders are intended to relieve Manitoba Hydro from the deleterious effects caused by the length of a regular regulatory proceeding. The questions to be determined by this Board are whether it would be just and reasonable to grant interim rates, and whether Manitoba Hydro would suffer a deleterious effect in the absence of an interim rate increase. For the reasons set out below, the Board considers it to be in the public interest to approve an interim rate increase, albeit at a level lower than requested by Manitoba Hydro.

Manitoba Hydro's Financial Position

According to Manitoba Hydro, the energy future in Manitoba will require significant annual rate increases regardless of which source of additional new generation is pursued, and regardless of which decision will be reached in the NFAT Review currently underway. All possible development plans presented in the NFAT Review require rate increases. As such, the Board and Manitoba Hydro customers cannot assume that in the absence of the Preferred Development Plan being approved, rate increases can be avoided. This requires the Board to take into account the need for rate stability and the avoidance of rate shock.

The Board notes that Manitoba Hydro's Interim Application for a 3.95% rate increase is consistent with the Preferred Development Plan that involves the construction of both Keeyask and Conawapa Generating Stations. The outcome of the NFAT Review will be known prior to the filing of Manitoba Hydro's next General Rate Application, and a full

General Rate Application is needed to examine the magnitude of additional rate increases.

Nonetheless, the Board is satisfied on a *prima facie* basis, that an interim rate increase is required. Reliability of Manitoba Hydro's infrastructure is paramount, and the Board accepts that investments in the maintenance and replacement of existing infrastructure is required.

Electricity export price forecasts have decreased over successive forecasts, resulting in less projected export revenue to help offset the requirement for domestic rate increases.

The Wuskwatim Generating Station is now 'in service' and has resulted in an additional domestic revenue requirement to be carried by domestic customers as those additional costs are not paid from export revenues.

Lastly, and despite the Board's comments in Order 43/13 with respect to the need for Manitoba Hydro to contain OM&A costs, those OM&A expenses are projected to increase above the rate of inflation in 2014/15.

The Board agrees with Manitoba Hydro's rebuttal submission that urgency is not a necessary precondition for an interim rate increase. However, it is appropriate to consider Manitoba Hydro's current financial condition in light of favourable recent financial results and the fact that a General Rate Application will be filed this Fall. The Board has determined that an interim rate increase of 2.00%, approximating the annual rate of inflation, is sufficient at this time to meet the needs of Manitoba Hydro. Whether or not an additional rate increase is required is an issue to be left to the General Rate Application, by which time actual financial results for the 2013/14 fiscal year will also be available.

Bipole III Deferral Account

The Board notes that Manitoba Hydro is continuing to spend money for the construction of the Bipole III transmission project which is estimated to cost approximately $3.2

billon. Once Bipole III will come into service (in 2018) it will affect Manitoba Hydro's Operating Statement. In Board Order 43/13, the Board determined that Bipole III will require additional annual revenue requirements of approximately $300 million when put into service, and which yearly amounts will have to be recovered in domestic customers' rates. As part of the last General Rate Application, the Board in Order 43/13, required Manitoba Hydro to establish a deferral account into which the proceeds of a 1.5% rate increase were to be deposited to defray a portion of the rate impacts of Bipole III. This deferral account continues to be active, and the Board remains concerned with the revenue requirement impact that Bipole III will have. Accordingly, in addition to the 2.00% interim rate increase approved above, the Board will approve an additional 0.75% interim rate increase to existing rates, the proceeds of which are to be collected in the Bipole III deferral account established in Order 43/13.

Depreciation & Amortization

As noted by CAC, Manitoba Hydro has not yet filed an Asset Condition Assessment that would provide additional clarity regarding expected depreciation and amortization expenses in the future. Directive 7 of Order 43/13 required Manitoba Hydro to file an Asset Condition Assessment no later than the filing of the Corporation's next depreciation study.

OM&A Increases

The Board has expressed concern with the growth of OM&A expense in prior Orders and remains concerned with Manitoba Hydro's increases in OM&A spending to date, as stated in Order 43/13. Manitoba Hydro's most recently filed financial information shows that since Order 43/13 was issued, OM&A costs have continued to escalate. While Manitoba Hydro has stated that it targets below-inflation growth in OM&A expenses of 1.0%/yr in 2015/16 and expects OM&A expense to grow by only 1.3% in 2014/15, the Board notes that to date, Manitoba Hydro has not been able to achieve below-inflation

growth in the past several years. The Board will review Manitoba Hydro's plans for OM&A cost containment at the next General Rate Application.

The Next General Rate Application

The Board shares the concerns of CAC and MIPUG with respect to Manitoba Hydro's plan to file a three-year General Rate Application in the fall of 2014. Manitoba Hydro is undergoing a period of significant and fairly rapid change, especially in light of its plan for substantial ongoing capital investments. The Board notes that it would be extremely reluctant to approve rates for a three-year timeframe in such a period of volatility and will direct that Manitoba Hydro file its next General Rate Application, for electric operations, for the 2014/15 and 2015/16 fiscal years.

Manitoba Hydro's request to implement new LED rates for the Area and Roadway Lighting class, will await further information and review at the General Rate Application.

5.0 IT IS THEREFORE ORDERED THAT:

1. Manitoba Hydro's Application for a 3.95% interim rate increase to all rate classes effective April 1, 2014 **BE AND HEREBY IS DENIED**.

2. The following interim rate increases to all Manitoba Hydro customer classes **BE AND HEREBY ARE APPROVED** effective May 1, 2014:

   (a) A 2.00% rate increase to existing rates to flow to Manitoba Hydro's general revenues; plus

   (b) A 0.75% rate increase to existing rates for all customer classes, with the revenues generated being placed into the Bipole III Deferral Account established in Order 43/13, to be dealt with at the next General Rate Application.

   (c) Manitoba Hydro file revised Rate Schedules, Proofs of Revenue and Customer Bill Impact Schedules;

   (d) The above rate increases will remain interim and are subject to being varied by the Board at the next General Rate Application;

3. Manitoba Hydro file a fully comprehensive two-year General Rate Application for electric operations, for the 2014/15 and 2015/16 fiscal years.

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with Section 36 of the Board's Rules of Practice and Procedure.

THE PUBLIC UTILITIES BOARD

"Régis Gosselin, B ès Arts, MBA, CGA"
Chair

"Kurt Simonsen, P. Eng."
Associate Secretary

Certified a true copy of Order No. 49/14
issued by The Public Utilities Board

C.C.S.M. c. P280

The Public Utilities Board Act

-Excerpt-

ORDERS OF THE BOARD

Power to order partial or other relief

44(1) Upon any application to it, the board may make an order granting the whole or part only of the application or may grant such further or other relief in addition to or in substitution for that applied for, as fully and in all respects as if the application had been for such partial, further or other relief.

Review of orders

44(2) The board may require a re-hearing of an application before making any decision thereon.

Varying order

44(3) The board may review, rescind, change, alter, or vary any decision or order made by it.

Interim orders ex parte

45 The board may, if the special circumstances of any case so require, make an interim ex parte order authorizing, requiring, or forbidding, anything to be done that the board would be empowered on application, petition, notice, and hearing to authorize, require, or forbid; but no such order shall be made for any longer time than the board deems necessary to enable the matter to be heard and determined, on such application, petition, notice or hearing.

Extension of time for compliance with order

46 Where any work, act, matter, or thing, by any order, regulation, or decision of the board is required to be done, performed, or completed within a specified time, the board may, if the circumstances appear so to require, upon such notice as it deems reasonable, or, in its discretion, without notice, extend the time so specified.

Orders subject to conditions

47(1) The board may direct, in any order, that the order or any portion or provision thereof shall come into force

(a) at a future fixed time; or

(b) upon the happening of any contingency, event, or condition specified in the order; or

(c) upon the performance to the satisfaction of the board, or a person named in the order for the purpose, of any terms that the board may impose upon any party interested;

and the board may direct that the whole or any portion of the order shall have force for a limited time, or until the happening of a specified event.

Interim order

47(2) The board may, instead of making an order final in the first instance, make an interim order and reserve further directions, either for an adjourned hearing of the matter, or for further application.

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BRITISH COLUMBIA UTILITIES COMMISSION

BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-182-14

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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

FortisBC Inc.
Multi-Year Performance Based Ratemaking Plan
for the years 2014 through 2019
Order G-139-14 Amended Financial Schedules Compliance Filing and
Request for Approval of 2014 Permanent Rates and 2015 Interim Rates

BEFORE: D. A. Cote, Panel Chair / Commissioner
D. M. Morton, Commissioner
N. E. MacMurchy, Commissioner

November 24, 2014

O R D E R

WHEREAS:

A. On June 10, 2013 and July 5, 2013, FortisBC Energy Inc. (FEI) and FortisBC Inc. (FBC), respectively, applied to the British Columbia Utilities Commission (Commission) for approval of a multi-year performance based ratemaking (PBR) plan for the years 2014 through 2018;

B. On September 15, 2014, the Commission issued Order G-138-14 for FEI and Order G-139-14 for FBC, with accompanying decisions, setting out the approved PBR plans for FEI and FBC (collectively FortisBC) for the period from 2014 through 2019 (the PBR Decisions);

C. The PBR Decisions directed, among other items, that FortisBC submit compliance filings to the Commission within 60 days containing amended financial schedules and incorporating all the adjustments and directives as outlined in the PBR Decisions;

D. FEI filed its required compliance filing on October 14, 2014. On October 24, 2014, the Commission issued Order G-164-14 approving for FEI, among other things:

- The use of inflation data from the most recent 12 month period (July through June) for the 2014 rate change calculations and for future annual reviews.

- The use of Statistics Canada CANSIM Table 326-0020 to determine the CPI-BC and CANSIM Table 281-0063 to determine AWE-BC.

.../2

- An adjustment to 2014 inflation for the transition from harmonized sales tax to provincial sales tax as of April 1, 2013 for an increase of 0.1750 percent.

E. On November 14, 2014, FBC filed its Amended Financial Schedules Compliance Filing (the Compliance Filing) and Application for Approval of 2014 Permanent Rates and 2015 Interim Rates (Application) with the following requested approvals:

- To use inflation data from July through June for the 2014 rate change calculations and the future Annual Reviews;
- To use Statistics Canada CANSIM Table 326-0020 to determine the CPI-BC and CANSIM Table 281-0063 to determine AWE-BC;
- To adjust 2014 inflation for the transition from harmonized sales tax to provincial sales tax as of April 1, 2013 for an increase of 0.1750 percent;
- That the current interim rates for 2014 be made permanent, effective January 1, 2014;
- Establishment of a non-rate base Interim Rate Variance deferral account, financed at the company's short-term interest rate, to record the difference between the 2014 permanent rates and the 2014 rates calculated in compliance with Order G-13-14, with a credit balance of $29.682 million (pre-tax), which is to be amortized in future rates over a period to be determined in the annual review of 2015 rates; and
- A 3.5 percent increase, effective January 1, 2015, on an interim and refundable basis, pending the outcome of the annual review of 2015 rates.

F. The Commission has reviewed the Compliance Filing and Application and considers that approval is warranted.

NOW THEREFORE pursuant to sections 59 to 61 of the *Utilities Commission Act* the Commission orders as follows:

1. FortisBC Inc. is approved to use inflation data from the most recent 12-month period (July through June) for the 2014 rate change calculations and future annual reviews.
2. FortisBC Inc. is approved to use Statistics Canada CANSIM Table 326-0020 to determine the CPI-BC and CANSIM Table 281-0063 to determine AWE-BC.
3. FortisBC Inc. is approved to adjust 2014 inflation for the transition from harmonized sales tax to provincial sales tax as of April 1, 2013 for an increase of 0.1750 percent.

4. FortisBC Inc.'s current 2014 interim rates are approved, on a permanent basis, effective January 1, 2014.

5. FortisBC Inc. is approved to establish a non-rate base 2014 Interim Rate Variance deferral account, financed at the company's short-term interest rate.

6. FortisBC Inc.'s request for a 3.5 percent increase over 2014 rates, effective January 1, 2015, is approved on an interim and refundable basis pending the outcome of the annual review of 2015 rates.

DATED at the City of Vancouver, In the Province of British Columbia, this day of November 2014.

BY ORDER

Original signed by:

D. M. Morton
Commissioner