FASKEN

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents

550 Burrard Street, Suite 2900
Vancouver, British Columbia V6C 0A3
Canada

T +1 604 631 3131
+1 866 635 3131
F +1 604 631 3232

fasken.com

December 13, 2023

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Christopher R. Bystrom
Direct 604 631 4715
Facsimile 604 632 4715
cbystrom@fasken.com

Electronic Filing

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Mr. Patrick Wruck, Commission Secretary

Dear Sirs/Mesdames:

Re: FortisBC Energy Inc. ("FEI") Revised Renewable Gas Program Application – Stage 2 - Reply Submission

In accordance with the regulatory timetable in the above proceeding, we enclose for filing the Reply Submission of FortisBC Energy Inc., dated December 13, 2023.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by]

Christopher Bystrom*
*Law Corporation

Encl.

cc (email only): Registered Interveners.

BRITISH COLUMBIA UTILITIES COMMISSION

FORTISBC ENERGY INC.

COMPREHENSIVE REVIEW OF A REVISED RENEWABLE GAS PROGRAM

REPLY SUBMISSION

OF

FORTISBC ENERGY INC.

December 13, 2023

Prepared by: Fasken Martineau DuMoulin LLP - Christopher Bystrom and Niall Rand

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PART ONE: INTRODUCTION

1. As described in its Application and Final Submission, FortisBC Energy Inc. (FEI) is seeking approval from the British Columbia Utilities Commission (BCUC) of three discrete and independent changes to its Renewable Gas[1] Program (also referred to as the RNG Program or Program): (1) a new Renewable Gas Blend service that would provide all sales customers with a blend of RNG as part of their gas supply; (2) a new Renewable Gas Connections service to provide all new residential construction customers with a low carbon gas service; and (3) changes to the pricing of the existing voluntary RNG Program. Together, these changes represent a comprehensive Renewable Gas Program which FEI submits meets the needs of FEI's customers, maintains energy choice and supports a diversified approach to energy delivery in British Columbia.

2. In this Reply Submission, FEI responds to the following ten interveners who filed final arguments in the proceeding:

- British Columbia Hydro and Power Authority (BC Hydro);
- BC Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, Tenant Resource and Advisory Centre, and Together Against Poverty Society (BCOAPO);
- BC Sustainable Energy Association (BCSEA);
- BrightSide Solutions Inc. (BrightSide);
- City of Vancouver, City of Victoria, City of Richmond and Lulu Island Energy Company Ltd., the District of Saanich, the District of North Vancouver, and Metro Vancouver Regional District (Local Government Interveners or LGI);
- Commercial Energy Consumers Association of British Columbia (CEC);
- GNAR Inc - Sustainable Home Design (GNAR);
- Canadian Office and Professional Employees Union, Local 378 (known as Movement of United Professionals or (MoveUP);

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[1] In this proceeding, FEI has used the term "Renewable Gas" to refer collectively to the low carbon gases or fuels that the utility can acquire under the *Greenhouse Gas Reduction (Clean Energy) Regulation*, which are: Renewable Natural Gas (RNG or biomethane), hydrogen, synthesis gas and lignin. As the scope of this proceeding has been restricted to RNG only, Renewable Gas generally refers to only RNG in this Reply Submission, unless the context indicates otherwise.

- My Sea to Sky (MS2S); and
- Residential Consumer Intervener Association (RCIA).

3. BCOAPO,[2] BCSEA, CEC, MoveUP, MS2S[3] and RCIA support BCUC approval of the proposed Renewable Gas Blend service, while the remaining interveners do not address or take no position regarding the service in their final arguments.[4] The Voluntary Renewable Gas service is supported by BCOAPO, BCSEA, CEC and MoveUP, while BrightSide, MS2S and RCIA do not oppose the service but raise comments primarily focused on the pricing of the service. BC Hydro, GNAR and the LGI take no position or do not specifically address the service in their final arguments. The Renewable Gas Connections service is supported by MoveUP and CEC, but opposed by the LGI and others, with BrightSide taking no position in their final arguments. FEI respectfully submits that the submissions in opposition to the Renewable Gas Connections service have not rebutted the evidence and rationale for the service, and generally fail to substantively respond to the ratemaking rationale for the service as supported by the expert opinion of John Reed of Concentric Energy Advisors Inc. (Concentric).

4. FEI submits that by leveraging decades of investment in FEI's existing gas delivery system, while addressing governmental climate policies, customer needs for renewable natural gas (RNG), and the significant increase in RNG that FEI is acquiring to reduce GHG emissions in alignment with government policy, the BCUC should find that the revised Renewable Gas Program is just and reasonable and in the public interest. As such, FEI respectfully requests approval of the Application pursuant to sections 59 to 61 of the *Utilities Commission Act* (UCA).

5. In the remainder of this Reply Argument, FEI responds to the submissions of interveners, generally following the outline of topics in its Final Argument. Silence in this submission is not indicative of agreement.

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[2] BCOAPO provides one specific recommendation regarding setting the Blend percentage, which FEI addresses in reply below.

[3] MS2S supports diverting Renewable Gas supply to the Renewable Gas Blend service after "hard-to-decarbonize" industries.

[4] BC Hydro takes no position, while BrightSide, GNAR and LGI do not specifically address the proposed Renewable Gas Blend service.

PART TWO: RENEWABLE GAS BLEND

6. The final arguments filed by several interveners in this proceeding express support for the Renewable Gas Blend service, while the remaining interveners do not address or take no position regarding the service in their final arguments.

7. BCOAPO recommends, however, that the BCUC consider quarterly adjustments to the blend percentage to "maximize carbon tax credits" and align with the quarterly changes in gas costs.[5] FEI submits that BCOAPO's proposal should be rejected as there are no benefits to adjusting the blend percentage on a quarterly rather than as needed on a monthly basis.

8. First, BCOAPO's suggestion that adjusting the blend quarterly would "maximize carbon tax credits" is incorrect. To the contrary, BCOAPO's proposed approach is more likely to result in a greater cost impact to customers as, in the absence of a legislative change, adjusting the percentage of RNG quarterly would result in a significantly less accurate matching of RNG supply and demand because:

(a) Setting the blend percentage based on a three-month forecast, rather than a single month as proposed by FEI, would increase variances between the forecast and actual balance of RNG supply and demand. Given that the variability in FEI's demand is primarily driven by changes in weather, a three-month forecast would increase the risk of weather-related variances which could leave FEI with a greater amount of RNG that would not be eligible for a carbon tax refund from the Province. This risk is mitigated by forecasting over a shorter period.[6]

(b) FEI is proposing to record carbon tax credits that FEI has granted or grants to customers, but which are not refunded to FEI by the Province, in the Low Carbon Gas Account (LCGA) for recovery from customers.[7] The less accurate the matching of RNG supply and demand, the greater the amount FEI would need to record in

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5 BCOAPO Final Argument, p. 22.

6 Exhibit B-90, BCUC IR3 12.3.

7 FEI Final Argument, paras. 44-47.

the LCGA and, therefore, the larger the impact on all sales customers in a subsequent period when setting the Sales & Transport Low Carbon (S&T LC) rider.[8]

9. Thus, while FEI considered adjusting the Renewable Gas Blend using alternative intervals,[9] FEI focused on shorter (not longer) forecasting intervals to minimize the potential for residual supply and demand imbalances, thus reducing the impact of any imbalances on customers.

10. Second, there is no administrative efficiency to be gained by adjusting the Renewable Gas Blend at the same time as setting the commodity cost, as FEI would not require BCUC approval of changes to the blend. FEI is proposing to change the percentage of renewable and conventional gas volumes delivered to its customers on a monthly basis,[10] but is proposing to set the S&T LC rider annually in its Q4 Gas Cost Report, based on a forecast overall blend it will provide to customers over the year.[11]

11. FEI submits that Renewable Gas Blend is just and reasonable and should be approved as proposed.

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8 Exhibit B-89, Evidentiary Update, pp. 16-17.

9 Exhibit B-90, BCUC IR3 12.1.

10 Exhibit B-91, BCOAPO IR3 25.1.

11 Exhibit B-42, BCUC IR2 49.1. See also Exhibit B-90, BCUC IR3 12.1.

PART THREE: RENEWABLE GAS CONNECTIONS

12. In this Part, FEI responds to the arguments of interveners raised in opposition to the Renewable Gas Connections service. FEI has organized these submissions around the following points:

- The BCUC's ratemaking authority is not constrained by the decisions of municipalities or local governments.
- The Renewable Gas Connections service is firmly within established rate setting practice.
- The inability to serve the new residential construction sector, and new buildings generally, poses a real risk to the long-term viability of the gas system.
- The Renewable Gas Connections service will support the environmental benefits of a diversified energy future.
- The Renewable Gas Connections rate design is supported by ratemaking principles.
- The Renewable Gas Connections service will not have negative implications for municipal policy making and is in the public interest.
- Letters of Comment show that there is customer support for the Renewable Gas Connections service.
- The Renewable Gas Connections service is not vintaging.
- The other submissions of BCSEA on the Renewable Gas Connections service are without merit.
- The Renewable Gas Connections service treats all residential customers equitably.
- The Renewable Gas Connections service should be approved as proposed, without modification.

A. The BCUC's Ratemaking Authority Is Not Constrained by Municipal Policy Decisions

13. The key argument of the LGI is that the local governments "have specifically chosen to impose some of these [climate policy] costs on residents of new buildings" and it "is not the job

of the Commission to prefer a more socialized outcome of these costs".[12] The suggestion that the BCUC's ratemaking authority is restricted by the policy decisions of local governments is wrong in law and must be rejected. Only the BCUC has the jurisdiction and expertise to set FEI's rates, which includes determining when FEI's costs should be socialized.

14. The subsections below address the following points:

(a) the proper approach to interpreting legislation is well-established, and requires assessing the wording of legislation within the overall legislative framework and purpose;

(b) the BCUC's rate setting powers are explicit and exclusive and core to the BCUC's mandate;

(c) the primacy of the BCUC's authority over public utilities when doing business in municipalities is clear; and

(d) purpose of the framework is to recognize the BCUC's broader public interest mandate.

(a) Approach to Interpreting the UCA is Well Established

15. The proper approach to interpreting legislation like the UCA was addressed by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (*ATCO*):[13]

> [37] For a number of years now, the Court has adopted E. A. Driedger's modern approach as the method to follow for statutory interpretation:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [38] But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers).

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[12] LGI Final Argument, paras. 108-109.

[13] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4. [Tab 1 of Book of Authorities]

…

[49] The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:

> As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole"…

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme. "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments".

[50] Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation. In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law‑making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

[51] The mandate of this Court is to determine and apply the intention of the legislature without crossing the line between judicial interpretation and legislative drafting. That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature. Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

[Citations have been omitted.]

16. The remaining subsections below apply this analytical framework to the applicable legislation.

(b) The BCUC's Rate Setting Function is Key, Explicit and Exclusive in the UCA

17. The courts have been clear that utility regulators have a broad public interest mandate, a central component of which is to set rates that are just and reasonable.

18. The power of the BCUC to set rates is set out explicitly in sections 58 to 61 of the UCA and the setting of rates is at the core of the BCUC's jurisdiction. The BCUC's central functions are to determine rates and protect the supply system consistent with the public interest. For example, the Supreme Court of Canada in *ATCO*:

> [38] The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting…
>
> [60] Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates…

19. The Supreme Court of Canada in *ATCO* also cited a prior decision of that court in which it held:[14]

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and

[14] *ATCO* at para. 60. See also para. 28. [Tab 1 of Book of Authorities]

> facilities [Note for clarity: "union" was a reference to mergers]. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board. [Emphasis and parenthetical added.]

20. Furthermore, the BCUC is given exclusive jurisdiction to determine matters in which jurisdiction is conferred. The UCA states: [15]

> The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.

21. In addition, the BCUC's powers under the UCA apply even if the subject matter about which they relate are the subject of another piece of legislation:

> 110 The powers given to the commission by this Act apply
>
> (a) even though the subject matter about which the powers are exercisable is the subject matter of an agreement or another Act,
>
> (b) in respect of service and rates, whether set by or the subject of an agreement or other Act, or otherwise, and
>
> (c) if the service or rates are governed by an agreement, whether the agreement is incorporated in, or ratified, or made binding by a general or special Act, or otherwise.

22. FEI submits that the UCA clearly grants the BCUC with explicit and exclusive jurisdiction to set FEI's rates, and that this jurisdiction is central to the BCUC's mandate and is unhindered by municipal policy decisions.

(c) Primacy of the BCUC's Jurisdiction

23. There are several sections of the UCA that drive home the primacy of the BCUC, relative to municipalities, when it comes to public utilities carrying on business in municipalities. As held by the BCUC in Decision and Order G-80-19,[16] section 121 of the UCA makes the *Local*

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[15] UCA, s. 105(1).

[16] BCUC Decision and Order G-80-19, dated April 15, 2019, pp. 15-16. Online: https://www.bcuc.com/Documents/Proceedings/2019/DOC_53811_G-80-19-FEI-LMIPSU-ReasonsforDecision.pdf.

Government Act[17], and *Community Charter*[18] subordinate to the BCUC's jurisdiction in certain circumstances that are applicable here. Section 121 of the UCA provides:

> 121(1) Nothing in or done under the *Community Charter* or the *Local Government Act*
>
> (a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or
>
> (b) relieves a person of an obligation imposed under this Act or the *Gas Utility Act*.

24. Section 45 of the UCA includes another provision that is notable in how it confers jurisdiction on the BCUC to oversee the relationship between municipalities and utilities operating within their boundaries. Section 45(7) to (9) provides that franchises, privileges or concessions granted by municipalities to a public utility are invalid unless approved by the BCUC. The BCUC may impose terms that the public interest requires.

> (7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.
>
> (8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.
>
> (9) In giving its approval, the commission
>
> (a) must grant a certificate of public convenience and necessity, and
>
> (b) may impose conditions about
>
> (i) the duration and termination of the privilege, concession or franchise, or
>
> (ii) construction, equipment, maintenance, rates or service,
>
> as the public convenience and interest reasonably require.

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[17] *Local Government Act*, R.S.B.C. 2015, c. 1.

[18] *Community Charter*, S.B.C. 2003, c. 26.

25. The statutory provisions outlined above, on a plain reading, establish a structure that places the BCUC in the position of overseeing utility rates, even where the public utilities services are provided within a municipality.

(d) The UCA Gives the BCUC a Broad Public Interest Mandate

26. As indicated by the Supreme Court of Canada in *District of Surrey v. British Columbia Electric Company Ltd.* (*District of Surrey*),[19] the BCUC has a broad public interest mandate.

27. In *District of Surrey*, the Supreme Court of Canada considered FEI's predecessor's rights under the *Gas Utilities Act* (GUA) and the precursor to section 32 of the UCA, which were substantively the same as the current provisions. In that case, the municipalities had argued that the public utility could not carry on its activities in a municipality without municipal consent. The municipalities cited certain provisions in the then *Municipal Act* whereby the municipality was authorized to pass by-laws regulating the operations of a wide variety of businesses and other activities and prohibiting the carrying on of certain such businesses other than with the leave and licence of the municipality.[20]

28. The Supreme Court of Canada rejected that argument and found that it was for the Public Utilities Commission to decide: (i) which public utilities should provide service; and (ii) the manner in which they operate.[21] Locke J. discussed the powers of the Commission under the *Public Utilities Act* and then went on to highlight the importance of the Commission's province-wide public interest mandate:[22]

> The whole tenor of the Act shows clearly that the safeguarding of the interests of the public, both as to the identity of those who should be permitted to operate public utilities and to the manner in which they operate, was a duty vested in the Commission. It is quite impossible, in my opinion, to hold that these powers and

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19 *District of Surrey v. British Columbia Electric Company Ltd.*, [1957] S.C.R. 121. [Tab 2 of Book of Authorities]

20 Specifically, it allowed a municipality to pass by-laws for regulating the construction, installation, repair and maintenance of pipes, valves, fittings, appliances, equipment and works for the supply and use of gas and for the licensing and regulating of gas companies the authorizing of the use of the public highways by such companies.

21 *District of Surrey* at p. 124. [Tab 2 of Book of Authorities]

22 *District of Surrey* at p. 126. [Tab 2 of Book of Authorities]

> those which might be asserted by a municipality to regulate the operations of such companies under [the sections of the *Municipal Act*] were intended to co-exist.
>
> …
>
> In discharging its important duties under the *Public Utilities Act* the Commission is required to consider the interests not merely of single municipalities but of districts as a whole and areas including many municipalities. The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission, subject, *inter alia*, to the right of municipalities of ensuring a supply of gas by municipal enterprise of the nature referred to in the reasons delivered by the Chairman of the Public Utilities Commission [Note: this exception is a reference to the municipality's ability to establish a municipal utility]. This right the Commission was careful to preserve. [Emphasis and parenthetical added.]

29. The Ontario Divisional Court's decision in *Union Gas Limited v. the Township of Dawn* (*Union Gas*),[23] expresses similar views regarding the importance of a broader public interest perspective when considering the role of public utilities operating in a municipality. The court emphasized that the local problems of the Township "when viewed in the perspective of the need for energy to be supplied to those millions of residents of Ontario beyond the township borders" were insignificant.[24] The court held:[25]

> In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the Planning Act.
>
> These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. [Emphasis added.]

30. These two cases involved the development of new infrastructure, but the same analysis would apply to the setting of rates. Decisions about what rates a public utility should charge, and

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[23] *Union Gas Limited v. the Township of Dawn* (1977), 76 D.L.R. (3d) 613. [Tab 4 of Book of Authorities]

[24] *Union Gas.* [Tab 4 of Book of Authorities]

[25] *Union Gas.* [Tab 4 of Book of Authorities]

how those rates are designed, are key features of the BCUC's public interest mandate with stakeholder impacts beyond residents and businesses of a single municipality.

31. Although municipalities deal with important matters of public interest, it is common for the legislature to reserve jurisdiction for provincial agencies where a province-wide perspective is fundamental. The supervision of public utilities is one of these areas. The relevant provisions of the UCA, read in the context of the overall legislative framework and purpose of the legislation should be interpreted as providing the BCUC with the necessary jurisdiction to override a municipality's preferences when it is in the broader public interest to do so, especially as it relates to utility rates.

32. Finally, while the Zero-Carbon Step Code sets requirements for GHG intensity (GHGi) levels, it does not speak to the rates for the low carbon energy required to meet those GHGi levels. The BCUC has the sole and exclusive jurisdiction to set such rates. Therefore, the LGI have not in fact set a policy that makes the cost of low carbon energy a private obligation, nor do they have the jurisdiction to do so. Please refer to Part Three, Section E(a) for further discussion of this point in the context of rate design principles.

B. FEI's Proposal Is Firmly Within Established Rate Setting Practice

33. In Part I of their Final Argument, the LGI make submissions on the legal framework for how the BCUC should consider the Renewable Gas Connections service. In FEI's respectful submission, the position of the LGI does not accurately represent the legal framework. FEI replies to each of the points made by the LGI on this topic below.

(a) FEI's Proposal Is Based on Considerations Within the Confines of Sections 59 to 61 of the UCA

34. The LGI urge the BCUC to stay within the confines of sections 59 to 61 of the UCA, suggesting that FEI's proposed rate for the Connections service is "being proposed for approval on the basis of its supposed environmental benefits" which is outside the scope of sections 59 to 61 of the UCA.[26] FEI submits in reply that the rate design for the Connections service is firmly

[26] LGI Final Argument, paras. 16-27.

within the BCUC's jurisdiction to approve under sections 59 to 61, and the BCUC has jurisdiction to consider facts relevant to whether the rate is just and reasonable, including facts about environmental benefits.

35. First, as discussed above, the Renewable Gas Connections rate is firmly within the core of the BCUC's jurisdiction to approve under sections 59 to 61 of the UCA. FEI has analyzed and justified its proposed rate for the Connections service based on traditional Bonbright ratemaking principles, as set out in its Part Three, Section E of its Final Argument.

36. Second, FEI is not requesting the BCUC's approval of the Connections service *because* it has environmental benefits *per se*, but rather, because there is a need and demand for a low carbon gas service to meet GHGi requirements in the new residential construction sector. This is discussed further in Part Three, Section A of FEI's Final Argument.

37. Third, FEI has reasonably and appropriately described the benefits of the Renewable Connections service in Part Three, Section F of its Final Argument, including maintaining energy choice, promoting economic efficiency and more affordable rates and supporting a diversified energy system. This evidence is relevant to why the BCUC should approve a rate for the Connections service and is therefore squarely relevant to the exercise of the BCUC's discretion under sections 59 to 61 of the UCA. Consistent with the BCUC's broad public interest mandate, these are facts about the service that the BCUC can consider when exercising its jurisdiction under sections 59 to 61.

(b) The GGRR Does Not Speak to Rate Design for RNG Services

38. The LGI submit that the *Greenhouse Gas Reduction (Clean Energy) Regulation* (GGRR) already defines the appropriate use of RNG in utility supply portfolios.[27] This is incorrect in law. The GGRR sets out the parameters for what qualifies as a prescribed undertaking for the purpose of section 18 of the *Clean Energy Act*. The GGRR does not address rate design or cost recovery or how RNG must be incorporated into a public utility's supply portfolio. Section 18 of the *Clean Energy Act* states that the BCUC must allow public utilities to recover the costs of prescribed

[27] LGI Final Argument, paras. 28-31.

undertakings in rates, but does not prescribe *how* this must occur or how RNG must be used. This is uncontroversial and plain from the wording of the legislation. For example, the BCUC determined in Decision and Order G-18-22, page 31, that the GGRR does not determine from which customers the costs of a prescribed undertaking should be recovered: "The GGRR also does not specify from which groups of customers the costs of providing EV charging services should be recovered."

(c) Renewable Gas Connections is In Response to Local Government Requirements, Not the Proposed GHGRS

39. The LGI submit that "FEI suggests that the GGRR is effectively a dead letter, superseded in some sense by the emissions cap discussion within the Province's CleanBC Roadmap to 2030".[28] This is not true – FEI has not made any such suggestion.

40. The LGI go on to argue that FEI is asking the BCUC to approve the Renewable Gas Connections service based on the proposed cap on natural gas utilities (i.e., the Greenhouse Gas Reduction Standard (GHGRS)) and policy signals in CleanBC that are not yet law.[29] This is not true – the Connections service is not in response to the emissions cap or mere policy signals in CleanBC. In fact, FEI designed the Connections service in response to local government requirements for new residential construction,[30] which, except for in the City of Vancouver, have now been superseded by the Zero Carbon Step Code.[31]

(d) Renewable Gas Connections Does Not Intrude on Local Government Jurisdiction

41. The LGI argue that approval of the Renewable Gas Connections service would intrude on local government regulatory and policy jurisdiction.[32] FEI submits that this is not possible. FEI is requesting the BCUC's approval of a rate for a gas service which is at the core of the BCUC's

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28 LGI Final Argument, para. 9.

29 LGI Final Argument, para. 36.

30 Exhibit B-11, Application, Appendix A.

31 Exhibit B-65, Rebuttal Evidence to CoV et al., pp. 4-6.

32 LGI Final Argument, paras. 39-46.

jurisdiction, and which is clearly outside of the jurisdiction of local governments: the BCUC is the only authority with jurisdiction to approve FEI's rates and its jurisdiction is exclusive.[33]

42. Furthermore, the BCUC's approval of a rate for Renewable Gas Connections would not interfere with local government policy or jurisdiction to implement building codes. As FEI has stated:[34]

> FEI is requesting the BCUC's approval of the Renewable Gas Connections service so that it has a low carbon gas service to offer for new residential construction, consistent with its obligation to provide adequate, safe, efficient, just and reasonable service under section 38 of the *Utilities Commission Act*. If a municipality enacts legislation that lawfully precludes new customers in that municipality from heating with conventional natural gas or even 100 percent RNG, then the BCUC's ratemaking authority and, specifically, the approval of the Renewable Gas Connections service will not permit FEI to connect new customers in that municipality. However, municipal policy can change, and many municipalities have expressed support for FEI's Application.

43. As indicated above, FEI is seeking the BCUC's approval of a rate for a service that FEI can offer to customers, the Province and local governments as a low carbon pathway in the residential new construction sector. FEI's position is that the Connections service should be a low carbon pathway in the building codes of the Province and local governments, and FEI will be advocating for decisions to make it so. However, the decision to accept RNG as a low carbon pathway in the Zero Carbon Step Code is, of course, within the sole jurisdiction of the Province, just as the Vancouver Building By-law is within the sole jurisdiction of the City of Vancouver. In other words, the BCUC's approval of the Connections service would give FEI a low carbon pathway to offer its customers, but would not change the building codes of local governments or otherwise interfere with the lawful jurisdiction delegated to them by the Province.

44. Please also refer to Part Three, Section F of this Reply Argument below where FEI responds to the submissions of the LGI that the Connections service will limit their ability to regulate and constrain their statutory powers, which FEI submits is plainly not the case.

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[33] UCA, s. 105(1).

[34] Exhibit B-78, BCSEA IR1 31.3 Rebuttal.

(e) RNG Should be an Eligible Compliance Pathway

45. The LGI state that "FEI incorrectly presumes that RNG is an accepted compliance pathway for new residential construction" and offers three reasons why the Connections service does not make RNG a compliance pathway for new residential construction, regarding: (1) permanence; (2) long-term supply; and (3) protections against double counting.[35] FEI addresses these three points below, but first makes some general observations about this argument from the LGI.

46. First, FEI has not presumed that RNG is an accepted compliance pathway. Rather, as discussed above, FEI believes that RNG should be an accepted pathway and is requesting approval of the Renewable Gas Connections service so that it can have an RNG service for the new residential construction sector that it can offer to its customers who desire such a service and advocate that it become an accepted pathway in legislation such as the Zero Carbon Step Code.

47. Second, the LGI do not speak for the Province or all local governments in the province. FEI has conducted extensive consultation and there are many in the province, including other local governments, who support the Connections service.[36]

48. Third, to the extent that the LGI have jurisdiction to lawfully prevent RNG from being an accepted pathway, they can exercise that lawful jurisdiction and therefore should have no concern about the BCUC's approval of the Renewable Gas Connections. The City of Vancouver, for example, has jurisdiction over its own building code. To the extent that it lawfully determines that RNG is not accepted in its own building code as a compliance pathway, then this is the City of Vancouver's decision to make. FEI, however, remains interested in continuing discussions with the City about how and why a low carbon gas service should be accepted as a decarbonization pathway. The BCUC's approval of the Connections service would enable FEI to have those

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[35] LGI Final Argument, paras. 47-49.

[36] Exhibit B-11, Application, pp. 137-138, 154-155 and Appendix F-4 (City of Burnaby and City of Prince George); see also, e.g., Exhibit E-3 (City of Coquitlam); Exhibit E-2 (E3 Eco Group); Exhibit E-20 (Aboriginal Housing Management Association); Exhibit E-26 (ARPA Investments Ltd.); Exhibit E-28 (City of West Kelowna); Exhibit E-37 (Capital Home Energy); Exhibit E-38 (Town of Creston); Exhibit E-39 (District of Chetwynd); Exhibit E-84 (District of Hope); Exhibit E-136 (District of Kent); Exhibit E-140 (Canadian Home Builders' Association); Exhibit E-180 (Sartori Custom Homes); Exhibit E-244 (City of Kamloops); Exhibit E-252 (City of Campbell River).

conversations with the City of Vancouver and the Province in a concrete way, as FEI would have an approved service to offer.

49. Finally, the LGI's three points discussed below are more relevant to discussions between FEI and the Province, rather than whether the BCUC should approve the Connections service. If the BCUC approves the Connections service, FEI will continue to work with the Province and the City of Vancouver regarding how the Connections service can and should be accepted as a low carbon solution for the new residential construction sector.

Renewable Gas Connections Has a Sufficient Level of Permanency

50. The LGI submit that permanence cannot be assured because the BCUC can always change its mind.[37] BCOAPO and BCSEA make similar submissions.[38] In reply, FEI is asking the BCUC to approve the Renewable Gas Connections service with the degree of permanence that it can provide, which FEI submits is substantial and sufficient for the purposes of the rate design. FEI has proposed tariff language that specifies that the rate is to be permanent for the life of the building, and made it as clear as possible on the record of this proceeding that the rate is intended to be permanent. FEI submits that the BCUC can approve the rate as proposed, and that this will provide substantial and significant assurance that the service will indeed be permanent for the life of the building.

51. The BCUC regularly exercises its jurisdiction to approve rates that are locked in for long periods of time. For instance, the BCUC can and does approve long-term contracts, such as the three long-term biomethane contracts with UBC, Translink and the City of Vancouver. These contracts have 5- to 10-year terms.[39] These approved contracts are legally binding and enforceable for the length of their term.

52. Other examples of long-term contracts approved by the BCUC with terms longer than 10 years, including up to 35 years, include:

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[37] LGI Final Argument, paras. 54-55

[38] BCOAPO Final Argument, p. 10; BCSEA Final Argument, pp. 32-33.

[39] E.g., Exhibit B-17, BCUC IR1 11.3.

- The BCUC originally approved FEI and BC Hydro's transportation service agreement for natural gas service to BC Hydro's Island Cogeneration Plant on Vancouver Island in 2007. The initial term ran from 2008 to 2022 – **14 years.** BC Hydro could elect to extend for renewal of one or more years, **subject to a maximum term of 35 years**. Under the agreement, if expansion facilities were required for any renewal period, FEI (then Terasen) could require a minimum renewal term of up to 10 years. A peaking agreement was signed with the same term.[40]

- Terasen Gas and Husky Energy agreed to a Bypass Transportation Agreement (Rate Schedule 22A) with an **initial term of 10.75** years, but if Husky terminates within **20 years**, it agrees to pay Terasen the remaining undepreciated value of the bypass pipeline facilities that Husky would have needed for the increased volumes.[41]

- The BCUC approved a long-term service agreement between BC Pavilion Corporation and Creative Energy – Steam Service Contract – with a term of **25 years**.[42]

53. The BCUC respects long-term contracts. For example, with respect to the three long-term biomethane contracts, the Panel noted in the Stage 1 Decision in this proceeding that these long-term customers have their rate locked in for 5-10 years:[43]

> The Panel's concern is that unlike customers who are on a Short-Term BERC Rate which is updated annually, those on longer term contracts are charged the BERC Rate effective at the date of signing for the length of the contract — which is a minimum of five and up to ten years. The only price adjustment made to this contracted rate over the first five years is the potential for an annual rate

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40 BCUC Decision and Order G-139-07, dated November 15, 2007. Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/116557/1/document.do;
BCUC Decision and Order, dated December 6, 2007. Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/116612/1/document.do.

41 BCUC Decision and Order G-82-05, dated September 1, 2005. Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/115788/1/document.do.

42 BCUC Decision and Order C-1-20, dated March 5, 2020. Online: https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/462449/1/document.do.

43 BCUC Decision and Order G-242-21, dated August 12, 2021. Online: https://docs.bcuc.com/documents/other/2021/doc_63837_decision-and-g-242-21-fei-berc-ratemethodology-stage-1.pdf (Stage 1 Comprehensive Review Decision).

> escalation based on the Consumer Price Index (CPI) rate (current contracts have an escalator of 50 percent of the CPI rate). For contract terms longer than five years, contracts must include a Contract Floor Price provision resulting in an RNG price that is not less than the prevailing Conventional Gas Cost in any period beyond year five. Thus, regardless of whether there is a significant increase in the price of natural gas which would be reflected in an increase to the Short-Term BERC Rate, long-term contract customers would pay substantially the same for at least five years. Given the five to ten-year length of long-term contracts, the Panel is concerned there is significant risk of a sizable variance developing between the Short-Term BERC Rate and the rates set out in long-term contracts thereby jeopardizing the opportunity to optimize revenues as envisioned in the three objectives contained in the BCUC's 2016 Biomethane Decision.

54. FEI's proposal is similar to a long-term contract with a customer, except that it is tied to the building, so that customers occupying that building from time-to-time are bound to take the Connections service.

55. FEI submits that the difference between a long-term contract for 10 years or 35 years and the proposed Connections service for the life of the building of approximately 50 years is one of degree only. In both cases, the BCUC's approval means that the rate is locked in for the long term.

56. The fact that the BCUC can and does approve long-term binding agreements and rates speaks to the fact that the BCUC cannot exercise its discretion arbitrarily. After the BCUC approves a long-term contract executed between two parties, the BCUC cannot arbitrarily cancel the agreement. Rather, the BCUC must consider its past approval of the long-term agreement, the intention of the parties to enter into a long-term agreement, the underlying purpose and benefits of doing so, and the consequences for the parties and ratepayers if the BCUC were to interfere with a long-term contract. The BCUC would understandably be loath to interfere with a long-term contract that it previously approved.

57. This would similarly be the case with the Renewable Gas Connections service. Given that the BCUC must regulate in the public interest and must take into account factors such as the reliance placed on the long-term permanent nature of the service, FEI cannot foresee circumstances in which it would be just and reasonable for the BCUC to change the permanent nature of the low carbon service provided to Renewable Gas Connections customers.

58. Therefore, FEI submits that its proposal provides a sufficient degree of certainty that the service will be permanent for the life of the building. In this context, it is important to note that every energy system is subject to change in the long run. Electrical equipment could be replaced by gas equipment at some time in the future and *vice versa*. Further, the carbon intensity of electricity supply changes over time due to imports or new in-province generation, as can the carbon intensity of the content of gas pipelines through the introduction of RNG and hydrogen. Moreover, bylaws, regulations and legislation governing GHG emission targets and energy supply requirements are all subject to change due to changes in the priorities of governments, voter sentiment, technological developments and other circumstances. In this context, the permanence of any energy supply is always a matter of degree only. FEI therefore submits that the Renewable Gas Connections service provides a high level of certainty with respect to its permanence.

59. Finally, permanence is ultimately a feature of the Renewable Gas Connections service that is important to local governments, but is not a requirement for the BCUC. FEI requests that the BCUC approve the Connections service as proposed, which will provide the degree of permanency that can be provided by the BCUC, which FEI believes is substantial and sufficient. This will enable FEI to work with local governments and the Province to have the Connections service recognized as a low carbon pathway.

FEI Has Sufficient Supply of RNG

60. The LGI and GNAR state that they have long-term RNG supply concerns.[44] While long-term supply of RNG was ruled to be out of scope of this proceeding,[45] the evidence on the record shows there will be more than sufficient supply of RNG to meet the demands of the Renewable Gas Connections service. FEI's plan is to acquire enough renewable and low carbon gas to meet provincial GHG emission reduction targets.[46] Further, as the Renewable Gas Connections service

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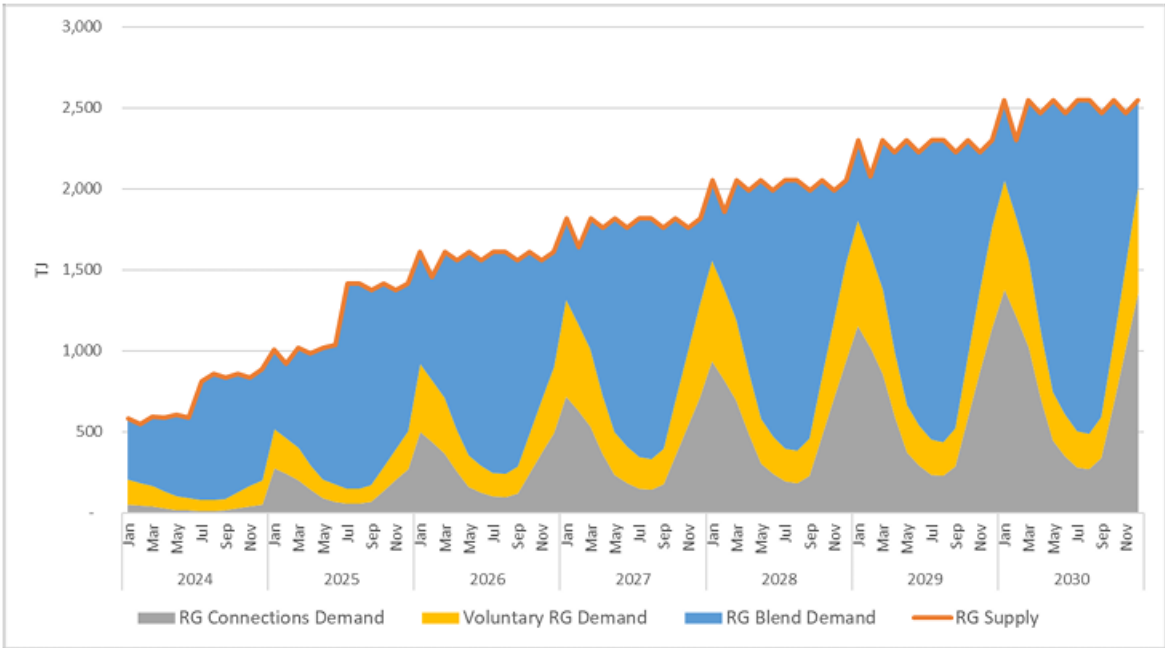
[44] LGI Final Argument, paras. 64-69; GNAR Final Argument, pp. 8-9.

[45] BCUC Decision and Order G-165-22A, dated June 16, 2022, Appendix C, items 5 and 6 (Exhibit A-20-1). Online: https://docs.bcuc.com/documents/proceedings/2022/doc_66910_a-20-1-g-165-22a-timetable-scope-reasons.pdf.

[46] Exhibit B-11, Application, Section 6.3; Exhibit B-17, BCUC IR1 1.1.

is mandatory, FEI would prioritize supply to meeting the demand from Renewable Gas Connections.[47] In that context, the demand for RNG from the service can be easily met. This is illustrated by FEI's latest forecast of supply and demand provided in its Evidentiary Update, which, as reproduced below, shows that the demand from Renewable Gas Connections customers can be easily met.[48]

Figure 5-4: Monthly Renewable Gas Supply and Demand when the Blend Percent is set Monthly



FEI Assures No Double Counting of Environmental Benefits

61. The LGI also argue that there are insufficient safeguards against double counting of environmental attributes.[49] FEI notes that the LGI have provided no evidence or argument to show that there has been any double counting or any reasonable potential for double counting, but only expresses vague concerns.

62. FEI ensures that there is no double counting of environmental benefits of RNG through contractual assurances. FEI did not provide rebuttal evidence on this topic because FEI had

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47 Exhibit B-17, BCUC IR1 10.2; Exhibit B-48, CoR IR2 22.1.

48 Exhibit B-89, Evidentiary Update, p. 15, Figure 5-4.

49 LGI Final Argument, paras. 70-74.

already addressed the topic in response to information requests from the City of Richmond et al. FEI explained:[50]

> FEI ensures that the attributes are not double counted through the contractual assurances with the suppliers. Contravening these assurances would create a contractual breach with FEI which could lead to termination of the associated supply agreement. In particular:
>
> - FEI's supply contracts include provisions allocating all attributes to FEI for any volumes it purchases and preclude the sale or use of these attributes by the suppliers in any other market.
> - Suppliers must warrant and assure to FEI that they are meeting any obligations related to environmental attributes.
> - FEI also has the contractual right to audit facilities which includes the right to review records related to feedstock and emissions specific to the supplier facilities used to determine the overall lifecycle carbon intensity.
>
> The obligations of the supplier combined with the possible threat of losing a contract due to breach are sufficient to ensure emissions are not double counted.

63. Further, this topic was the subject of Phase 2 of the BCUC's Inquiry into the Acquisition of Renewable Natural Gas by Public Utilities in British Columbia (RNG Inquiry), which determined that FEI is responsible to the BCUC to demonstrate the validity of the environmental attributes of its RNG. The BCUC's RNG Inquiry – Final Phase 2 Report states:[51]

> **For the reasons set out below, we find that in order for the rate a public utility charges its customers for RNG to not be unjust, unreasonable, unduly preferential, or unduly discriminatory, the public utility must be prepared to demonstrate, to the satisfaction of the BCUC, an acceptable chain of custody for any EAs included in the bundle of conventional natural gas and EAs that constitutes RNG.**

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[50] Exhibit B-20, CoR IR1 4.2.

[51] BCUC Inquiry into the Acquisition of Renewable Natural Gas by Public Utilities in British Columbia – Phase 2 Report, dated June 13, 2023, p. 31. Online: https://docs.bcuc.com/Documents/Other/2023/DOC_71871_BCUCRNGInquiryPhase2FinalReport.pdf (BCUC RNG Inquiry - Phase 2 Report).

64. The BCUC has also indicated that it will be introducing further requirements to verify sources of RNG:[52]

> **We recommend the BCUC develop a scheme to ensure adequate protection against double counting or inappropriate claims regarding EAs. This scheme may include annual attestation from the purchasing public utility. The Panel recommends that the BCUC verify the accounting for GHG emissions associated with purchases and sales of RNG including:**
>
> - **Quantities of RNG purchased**
> - **Carbon intensity of the purchased RNG**
> - **Quantities of RNG sold**
> - **The deemed carbon intensity associated with each quantity of RNG sold**
> - **The amount of unsold RNG and the carbon intensity associated with that remaining unsold RNG**
>
> **We also recommend that the BCUC establish reporting requirements to require public utilities to provide the above information to the BCUC on a quarterly basis.**
>
> **Therefore, as part of the reporting requirements established by the BCUC, public utilities must provide the basis for their methodology of accounting for the allocation of GHG emissions reductions and report on any changes to that methodology.**

65. Therefore, FEI has contractual means in place to prevent double counting, and verification of the environmental benefits of RNG and assurance of no double counting can be further addressed through BCUC processes.

C. There is Real Risk to the Long-term Viability of the Gas System

66. In the prelude to their submission on rate design principles, the LGI state that "FEI has failed to demonstrate, with any compelling evidence, that the alluded-to rate shock and death spiral are real risks".[53] However, the risk to the gas system has been confirmed by the BCUC, is

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[52] BCUC RNG Inquiry - Phase 2 Report, p. 32.

[53] LGI Final Argument para. 77.

apparent from recent legislation, and the impacts of the risk can be calculated and shown to lead to rate shock.

67. First, the BCUC has recently confirmed that there are real risks to the gas system in its decision on FEI's cost of capital. Political risk is one of a variety of risks that the BCUC found to have increased significantly since 2016. The BCUC states in Decision and Order G-236-23 (at pages 46-47):[54]

> FortisBC notes that the Energy Transition risk is apparent in the BC government's recently updated Roadmap which is anticipated to have a significant impact on FEI's competitive and operational landscape, resulting in FEI to assess its political risk as significantly higher than 2016. The evidence shows that the Energy Transition represents a fundamental change that has a pervasive impact on FEI's business and that the change in BC is markedly different than in other jurisdictions as a result of government policies relating to climate change, decarbonization and electrification that have emerged since 2016. The Panel considers this to be the biggest driver of real and perceived risk for FEI's shareholder primarily as a result of all levels of government addressing climate change concerns and the uncertainty regarding the role that BC's natural gas utilities will play in addressing climate change concerns, especially when compared to utilities operating in other jurisdictions since the FEI 2016 COC proceeding.
>
> The Panel agrees with BCOAPO that "the critical aspect regarding Political risk is the uncertainty regarding future policies and the impact they will have on FEI's business" and agrees with the CEC that there is a growing bias against the use of natural gas on the part of multiple policymakers. **Accordingly, the Panel finds that the political risks faced by FEI's shareholders have increased significantly since 2016.**

68. Second, the risk to the long-term viability of the gas system is apparent from the introduction of the Zero Carbon Step Code, the higher levels of which cannot be met with conventional natural gas. If FEI cannot add new customers and its existing customer base declines with turnover in the building stock, FEI's customer base will inevitably shrink. A shrinking customer base, coupled with the additional costs to address climate change, will put upward pressure on rates, which will further exacerbate the loss in customers.

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[54] BCUC Decision and Order G-236-23, dated September 5, 2023. Online: https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/521862/1/document.do.

69. Third, while LGI characterize FEI's position as based on "speculative claims",[55] the impact of the risk can in fact be estimated. For instance, in a scenario which assumes that provincial building stock turnover is approximately 2 percent per year and none of those new buildings connect to the gas system, resulting in FEI losing 2 percent of its residential and commercial customers per year, FEI could expect the total volume of gas sold to residential and commercial customers to be 20 PJ or 18 percent lower.[56] A bill impact analysis shows this would lead to "rate shock" – which is typically considered to be a rate increase of 10 percent or greater in a single year.[57]

70. The LGI state that FEI admits that its analysis is "subject to uncertainty".[58] However, what FEI "admitted" is that the percentage turnover in the building stock is subject to uncertainty.[59] However, whether the turnover rate is 2, 2.5 or 1.5 percent, the end result will be the same.

71. In FEI's submission, the inability to serve the new residential construction sector, and new buildings generally, poses a real risk to the long-term viability of the gas system, which has significant consequences for the affordable and reliable delivery of energy to British Columbians.

D. Renewable Gas Connections Will Support the Environmental Benefits of a Diversified Energy Future

72. Also in the prelude to their submission on rate design principles, the LGI allege that FEI has failed to show that the Renewable Gas Connections service brings any environmental gains.[60] BC Hydro similarly argues that proposed service will not help to reduce GHG emissions in the province.[61] FEI disagrees, and submits that the environmental benefits of the Renewable Gas Connections service would be significant for both the new residential construction sector specifically, and British Columbia more broadly.

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55 LGI Final Argument, para. 78.

56 Exhibit B-17, BCUC IR1 12.2.1.

57 Exhibit B-19, BCSEA IR1 8.5, Table 2, Scenario 2.

58 LGI Final Argument, p. 18, fn. 60.

59 FEI Final Argument, fn. 140.

60 LGI Final Argument, para. 79.

61 BC Hydro Final Argument, pp. 8-9. See also GNAR Final Argument, p. 2; MS2S Final Argument, p. 14.

73. The direct environmental benefit of the Connections service is that all new residential construction would be served with 100 percent RNG and FEI would be committed to continuing this supply for the life of the building. This would meet the policy goal of decarbonizing new residential buildings.

74. From a broader perspective, the Renewable Gas Connections service would support a diversified pathway to meeting GHG emissions reduction targets in British Columbia. The use of renewable and low carbon gases in the existing gas distribution system – a multi-billion dollar asset, resulting from over 70 years of sustained development – provides a reliable, safe, cost-effective, scalable solution to reducing emissions.[62] Further, the gas system can deliver rapid and long-term GHG emission reductions.[63] However, it is not reasonable to expect a shrinking number of gas customers to pay for the costs of renewable and low carbon gas. In other words, the viability of the gas system needs to be maintained if it is to be used as a decarbonization solution. The Renewable Gas Connections service will help maintain the viability of the gas system and support a diversified energy future that is needed to decarbonize energy delivery in the province.

75. BC Hydro's position that adding customers through Renewable Gas Connections would not result in any additional RNG incorrectly assumes that the GGRR fixes a maximum volume of RNG that FEI can acquire.[64] While the GGRR does have a maximum volume, this does not limit the amount of renewable and low carbon gas that the BCUC could approve outside the scope of any prescribed undertaking. Furthermore, section 2.2(4) of the GGRR indicates that the maximum volume does not apply to RNG "that the public utility provides to a customer in accordance with a rate under which the full cost of the following is recovered from the customer: (a) the acquisition of the renewable natural gas; (b) the service related to the provision of the renewable natural gas." In short, the maximum volume in the GGRR does not constrain the amount of RNG that FEI could obtain if the cost is fully recovered in rates from the customer (e.g., as in the Renewable Gas Blend).

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62 Exhibit B-11, Application, p. 44.

63 Exhibit B-11, Application, Section 4. Also see FEI's Final Submission, Part Three, Section F(b) and (c).

64 BC Hydro Final Argument, p. 8.

76. BC Hydro states that RNG would simply displace clean electricity and therefore not reduce GHG emissions.[65] BCSEA similarly argues that the RNG that FEI proposes to serve Connections customers should instead flow to the Blend, so that sales customers would fully benefit from the RNG and RNG would not offset clean electricity that would otherwise be used for new residential heating.[66] However, BC Hydro's and BCSEA's position is premised on an electrification-only approach to decarbonization, and assumes an endless supply of clean, affordable electricity, such that Renewable Gas is not considered a viable decarbonization pathway in the long term. FEI's vision, however, is for a diversified energy future where renewable and low carbon gas, including RNG and hydrogen, can be used in the long term to decarbonize buildings. A diversified approach to decarbonization is lower cost than solely electrifying, and will result in a more affordable and resilient energy delivery system in British Columbia. FEI submits that there is no evidence or argument filed in this proceeding that materially contradicts FEI's evidence in this regard. In FEI's view, it is intuitive that leveraging the multi-billion dollar investment in the gas system to decarbonize through renewable and low carbon gas will be a more affordable and reliable path to meeting GHG reduction goals than building new and costly electricity generation, transmission and distribution infrastructure.

77. Furthermore, without the Renewable Gas Connections service, FEI will have no service to offer as a low carbon pathway and FEI will lose the ability to serve the new residential construction sector. As discussed in Part Three, Section C of this Reply Argument above, this scenario poses a real risk to the long-term viability of the gas system. If FEI's customer base shrinks, it will be increasingly unaffordable for remaining customers to bear the cost burden of the distribution system and the cost of renewable and low carbon gas. In time, this will undermine the viability of the gas system, compromise the affordability of renewable and low carbon gas service for customers and, ultimately, the ability to meet provincial GHG reduction targets.

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65 BC Hydro Final Argument p. 9.

66 BCSEA Final Argument, paras. 47-50.

78. FEI submits that there is a customer need for a low carbon gas solution for new residential construction that can and should be met with the Renewable Gas Connections service.[67] This will provide a low carbon pathway that will not only help decarbonize this sector, but also support a diversified approach that will be a more affordable way to meet GHG reduction targets.

E. Renewable Gas Connections Rate Design Is Supported by Ratemaking Principles

79. Mr. Reed and Mr. Strunk agree on the three ratemaking principles that are central to analyzing the Renewable Gas Connections rate design. As stated by Mr. Reed:[68]

> Mr. Strunk and I appear to agree on the most basic elements of ratemaking principles that are applicable to FEI's proposed RNG program. The principles are that just and reasonable rates should balance three key objectives, namely that rates should:
>
> 1) reflect a link between cost causation and cost responsibility;
>
> 2) not unjustly discriminate in the prices charged to similarly situated customers; and
>
> 3), promote economic efficiency, which means that rates should, to the extent possible, send a price signal to customers that promotes the cost-effective use of scarce resources. [Formatting added.]

80. The LGI's submission that the proposed Renewable Gas Connections rate design "offends" these ratemaking principles[69] is without merit and fails to provide any cogent rebuttal to the evidence of Mr. Reed.

81. FEI addresses each principle below.

(a) Renewable Gas Connections Reflects a Link Between Cost Causation and Cost Responsibility

82. The LGI argue that new residential customers cause the increased costs of RNG by seeking to connect "at a class of property where, in some municipalities, bylaws require them to use a

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67 e.g., Exhibit B-11, Application, p. 88.

68 Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A8 (p. 4).

69 LGI Final Argument, p. 20.

low or zero carbon source of energy"[70] and therefore should form a new class with a higher rate.[71] FEI submits that there is no basis in ratemaking principles to create a new class of residential customer. Never before has FEI had to create a class of "new customers" from an otherwise similar group, to reflect a new cost required to serve those new customers. FEI has always served residential customers and – due to environmental policies – new residential customers are now required to be served with low carbon gas. It is an unreasonable response to this new requirement to create a new class of "new" residential customers. Moreover, neither Mr. Strunk, nor the LGI, nor any other intervener in this proceeding has cited a single instance where such a ratemaking approach was taken anywhere, ever. To be clear, there is no evidence of any regulator anywhere dividing residential customers into two classes – between new and old customers – because of a cost to serve new residential customers. FEI submits that the LGI's position leads to an absurd result, is unsupported by ratemaking principles, and must be rejected.

83. From a rate design perspective, new residential customers have done nothing atypical under the Bonbright principles to cause them to be classified any differently than other residential customers receiving the same service. Even though there are significant differences between the embedded costs to serve existing customers and the incremental cost of serving new customers with low carbon gas, Connections customers would require no atypical mains, service lines, risers, meters or other equipment. Nor would Connections customers require incremental capital or operational expenditures that would be out of line with the needs of other customers. This is because there are not two systems – one to delivery RNG and one to deliver conventional natural gas. There is instead one system and the service that existing and new customers receive is not different under the Bonbright principles.

84. The LGI argues that the physical product delivered to customers is irrelevant, and that FEI cannot claim the benefits of RNG on the compliance side but not cost responsibility for those benefits.[72] BCSEA and BCOAPO echo this claim.[73] However, this argument misconstrues the point

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[70] LGI Final Argument, para. 93.

[71] LGI Final Argument, para. 101.

[72] LGI Final Argument, paras. 119-120.

[73] BCSEA Final Argument, paras. 82-83; BCOAPO Final Argument, pp. 9-10.

and takes Mr. Reed's rate design statements out of context. To be clear, Mr. Reed's Rebuttal Evidence was making three points regarding cost causation, summarized by Mr. Reed as follows:[74]

> 1) new Connections customers are not causing a need for RNG on the system (the RNG requirement comes from environmental policy); 2) there is no physical point of differentiation on the system for cost allocation purposes (all customers receive the supply over the same system); and 3) new customers are not receiving any other commodity than what other customers are receiving (all customers are receiving a blended supply).

85. Each point is addressed below, although in a different order than in the quote above.

86. First, from a ratemaking perspective, the fact that the system delivers the same mixed stream product to all customers is a critical distinction. There is no point of differentiation in the system on the delivered product, so customers should not be treated on such a highly discriminatory basis. New customers of any type are no more responsible for system demands than existing customers, who either maintain demand or even increase it. New customers on a system are not targeted for atypical supply costs (e.g., a new peaking resource) simply because they are new; but this outcome is exactly what the LGI propose as a reasonable outcome under the Bonbright principles. This result is not supported.

87. Second, the benefits and commodity received by the existing and new customers is the same. As Mr. Reed states:[75]

> To the extent that Mr. Strunk is arguing that the new Connections customers benefit directly from the energy value of the commodity they use, I agree, but the energy value benefit they derive is the exact same for existing customers since FEI is using only one gas system to deliver a single commingled gas supply. Following the beneficiary pays reasoning, then all customers should share in the commodity costs. I find nothing in Mr. Strunk's reasoning to support a determination under the Bonbright fairness principles that new customers pay more than already proposed. Whatever incremental benefits that Mr. Strunk believes accrue to

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[74] Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A23 (p. 20).

[75] Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A20 (p. 18).

> Connections customers alone, they are not recognizable for cost causation purposes.

88. The LGI claim that the benefit that the new customer receives is in compliance with their personal (private) obligation to decarbonize.[76] However, there is nothing "personal" about this obligation from a ratemaking perspective. To the contrary, the need to decarbonize is a general policy-driven cost imposed on new residential buildings through building codes, not the choice of the new residential customer. In fact, the new residential customer, who likely buys the residence from a developer or builder or previous resident, likely has no say into the construction of the home and what connections and appliances are installed. The obligations apply most directly to buildings. The LGI calling building codes a "personal obligation" to decarbonize is an attempt to transform a building code rubric into a rate design principle and should be rejected.

89. Third, the cost of RNG for the Renewable Gas Connections service is not a cost driven directly by the new customers, but is instead an environmental compliance cost, as these costs are caused by environmental policies and bylaws aimed at curbing GHG emissions. They are not a cost driven by the new residential customers at all, but by climate change and the need address it through decarbonization. Mr. Reed described it this way:[77]

> The costs associated with RNG are best considered as an environmental compliance cost, which is no different than a safety compliance cost. If safety regulators required that new mains use a thicker walled pipe, or if environmental regulators required that new city-gate stations use new technologies for noise abatement, I find nothing in the principles of cost causation and cost responsibility to conclude that it would be proper to charge only new customers for those costs. Such "new" costs have arisen frequently in the past decades and have always been rolled-in to existing cost pools. RNG costs are no different.

90. The LGI attempt to counter this argument with several dubious propositions:

- The LGI state, "If these customers did not exist, or if they decided to build a new building in a jurisdiction without such greenhouse gas emission limits, FEI would

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[76] LGI Final Argument, para. 157.

[77] Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A18 (p. 16).

not need to incur this cost premium". This position is without merit, as the same can be said for any other cost that FEI incurs to serve a new customer or a new area. FEI incurs incremental costs every time it adds a customer, and incremental costs to serve may increase for a myriad of reasons, with which the BCUC is familiar. However, the BCUC does not require FEI to start a new class of residential customer every time it adds a new customer that adds costs, or every time the incremental cost to serve increases. Rather, the BCUC has consistently rolled in the cost of serving new customers, as well as the cost of serving new areas, even though there are differences in costs to serve based on location or based on the latest requirements for gas distribution service. This ratemaking reality is reflected in the postage stamp rates in place across FEI's entire service area.

- The LGI claim that "it is impossible to look at these facts and conclude that the incremental costs of RNG are not caused by these new connection customers."[78] FEI submits that the exact opposite is true. New residential customers did not cause global warming or the need to decarbonize and reduce GHG emissions in the province, or the policies aimed at reducing GHG emissions in the new residential construction sector. Nor do new customers benefit in any unique way from the reduction in GHG emissions from their building. As stated by Mr. Reed:[79]

> The effects of GHG mitigation from RNG use is very broad, literally global, and affects new and existing customers alike. New customers will not live in a carbon-free "bubble" while existing customers experience climate change. The entire RNG program is founded on providing a very public benefit that goes beyond Provincial or national borders and certainly benefits all Company customers. There can be no doubt that these costs are driven by policies that are intended to benefit everyone. Asking new customers to foot the bill for these very public benefits is entirely unsupported by ratemaking policy.

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[78] LGI Final Argument, para. 100.

[79] Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A19 (pp. 17-18).

- Finally, the LGI claim that the RNG costs are not an obligation of FEI, but a "private obligation of specific customers that choose to live in a new home in specific places." The LGI claim that "[i]t is that choice, and only that choice, that carries the GHG mitigation obligation."[80] This is a specious argument. The same could be said about the cost to serve customers that choose to live in: (1) Fort Nelson rather than Victoria which is further from the source of natural gas; (2) Revelstoke where they are served with propane rather than Vancouver where they are served with natural gas; or (3) Whistler which required a pipeline project to convert their appliances to natural gas. The ratemaking policy of the BCUC, similar to regulators across North America, is that customers are not punished for where they chose to live or when their home was constructed. Rather, customers' rates are set regardless of the cost to serve based on location and when service commences. The alternative would be that every customer would have a different rate based on their unique cost to serve. Regulators across North America have consistently rejected this approach, as reflected in the predominance of postage stamp ratemaking.

Contrary to the LGI's position, new residential customers are not the cause of the additional cost of serve them.

91. Seeking a way to avoid the application of sound regulatory principles, the LGI go on to argue in various ways that governments have already determined that the cost of low carbon energy is a private obligation that cannot be socialized, saying "it is not the job of the Commission to prefer a more socialized outcome of costs".[81] First, as submitted in Part Three, Section A of this Reply Argument above, the BCUC's jurisdiction to set FEI's rates is explicit and exclusive. The framework in the UCA gives the BCUC a broad public interest mandate when setting public utility rates that is not restricted by the policy decisions of local governments on building codes.

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[80] LGI Final Argument, para. 112.

[81] LGI Final Argument, paras. 107-109.

92. Second, the LGI policies actually do not, and cannot, determine who pays the cost of low carbon energy. Local government bylaws and building codes may require new buildings to be built in a fashion that requires low carbon energy, but such bylaws and building codes cannot and do not determine who pays for that low carbon energy or what the price of that low carbon energy is once the building is complete. For example, through the Zero Carbon Step Code, local governments can control the parameters to which new buildings are constructed and designed to meet certain GHGi limits; but the Zero Carbon Step Code does not dictate or say anything about the rates for the low carbon energy that residents will pay over the life of the building. The developer or builder of a new building, who must cause the building to comply with the building code, is different from the resident who pays the cost of energy over the life of the building. It is the resident who ultimately pays the rates for low carbon energy, and it is the exclusive jurisdiction of the BCUC to set the rates for that energy.

93. Furthermore, the various concepts employed by the LGI, such as "class of property" and "private obligations", are municipal rubrics, rather than rate design principles or class designations. In other words, public utility rates are not set with reference to the class of property under municipal bylaws, or with reference to which costs are private vs public obligations according to municipal political philosophy. In short, these are concepts foreign to rate design.

94. FEI submits that its proposed rate for Renewable Gas Connections service follows the principle of cost causation, and reasonably and appropriately "rolls-in" the cost of RNG to recovered from all customers, consistent with how the incremental costs to serve new residential customers have always been treated.

(b) Renewable Gas Connections Rate Design Does Not Unjustly Discriminate in the Prices Charged to Similarly Situated Customers

95. The LGI, BC Hydro and other interveners assert that the Renewable Gas Connections rate design imposes a subsidy on existing customers.[82] FEI submits that these arguments are without merit. There is no undue discrimination involved in the Renewable Gas Connections service, as it

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[82] LGI Final Argument, paras. 121-122; BC Hydro Final Argument, p. 5. See also, e.g., RCIA Final Argument, pp. 8-10.

reasonably "rolls-in" the incremental commodity cost to serve new customers consistent with other increment costs to serve, and will treat equally both new and existing customers who are being served on the same system. By contrast, using rate design to force one narrow subset of customers to be responsible for a certain portion of the supply costs would be grossly unfair.

96. FEI responds to the specific arguments of interveners below, as represented by the submissions of the LGI and BC Hydro.

Renewable Gas Connections is Not Unduly Discriminatory and is Consistent with the Case Law Cited by BC Hydro

97. Citing the case of *Prince George Gas Co. v. Inland Natural Gas Co.* (*Prince George*),[83] BC Hydro argues that the Renewable Gas Connections rate is unduly discriminatory.[84] However, *Prince George* makes it clear that average cost pricing can be just and reasonable and, in fact, that the Renewable Gas Connections service does not result in a subsidy.

98. In contrast to the Renewable Gas Connections, in *Prince George*, the impugned rate expressly contemplated a contribution by Prince George Gas Co. to Inland Natural Gas Co. Ltd., based on the conclusion that Prince George Gas Co. would not have been able to receive gas but for the Inland system. The background in the case, as described by Davey J.A., is that the BCUC had granted a Certificate of Public Convenience and Necessity (CPCN) for Inland Natural Gas Co. Ltd. and a separate CPCN for Prince George Gas Co. on certain conditions, including the following (at p. 363):

> Those conditions, in so far as they bear upon these appeals, may be stated as follows:
>
> As to Prince George Gas Co.: That Prince George Gas should make a firm arrangement with Inland, by agreement or direction of the commission, to secure a supply of gas from Inland on terms which should put,
>
> > "the Prince George area on a substantially equal footing with other areas served by Inland Natural Gas Co. Ltd. as to supply * * * and shall provide for a price that, in the initial years at least, will ensure that a contribution

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[83] *Prince George Gas Co. v. Inland Natural Gas Co.,* 1958 CanLII 493 (BC CA). [Tab 3 of Book of Authorities]

[84] BC Hydro Final Argument, pp. 5-6.

> will be made by consumers in Prince George to the overall costs of that part of the Inland system but for the creation of which they might never have been in a position to receive gas at all."

As indicated in the quote above, the condition on Prince George Gas Co.'s CPCN required a rate that would include an explicit contribution by the consumers in Prince George to the Inland consumers to compensate for the fact that Prince George Gas Co. might not have otherwise received gas. This is not a sound basis for such a contribution under accepted ratemaking principles, and therefore was found to be wrong in law by the BC Court of Appeal.

99. As discussed by Davey J.A. in *Prince George*, however, contributions by customers to the costs of a public utility system are not necessarily subsidies (at pages 369-370):

> A requirement that one group of consumers contribute to the overall costs of a public utility system serving them and others does not, *per se*, constitute a subsidy; that depends upon the circumstances. In so far as those costs fairly constitute part of the cost of providing service to the consumers they may be a proper element in the rates those consumers are called upon to pay; the fact that such contribution to those costs may reduce the rates of other consumers does not make it a subsidy. However, in that case the benefit to the other consumers is not the specific purpose of the contribution, but the incidental result flowing from a proper rate based upon the cost of service.
>
> On the other hand that contribution to the overall costs becomes a subsidy if its specific purpose is to benefit other consumers without regard to the extent those costs properly enter into the cost of serving the contributing consumers.
>
> It is significant that the condition does not fix the contribution the Prince George consumers may be required to make by reference to the cost of providing them with service. I do not overlook the words
>
> > "overall costs of that part of the Inland system but for the creation of which they might never have been in a position to receive gas at all."
>
> Passing over the problems arising from the use of "might" instead of "would," such a circumstance will not necessarily make those costs part of the cost of providing service to the Prince George consumers. That will depend upon other circumstances not mentioned in the condition.
>
> So, while one result of the condition, depending on the mode of application, may be to require a contribution which can be supported as a proper rate, that will not be a necessary result.

> It seems clear from both the language of the condition and the reasons of the commission that the condition may require Prince George consumers to make a contribution to the overall costs by way of subsidy to other consumers. It is on that possibility that the validity of the condition must be determined.

100. It is within the above context that the Court went on to make its well-known pronouncement that a "rate which is set, without regard to what is a fair and reasonable charge for the service rendered by a public utility, for the express purpose of compelling some consumers to subsidize others, is, in my opinion, inconsistent with the statutory provisions governing rates…"[85]

101. However, Davey J.A. specifically went on to discuss how this principle did not prevent uniform rates for all or any part of system (at page 373):

> It does not follow from what I have said that the commission is prevented from setting, in proper cases, a uniform schedule of rates for all or any part of a system, which may incidentally have the effect of compelling some consumers to contribute to the cost of serving others. But the present order fixing the price cannot be upheld on that ground.
>
> The commission did not enter upon an inquiry to determine the facts which are necessary to support uniform rates. On the contrary, it said it would be premature to enter upon such inquiry at that time…

102. O'Halloran J.A. similarly specifically noted that he had "no quarrel" with "contributions" required to fix a uniform price (at pages 346-347):[86]

> If, however, it could be said, that the Prince George consumers ought economically "to contribute" to the costs of the supply of natural gas to other communities in British Columbia, that contribution would occur if Prince George were charged at its diversion point on the main Westcoast transmission line the same unit cost and price as other British Columbia communities are required to pay at their individual diversion points along the main Westcoast transmission line. The Westcoast Co. seems to have recognized that principle in effect, by requiring the Inland Co. to pay at the Prince George diversion point the same price that is chargeable at Savona, 270 miles south of Prince George, and also the same price that the B.C. Elec. Co. is charged some 500 miles south of Prince George at Huntington for the Lower Mainland and Vancouver markets.

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[85] *Prince George* at p. 371. [Tab 3 of Book of Authorities]

[86] *Prince George.* [Tab 3 of Book of Authorities]

> I have no quarrel with this latter principle of fixing a uniform price along the individual diversion points from the Westcoast mainline in British Columbia subject to what is later said that a competent rating authority first determine that the uniform price so established is an economically fair price when determined in relation to the actual cost of the construction of the pipeline from the Peace River to the United States boundary, and actual costs of operation along that main Westcoast line when also related to the fair economic return upon the actual capital investment. But the Public Utilities Commission did not examine that phase of the matter. Instead, the Public Utilities Commission, although it conceded that Prince George required only a separate four and a half mile feeder line for its own needs, nevertheless held Prince George ought to contribute as well to the cost of construction and operation of a separate 332 mile feeder line to start 270 miles south of Prince George, for the needs of the communities this latter feeder line would serve.

103. FEI's proposed Renewable Gas Connections service is in line with the fixing of a uniform price, rather than the subsidy included in the impugned rate that Prince George Gas Co. was required to pay to Inland Gas Co. Ltd. In particular, the service results in equal rates for new and existing customers, as it reasonably and justifiably rolls in the cost of the RNG similar to other environmental compliance costs that are properly recovered from all customers. As such, the *Prince George* case is consistent with the kind of rolled-in form of ratemaking proposed by FEI, which is not a ratemaking subsidy and not unduly discriminatory.

104. Similarly, BCUC Decision and Order G-5-17 regarding BC Hydro's 2015 Rate Decision Application,[87] as referred to by BC Hydro, is also consistent with the Renewable Gas Connections service. Decision and Order G-5-17 cited *Prince George* in support of the BCUC's finding "that low-income rates unsupported by an economic or cost of service justification are unjust, unreasonable and unduly discriminatory and are therefore not in accordance with sections 59 to 60 of the UCA."[88] The BCUC Panel in that proceeding explained that "a low-income rate design rate in the absence of an economic or cost of service justification is necessarily unduly discriminatory because it discriminates on the basis of a customer's personal characteristics as opposed to its electricity consumption characteristics."[89] The Connections service is not based

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87 BCUC Decision and Order G-5-17, dated January 20, 2017. Online: https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/218025/1/document.do.

88 BCUC Decision and Order G-5-17, p. 59.

89 BCUC Decision and Order G-5-17, p. 59.

on the personal characteristics of customers, but rather, on the cost to serve similarly situated customers consuming the same mixed stream supply, and is therefore not similar to the low income rate design rejected by the BCUC in in the decision raised by BC Hydro.

FEI Has Not Conceded There is Discrimination

105. The LGI states that "FEI itself, through Mr. Reed, concedes that there is discrimination inherent in the proposed new Renewable Gas Connection rate [citing Exhibit B-68, FEI Rebuttal Evidence to Strunk, p. 8 Q10 ll. 9-11], but suggests that the level of discrimination is not undue."[90] The LGI, however, misrepresent Mr. Reed's general statement about the Bonbright principles in the quoted section. Mr. Reed stated – accurately – that: "The [prohibition on undue discrimination] expressly acknowledges that there will be some level of discrimination inherent in the regulated ratemaking process and, therefore, prohibits only undue levels." This is not the concession that the LGI pretend it to be, but rather, a statement of a well-recognized aspect of the principle.

Imposing Average Cost of RNG Supply on New Residential Customers Would be Unduly Discriminatory

106. The LGI states that Mr. Reed makes no attempt to apply the description of undue discrimination to the case at hand.[91] To the contrary, Mr. Reed has been clear that the Renewable Gas Connections service would not amount to undue discrimination as it would treat new and existing customers equally.[92] Furthermore, Mr. Reed has shown that the approach to residential rates espoused by the LGI is vintaging, which is a form of discriminatory pricing under which new customers are assumed to be the only factor causing new costs to be added to the utility system and thus they should be responsible for all those new costs.[93] Under the LGI's approach, existing customers are entitled to maintain existing or "vintaged" rates, resulting in two otherwise similar customers paying very different rates for the same delivery or commodity service (or both) based on how and when the vintaging is applied.

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90 LGI Final Argument, para. 124.

91 LGI Final Argument, para. 125.

92 Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A.10.

93 Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), p. 18-19.

107. As discussed by Mr. Reed, vintaging is not favoured by utility rate regulators:[94]

> Vintaging is most often disfavored since it discards fairness principles and rests on the economic fiction that new customers are more responsible for expanded system needs than legacy customers who maintain the level of their use of the system rather than reduce it. New components and resources are added to the system to meet the joint demands of new and existing customers as well as to serve existing customers through the replacement of existing facilities and resources that may no longer be useful due to age, condition or obsolescence. This new plant and equipment, and the labor used to deploy it, will certainly cost more than what it replaces due to general wage and material inflation as well as more modern environmental requirements that have grown more stringent over time. These higher costs compound the burden placed on new customers while the legacy customers enjoy the benefits of using the system based on the lower depreciated historic costs. Vintaging is a form of ratemaking resulting in distorted consumption signals, causing old customers to consume relatively more and new customers to consume relatively less because of the two-tier rate system that is unrelated to the true cost burdens imposed on the utility to provide service.

108. Mr. Reed illustrated the impact of this practice as follows:[95]

> Envision an existing customer that built a new house in 2022 and then envision a second customer, a Connections customer, who built the same type of house right next door in 2024. Both customers are served off of the same facilities and receive the same stream of gas. Mr. Strunk is asking the new customer to pay a gas commodity charge that is four times the gas cost the "old" customer is charged and the ***only*** difference between these two customers is ***when*** each neighbor initiated service. That is a clear case of unjust discrimination and the essence of vintaged pricing, which reflects the creation of wealth entitlements through ratemaking, and which reflects the notion that the existing customer has acquired rights to historic costs because of its past use. These concepts have been flatly rejected in Canada.

109. The rate vintaging approach is entirely inconsistent with the treatment of other incremental costs to serve new customers and would result in highly discriminatory rates for new residential customers.

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[94] Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A22 (p. 19-20).

[95] Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A23 (pp.20-21).

Difference Between Incremental and Rolled-In Price Shows the Undue Discrimination of Vintaging

110. The LGI argues that the Renewable Gas Connections service is unduly discriminatory based on the extent of the difference between the incremental and rolled-in cost of RNG to serve Connections customers.[96] This argument, however, merely begs the question by assuming that there is a subsidy. FEI submits that based on ratemaking principles there is, in fact, no subsidy.

111. Further, FEI submits that the size of the difference between the incremental and rolled-in cost of supply for new residential customers illustrates how discriminatory the vintaging approach espoused by the LGI and others would be. In FEI's respectful submission, there is no justification to discriminate against new residential customers to this degree.

(c) Renewable Gas Connections Promotes Economic Efficiency, Sending a Price Signal to Customers that Promotes the Cost-effective Use of Scarce Resources

112. FEI submits that the Renewable Gas Connections service would make the most efficient use of existing assets and is consistent with the principle of economic efficiency. As explained by Mr. Reed:[97]

> As stated by Bonbright and many other ratemaking authorities, just and reasonable rates should send the proper price signals so that consumers can respond and make the most efficient use of the utility system and the resources provided by that utility. This includes making efficient use of existing infrastructure and other resources and avoiding wasteful or inappropriate use of the utility's product. However, as noted by Dr. Alfred Kahn, economically efficient price signals must be provided to all customers in order for the allocation of resources to be optimized. For example, it is not appropriate to attempt to send a marginal cost price signal to one set of "new" customers when others see their services being priced on embedded or average cost rates. Such an attempt to "optimize piecemeal" will not prove to be efficient, since existing customers are not being provided with the appropriate price signal to relinquish service that may be of relatively lower value, while new customers are required to cover the full incremental cost. Vintaged pricing, with new customers being priced at the stand-alone cost of new service and older customers being priced at embedded, average cost is a clear example of an inefficient set of price signals being sent.

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96 LGI Final Argument, paras. 125-127.

97 Exhibit B-17, BCUC IR1 13.2.

113. In the subsections below, FEI responds to the submissions of BC Hydro, BCSEA and the LGI that take a contrary position.

BC Hydro's Argument Is Premised on Incorrect Assumptions

114. BC Hydro submits that local and provincial policies do not require 100 percent RNG for new residential developments, but require (or are moving towards) requiring new residential developments to be heated with low carbon energy.[98] FEI agrees that the policy should be energy source neutral, which is why FEI has proposed the Renewable Gas Connections service to provide an alternative low carbon energy form for new residential developments. While there are no regulations that explicitly mandate that residential customers must use 100 percent RNG, building codes that can only be met with a low carbon resource require 100 percent RNG for any residential customer that seeks to access gas service. FEI's proposal is, therefore, a reasonable one.

115. BC Hydro goes onto submit, however, that the Connections service will not encourage efficient use and discourage inefficient use of energy "given that it fundamentally alters the economics of these energy use decisions".[99] BC Hydro's position is based on the incorrect premise that the Renewable Gas Connections service is an unfair subsidy, which FEI submits is incorrect for the reasons set out above and in Part Three, Section E(a) of FEI's Final Argument. Moreover, implementing asymmetrical rate design approaches between gas and electric supply for new customers favours the consumption of electricity. BC Hydro's position would amount to piecemeal optimization of energy consumption choices, by pricing gas energy supply for new customers on an incremental cost basis, while electric supply for new customers is priced on a rolled-in basis. As noted by Mr. Reed, this type of pricing regime will shift consumption "to the service priced at average embedded costs and erode hoped for efficiency gains in the market."[100] The Renewable Gas Connections service, in contrast, will promote efficiency and preserves equity

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98 BC Hydro Final Argument, p. 6.

99 BC Hydro Final Argument, p. 6.

100 Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A28 (pp. 27-28), quoting Alfred E. Kahn, "Thou shalt not optimize piecemeal." (citation omitted).

between old and new residential customers by reflecting rolled-in pricing which is the predominant way that utility rates are set in this province.

116. Furthermore, and in any event, FEI submits that energy use decisions in the province are not currently being guided by the true economics of the options. Rather, the economics of energy use decisions have been fundamentally altered by policies biased against the use of the gas system (e.g., the PST difference between gas (12 percent) and electric (0 percent) heating equipment),[101] the removal of demand-side measures for high efficiency gas heating equipment in the recent amendments to the *Demand-Side Measures Regulation*, the incentives and subsidies for electric heat pumps,[102] and the advantages of government ownership to help keep BC Hydro rates low.[103] In this context, the true economics of energy use decisions cannot be maintained, and setting the Connections rate for new customers on an incremental costs basis will significantly erode energy market efficiency.

BCSEA's Argument and Analysis is Flawed

117. BCSEA argues that the analysis of Energy Futures Group (EFG) shows that 100 percent RNG in new residential single-family homes in BC is less cost-effective than electricity for zero-carbon heating, which attempts to rebut FEI's argument that the Renewable Gas Connections service would foster economic efficiency.[104] FEI submits that BCSEA's argument is inaccurate for a number of reasons.

118. First, EFG's analysis is flawed as it incorporates a gas connection cost of $3,704, when a customer would actually only pay a $15 connection fee.[105] Further, EFG includes no electric system connections costs. FEI explained why this approach is not reasonable, as follows:[106]

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101 *Provincial Sales Tax Act*, S.B.C. 2012, c. 35, s. 34. Heat pumps are excluded from the definition of a "fossil fuel combustion system" in s. 1 of the Act.

102 Exhibit B-17, BCUC IR1 17.1; Exhibit B-24, CoV IR1 4.3; Exhibit B-39, CoR et al. IR2 23.2.

103 Exhibit B-17, BCUC IR1 17.1.

104 BCSEA Final Argument, pp. 14-18.

105 Exhibit B-62, Rebuttal Evidence to BCSEA, pp. 2-3.

106 Exhibit B-78, BCSEA IR1 24.1 Rebuttal.

> First, both gas and electric systems incur costs to attach customers. In the context of the electric system, capital expenditures provide the necessary electrical capacity to serve additional load requirements. Some of these costs are paid directly by customers by way of a contribution in aid of construction, while other costs are paid by the utility. These cost payment structures vary both within each utility and between both gas and electric utilities and are often difficult to ascertain precisely for the purposes of this type of analysis. If, as EFG states, it is comparing the costs irrespective of who pays, then it would be appropriate to add in electrical costs to the electrical analysis to create an "apples-to-apples" comparison.
>
> Second, EFG's inclusion of the cost incurred to connect gas customers to the system (where there is no customer contribution) double counts these costs. While there is indeed a cost incurred to connect customers to the gas system, this cost is recovered through the delivery charge component of the natural gas rate. Therefore, including the connection cost as a separate line item in its analysis, while also including the rates paid, results in a double counting of the connection costs in the analysis.
>
> Ultimately, given the difficulty in ascertaining the costs incurred by the customer and/or BC Hydro to connect to the electric system or upgrade electrical service, and in light of the above-noted double counting in EFG's RNG Scenario, it is not appropriate to include these connection costs in the analysis.

119. BCSEA argues in reply that it is appropriate to include gas connection costs and exclude electricity connection costs because customers would connect to the electricity system even if they were not using electricity for home heating. As an initial matter, BCSEA's position makes no sense from a rate design perspective since electric customers clearly benefit from connecting to the system to receive electric service and should recognise cost responsibility for that benefit. BCSEA's argument does not rebut FEI's evidence, as EFG's analysis still double counts the gas connection costs. Further, gas customers may also connect to the gas system for non-home or water heating purposes, including for BBQs, fireplaces, and cooktops. Finally, electric connection costs for home and water heating could be more costly than a connection that does not include these purposes.

120. Second, EFG's analysis uses the average acquisition cost of RNG, when the rolled-in cost of RNG should instead be used. FEI explained:[107]

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[107] Exhibit B-78, BCSEA IR1 25.4 Rebuttal.

> Despite the above, for EFG's cost comparison to be valid, the Electricity Scenario, which uses rolled-in costing, should have been compared to an RNG Scenario that similarly uses rolled-in costing, as proposed by FEI in the Application. Alternatively, EFG's analysis could have recognized that incremental customer additions require incremental clean energy from new sources. For example, all new electricity generation in BC will need to be derived from clean sources, such as hydroelectric dams. A proper "apples to apples" comparison would be to use the average cost of RNG (plus transmission and distribution) for the RNG Scenario, and the average cost of new, clean, firm electricity (plus transmission and distribution) for the Electricity Scenario (e.g., the Site C dam). As noted in its Rebuttal Evidence to BCSEA, while FEI does not have costing and rate-making data to derive an appropriate generation cost/rate for the Site C dam, it suggested a firm energy cost of $0.16/kWh, which does not include transmission and distribution. For context, FEI also noted as part of FortisBC's Clean Growth Pathways to 2050 report that in a high electrification scenario, electricity rates could increase to $0.24/kWh, as described in the response to CEC IR1 2.1 Rebuttal BCSEA.
>
> Ultimately, whichever approach is adopted, FEI maintains that any valid comparison must be consistent between scenarios, including energy costs using either rolled-in rates for both gas and electric services, or incremental rates based upon incremental resources.

121. With the rolled-in cost of RNG, the costs of using RNG and electricity for home heating are broadly comparable.[108]

122. Third, BCSEA's view of economic efficiency is narrowly focused on the comparative cost to heat a home, when the question of economic efficiency at issue in the design of FEI's rates should be about the efficient use of the gas system assets and the energy market through the avoidance of piecemeal optimization. The Renewable Gas Connections service will promote economic efficiency as it will utilize the existing assets of the gas utility more efficiently, leveraging the multi-billion dollar investment in gas infrastructure to help decarbonize the economy.[109] The use of the gas system assets to facilitate a diversified energy approach to meeting decarbonized goals is economically efficient when priced on a comparable basis, and will lead to more affordable rates for customers.

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[108] FEI Final Argument, para. 81.

[109] FEI Final Argument, paras. 76 and 98-100.

123. Finally, FEI disputes BCSEA's apparent premise that only the cheapest energy source should be permitted to serve the new residential construction sector. There is always a variation between the cost to serve a new home with gas vs. electricity; the BCUC nonetheless approves rates for both services, so that customers can choose their end use appliances and connect to either system. FEI's proposed Renewable Gas Connections aims to preserve this long standing energy choice in the province.

Optimizing Piecemeal Is Inconsistent with Embedded Cost Ratemaking

124. Mr. Strunk's approach, as advocated for by LGI, would be to charge the incremental costs for only one isolated portion of the bill – commodity charges – and differentiate on that element between new and old customers. Trying to optimize price signals in this fashion is a piecemeal approach that is inconsistent with the embedded costs ratemaking applied to all other costs, and postage-stamp rates across the province. As stated by Mr. Reed:[110]

> It is not the standard anywhere in North America that economic efficiency for regulated service can be achieved only through incremental cost pricing. I agree that incremental cost pricing – standing alone as an economic principle – leads to economic efficiency, but as applied to utility service, incremental cost pricing would need to be applied to all gas customers, not just new customers, and to competing utility services as well to achieve the efficiency goals. Mr. Strunk does not extend this rationale for incremental cost pricing to the delivery function of the gas system, nor to all gas customers, nor does he recommend that it be applied to the electric utility market. As noted by economist Alfred Kahn, "Thou shalt not optimize piecemeal." That is because under piecemeal use of incremental cost pricing consumer consumption choices will shift to the service priced at average embedded costs and erode hoped for efficiency gains in the market.

125. In short, Mr. Strunk's approach is outside accepted regulatory norms and does not reflect gas distribution rates in North America.[111] For example, Mr. Strunks' position is arbitrarily applied to incremental gas costs, but not to incremental electricity costs:[112]

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[110] Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A28 (p. 27).

[111] Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A13 (p. 12).

[112] Exhibit B-75, CEC IR1 2.1 Rebuttal Strunk.

> Based on Mr. Strunk's position, where new customers impose new costs they should be born by those new customers, any incremental cost expended to displace depreciated legacy resources with new zero-carbon resources would need to be paid for by the new customer. On nearly every electric system that relies on fossil-fueled resources, the displacement of those resources with a combination of renewable or nuclear power and peaking capacity or storage has proven to be more expensive than the status quo. Furthermore, significant electric load growth from electrification of end uses is causing cost increases associated with decarbonization.

126. The LGI take issue with Mr. Reed's reference to Decision and Order G-60-14 to show that the BCUC considers social issues, including environmental policy, when evaluating the ratemaking principle of efficiency and its benefits.[113] The LGI submit that "the Commission appears simply to have been acknowledging that these factors are among the reasons that economic efficiency matters. The Commission was identifying that economically inefficient rates can frustrate policy, and impose social as well as economic harms." The LGI's position is contrary to the plain words of BCUC Decision and Order G-60-14, which speak for themselves:[114]

> Efficiency benefits can be described as promotion of: (i) efficient customer consumption and investment decisions, (ii) efficient utility investment and operational decisions and (iii) innovation. The Panel also considers any effect on British Columbia social issues, including environmental and energy policy.

The LGI seem to overlook the words "also considers" in the Decision, and there is no indication that this further check should only be applied to inefficient rates.

127. It is apparent from the above and the remainder of the decision that the BCUC considers social issues as a check on the results of its efficiency analysis as both efficient and inefficient rates may have important social outcomes that the BCUC would want the flexibility to consider. For example, a pure application of an incremental cost approach to the distribution costs may have undesirable outcomes for more rural customers that are relatively more expensive to build out to serve than those located in more dense population centers. A commission may prefer to

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[113] As cited in Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A9 (pp. 6-7).

[114] BCUC Decision and Order G-60-14, dated May 6, 2014, p. 64. Online: https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/111742/1/document.do.

extend service and socialize costs across a class on the basis that the public good is better served by more liberal availability of the utility service rather than raising the economic costs to receive it for more remote customers. This is a matter of judgment that should be reserved to the BCUC.

128. In summary, FEI's proposal results in efficient outcomes under this Bonbright Principle since all customers would be served off the same system and receive the same mixed supply stream, and therefore provides customers with the same economic signals for consumption and investment as exists under currently approved offerings. Moreover, promoting RNG use will spur demand for the fuel and may prompt innovation regarding its production which would be beneficial for a less carbon intensive energy future. By contrast, singling out a subset of customers as the LGI propose to receive an atypical supply cost charge will send the decidedly wrong economic signals.

F. Renewable Gas Connections Will Not Have Negative Implications for Municipal Policy Making and is in the Public Interest

129. In Part III of their Final Argument, the LGI submit that Renewable Gas Connections service is not in the public interest as it has the potential to harm local government policy setting aims and interests, and is not the best use of the limited supply of RNG. FEI submits that the LGI have not articulated how the Connections service could detrimentally impact their policy setting powers. FEI submits that the policy-setting powers of local governments will remain unaffected, and the potential adverse impacts discussed by the LGI are not valid.

130. FEI responds to the specific submissions of the LGI on this topic below.

(a) A Diversified Approach is More Affordable

131. The LGI argue that existing customers would bear additional costs, consuming more of their disposable income and therefore inhibit the LGI's ability to develop regulations to reduce GHGs in existing buildings that are affordable and equitable.[115] FEI submits that this argument is not a fair or accurate characterization and that the Renewable Gas Connections service does not and cannot inhibit the ability of local government's ability to set policy.

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[115] LGI Final Argument, paras. 165-169.

132. The logic of the LGI argument would apply to any increase in costs for consumers. The logic appears to be that decarbonization is expensive and therefore anything that reduces the disposable income of consumers inhibits setting policies to decarbonize. With respect, the challenge identified by the LGI is in fact due to the high cost to decarbonize, rather than FEI's rates. FEI's rates simply cannot and do not impact the local government's *ability* to set policy. Rather, this is a challenge due to the economics of decarbonization generally: new clean energy is generally more expensive than existing energy supply (e.g., electricity generated by the Site C dam compared to heritage resources; RNG and hydrogen vs. conventional natural gas). Moreover, in the face of rising costs due to inflation, rising interest rates, and the myriad of other factors in the economy that affect the disposable income of residents, the costs due to FEI's rates cannot be reasonably singled out as the factor that will influence a consumer's decision to decarbonize or the ability of local governments to set affordable policies.

133. Furthermore, FEI responded in its Rebuttal Evidence to the argument that the Renewable Gas Connections service will consume more disposable income of customers, as follows:[116]

> First, as noted in Section 1.1 above, the Renewable Gas Connections service is reasonably and appropriately based on average cost pricing and does not constitute an impermissible cross subsidy.
>
> Second, the Renewable Gas Connections service will consume less of customers' disposable income. The important point that is missing in the argument of the City of Vancouver and City of Richmond is that FEI will be acquiring RNG as part of its efforts to meet provincial GHG reduction targets and that all customers will bear the costs of these efforts, with or without the Renewable Gas Connections service. However, by preserving a gas service for new residential construction, all FEI customers will benefit from higher demand and lower rates compared to an alternative where FEI was not permitted to serve new residential construction customers. Preserving a role for gas service will provide an option for low-income customers that cannot afford costly equipment changes. Further, by supporting a Diversified Energy Future, the Renewable Gas Connections service will help support an overall lower cost approach to reducing GHG emissions in the Province. Therefore, contrary to the Cities of Vancouver and Richmond, the Renewable Gas Connections service will leave customers, including low- income customers, better positioned to shoulder the costs of emission reduction requirements.

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[116] Exhibit B-65, Rebuttal Evidence to CoV, p. 10.

> Third, all customers will benefit from the Renewable Gas Connections service. The GHG reduction benefits of substituting RNG for conventional natural gas will benefit all British Columbians, not only those that receive the service. In addition, as noted above, by preserving a gas service for new residential construction, all FEI customers will benefit from higher demand and lower rates compared to an alternative where FEI was not permitted to serve new residential construction customers.
>
> Fourth, the cost to reduce the GHG emissions from existing buildings will also be shared. For example, FEI's costs to run its DSM programs are borne by all customers, as would be the cost of the Renewable Gas Blend service. The challenge posed by climate change is a global one and the costs to meet this challenge are driven by government policy, not any individual customers. It is therefore appropriate that all customers share the cost of reducing emissions.
>
> Finally, the City of Vancouver and City of Richmond have not considered the cost of an electrification approach on all residents of BC. All of the infrastructure costs of BC Hydro required to serve the load resulting from the City of Richmond and City of Vancouver policies will be recovered from all electricity customers in the Province, not just those in the City of Vancouver and City of Richmond. An electrification only approach will, therefore, result in additional costs being borne not only by residents of Vancouver and Richmond, but by all British Columbians.

134. FEI respectfully submits that the LGI's arguments in response are without merit for the reasons below:

(a) They argue that FEI's position runs counter to economic theory, saying "it is unclear whom FEI is proposing to sell all this fuel".[117] FEI has set out in this Application how it intends to sell RNG to all sales customers through the Renewable Gas Blend. The LGI do not appear to have considered this.

(b) They argue that the "GGRR tells FEI how much of the volume and cost they can expect to be allowed to recover by spreading the cost across all ratepayers".[118] The GGRR does set a maximum volume for the prescribed undertaking, but this does not limit the amount of renewable and low carbon gas that FEI could acquire or that the BCUC could otherwise approve. Notably, section 2.2(4) of the GGRR

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[117] LGI Final Argument, para. 173.

[118] LGI Final Argument, para. 173.

indicates that the maximum volume does not apply to RNG "that the public utility provides to a customer in accordance with a rate under which the full cost of the following is recovered from the customer: (a) the acquisition of the renewable natural gas; (b) the service related to the provision of the renewable natural gas."

(c) They argue that the death spiral scenario is "wholly speculative."[119] However, as discussed above, if FEI is not able to add new customers, and its existing customer base decreases as the building stock turns over, the impact on the long-term viability of the gas system is real and can be estimated.[120]

(d) They argue that the high cost to switch away from gas to electricity "is exactly what makes FEI's proposed Renewable Gas Connection rate unjust…"[121] The logic of the LGI appears to be that any additional cost for residents is unjust because it may prevent them from incurring the high cost of switching to electricity. However, FEI's Connections service does not change the cost of switching to electricity. As discussed above, this is a much broader economic challenge that cannot be blamed on the price of FEI's rates for gas service. Further, FEI's vision for a Diversified Energy Future is one where FEI will provide its customers with a low carbon gas service. FEI is taking steps towards that vision with its proposed Renewable Gas Blend. FEI's vision is that its customers will not have to switch to electricity to decarbonize, but rather FEI will decarbonize their gas service.

135. Please also refer to Part Three, Section I(d) of this Reply Argument below in response to a similar point from BCSEA.

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[119] LGI Final Argument, para. 174.

[120] The uncertainty noted in footnote 140 on page 53 of FEI's Final Argument was with respect to the 2 percent building stock turnover rate.

[121] LGI Final Argument, para. 174.

(b) Renewable Gas Connections Will Encourage Efficient Equipment Decisions and Innovation

136. The LGI argue that the Connections service will distort customer decisions and harm innovation.[122] However, this argument is based entirely on the premise that there is an unfair subsidy of the Connections service, which FEI denies for the reasons discussed in Part Three, Section E of this Reply Argument.

137. FEI has thoroughly responded in its Rebuttal Evidence to the suggestion that the Connections service could inhibit innovation.[123] FEI highlights that it is simply not plausible to think that the Connections service could materially impact innovation. As FEI stated in Rebuttal:[124]

> … innovation in mechanical space and hot water heating is necessarily driven by competitive and other forces, such as increasing energy efficiency requirements, in the market for these solutions as a whole, not only the market in FEI's service territory. To illustrate this point, FEI has often been involved in bringing innovations to British Columbia … that were developed in other jurisdictions, including piloting high-efficient natural gas heat pumps developed by the U.S. companies ThermoLift Inc. and Stone Mountain Technologies Inc. The size of the market for space and water heating solutions is immense, extending throughout North America and, indeed, the world. FEI's service territory represents a very small portion of this overall market. Large space and water heating manufacturers have often indicated to FEI that the size of the BC market is too small to influence the direction of research and development, and hence innovation. Therefore, as a general proposition, FEI's Renewable Gas Connections service is unlikely to have a material impact on the pace of innovation in the market.

138. Fundamentally, however, FEI disagrees that there is any market-distorting price signals caused by the Connections service.

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[122] LGI Final Argument, paras. 176-190.

[123] Exhibit B-65, Rebuttal Evidence to CoV, pp. 8-9.

[124] Exhibit B-65, Rebuttal Evidence to CoV, A11 (p. 8).

(c) Need for RNG Use in New Buildings Is Compelling

139. The LGI argue that RNG should be used for existing buildings, rather than new buildings, as they are harder to decarbonize.[125] FEI submits that new residential construction and existing buildings are both difficult to decarbonize. Furthermore, there is adequate Renewable Gas supply to address both segments of the building sector, and the use of Renewable Gas in new construction benefits the long-term viability of the gas system, FEI's existing customers and British Columbians at large.[126]

140. New buildings and existing buildings are both hard to decarbonize due to factors such as cost, lack of viable equipment that performs to customer expectations at a reasonable cost, need for new infrastructure, and lack of customer desire or demand.[127] The difficulty of decarbonizing new buildings is demonstrated by the significant changes in legislation and policy required to enable it, and the significant subsidies and incentives required to entice residential new construction adopt measures such as electric heat pumps for new buildings. It can also be difficult, and expensive, to ensure that there is adequate electrical capacity for buildings to heat with electricity at the individual customer level or at the system level. Further, customers each have their own preferences and desires which may not align with decarbonization initiatives.[128]

141. Generally, with the exception of a switch from coal to gas fired electrical generation, reducing emissions has proven extremely difficult. This is further complicated by increasing demand on energy from a growing economy. FEI submits that "we should use all tools in the tool box" to decarbonize the BC economy. The more options available to decarbonize the better chance there is of achieving the outcome.[129]

142. The LGI take issue with FEI's view that the Connections service will preserve energy choice for customers, saying that "No one is suggesting a denial of choice for anyone".[130] FEI submits

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125 LGI Final Argument, paras. 191-203.

126 Exhibit B-22, CEC IR1 53.1. FEI Final Argument, Part Three, Section F and Part Five.

127 Exhibit B-24, CoV IR1 4.2.

128 Exhibit B-24, CoV IR1 4.3.

129 Exhibit B-24, CoV IR1 4.2.

130 LGI Final Argument, para. 196.

that the LGI's submission cannot be reconciled with the adoption of building codes and policies that prohibit the use of the gas system in new buildings, the effect of which is to deny residents the ability to chose to use gas. The fact is that, without a feasible low carbon gas service for the new residential construction sector, adoption of the higher levels of the Zero Carbon Step Code will effectively make electricity the only choice. FEI's proposition in this proceeding is that the Connections service should be approved by the BCUC, so that FEI can offer it to its customers and the Province can consider its merits as a low carbon pathway under the step code. This will preserve energy choice, or at least the potential for it, which is beneficial for the numerous reasons identified in FEI's Final Argument, including affordability and resiliency of the energy supply in BC.

143. The LGI also argue regarding customer choice that FEI relies "almost exclusively" on letters of comment which should be accorded little or no weight.[131] FEI submits that the LGI inappropriately seeks to silence the opinions of stakeholders. The letters of comment that FEI has relied on (e.g., at paragraph 92 of FEI's Final Argument) are expressions of these individuals' and organizations' personal preferences and should and can be taken at face value. Further, these letters of comment include letters from local governments in Coquitlam, Burnaby, Kamloops, Prince George, West Kelowna, and Hope, as well as stakeholders representing thousands of businesses. They are examples of municipalities, customers and stakeholders that have expressed support for RNG as a choice to meet their needs, and there is no basis to doubt the sincerity of their statements.

144. FEI, however, is not just relying on letters of comment, but the results of its consultation which was described in Section 10 of the Application and subject to testing in this proceeding.[132] FEI submits the record is clear that there are many individuals and organizations that support preserving energy choice for the new residential construction sector. Moreover, evidence is hardly needed to support the proposition that approval of a feasible low carbon gas solution for the new residential construction sector would increase customer fuel choice.

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[131] LGI Final Argument, paras. 195-198

[132] e.g., Exhibit B-17, BCUC IR1 8 and 9.

145. The LGI state that the policy bulletin cited by FEI contemplates RNG as a stop gap, rather than a permanent solution.[133] However, this misses the point. The policy bulletin illustrates the constraints and costs of expanding the electrical distribution system, and the benefit of preserving energy choice, in that allowing RNG to serve new buildings will provide alternatives where there are such constraints on the electrical distribution system.[134]

146. Lastly, the LGI take issue with FEI's submission that the BCUC is better placed to make decisions on the best use of RNG, electricity and other renewable and low carbon energy; the LGI submit that it is local governments who make policy, not the BCUC.[135] FEI does not question the jurisdiction of local government's ability to make policy within their jurisdiction and mandate. However, the BCUC is in a superior position to municipalities when it comes to decisions about the provincial energy supply system. This is evident from the BCUC's mandate to regulate all public utilities in the province. It is also reflected in specific sections of the UCA, for instance: the requirement for municipalities to obtain BCUC approval of privilege, concession or franchise; the multiple sections that make the BCUC arbiter of disputes between public utilities and municipalities over the use of public places; and, section 121, which precludes municipal legislation or actions from superseding or impairing a provision of the UCA or an authorization granted to a public utility.

147. Overall, given the benefits of preserving a role for the gas system and a diversified approach to energy delivery, including affordability and resiliency, FEI submits that there is a compelling need for the Renewable Gas Connections service to serve the new residential construction sector. FEI submits that the BCUC is well positioned to make this determination and has the exclusive jurisdiction to approve FEI's proposed Renewable Gas Connections service.

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133 LGI Final Argument, para. 202.

134 FEI Final Argument, para. 95.

135 LGI Final Argument, para. 203, citing Exhibit B-65, FEI Rebuttal Evidence to CoV, p. 7.

G. Letters of Comment Show Customer Support for Renewable Gas Connections

148. The LGI argue that FEI has relied "heavily" on letters of comment and that the "factual statements and opinions" in them should be given no weight.[136] The LGI overstate FEI's reliance on letters of comments and misconstrue the purpose of that reliance.

149. FEI has not relied "heavily" on letters of comment, but has appropriately cited and relied on letters of comment where the expressions of opinion in these letters is relevant and lends weight to FEI's argument. In Part Three of FEI's Final Argument regarding the Connections service, FEI only quoted from letters comment at paragraphs 92 and 94, in support of the point that the Connections service maintains customer choice and responds to customer needs. In this context, the letters of comment are properly cited and quoted for the fact that there are many individuals and organizations whose opinion is that the Connections service is one they desire and believe is beneficial. This is a matter of these municipalities, individuals' and organizations' opinions, and the BCUC should and can take these statements of opinion at face value. For example, in one letter of comment, an organization states: "We see RNG as a key ingredient to a clean energy mix and carbon neutral future in residential living."[137] FEI is obviously not quoting this statement to establish the fact that RNG is a key ingredient for a carbon neutral future in residential living. Rather, FEI is quoting this letter of comment to show that *this particular organization believes that to be the case*. The fact that many individuals and organizations sent in letters of comment and expressed these opinions is relevant to FEI's argument that there is customer demand for the low carbon gas service that FEI is proposing, and a need to preserve energy choice.

150. Furthermore, these letters of comment are supported by the results of FEI's extensive consultation efforts which confirm that there are many individuals and organizations that support the Connections service.[138] The results of FEI's consultation efforts were discussed in detail in the Section 10 of the Application and have been tested in this proceeding.

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[136] LGI Final Argument, paras. 84-86.

[137] FEI Final Argument, p. 50.

[138] Exhibit B-11, Application, Section 10 (pp. 135-156).

151. Finally, while letters of comment are not *automatically* accorded the same weight than other evidence on the record, the BCUC should consider all evidence on the record and assign the appropriate weight to the letters of comment as per its usual practice.[139] FEI submits that this approach is consistent with the BCUC giving weight to the fact that there are many individuals and organizations that FEI consulted with who support the Connections service and that the Connections service will meet a demand, and preserve energy choice.

H. Renewable Gas Connections is Not Vintaging

152. The LGI makes the spurious argument that Renewable Gas Connections is vintaging, because existing customers would have to pay a higher rate for 100 percent RNG under the Voluntary service.[140] This is inaccurate for various reasons, including that differential pricing for the Voluntary customers is not unduly discriminatory because they freely chose to acquire a higher level of RNG than provided by the Renewable Gas Blend, and they always have the default gas service available to them. This is discussed further in Part Four, Section B(e) of FEI's Final Argument.

153. FEI also notes that the difference in price between a Voluntary and Connections customer is not determined by when either customers take service, but when the Voluntary customer chooses to purchase 100 percent RNG, which could be before or after a Connections customer takes service.

154. The LGI states that Mr. Reed sets out three reasons at Question 23 why Renewable Gas Connections is not vintaging.[141] This is a plainly false reading of Mr. Reed's evidence. In Question 23, Mr. Reed was describing how Mr. Strunk was effectively recommending a vintaging approach.

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[139] Section 8.05 of the BCUC Rules of Practice and Procedure; see also BCUC Decision and Order G-277-23, dated October 18, 2023, p. 6. Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/521925/1/document.do.

[140] LGI Final Argument, para. 151.

[141] LGI Final Argument, para. 152.

I. BCSEA-Specific Issues Are Without Merit

155. In this section, FEI responds to the points made by BCSEA on the proposed Renewable Gas Connections service that are not addressed above.

(a) FEI Is Seeking a Low Carbon Gas Service to Offer its Customers

156. BCSEA submits that the BCUC "should not let itself be used for FEI's public advocacy", saying that FEI's proposal is a "pitch" not a "fact".[142] BCSEA's submissions are confused and its characterization of FEI's proposal is misleading. FEI is not seeking any public advocacy from the BCUC, but is seeking the rate approvals it necessarily requires from the BCUC for a low carbon gas service for the new residential construction.

157. FEI has been transparent about what it is seeking in this proceeding. Presently, with the Voluntary Renewable Gas service only, FEI has no RNG service that it can offer up to the Province or the City of Vancouver as a low carbon solution for the new residential construction sector. FEI is therefore seeking approval from the BCUC of a low carbon gas service which it has designed to comply with the GHGi limits in the building codes of local governments. To implement the Connections service, FEI needs a rate approved by the BCUC in this proceeding, but it is up to the Province and the City of Vancouver to make decisions about whether RNG through the Renewable Gas Connections would qualify as a low carbon pathway under the Zero Carbon Step Code and Vancouver Building Code.

158. BCSEA claims that "FEI implicitly acknowledges that service under the Connections Program would not meet the carbon intensity (GHGi) requirements of the City of Vancouver 2022 Building Bylaw, citing FEI's statement that: "Additional language may need to be incorporated in the bylaw to demonstrate that Renewable Gas is an option for builders and a reference to the BCUC approved tariff for the Renewable Gas Connections service."[143] BCSEA is confusing two points. Renewable Gas Connections would meet the carbon intensity (GHGi) requirements of the City of Vancouver 2022 Building Bylaw as it would be 100 percent RNG. However, the Building

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[142] BCSEA Final Argument, paras. 91-98.

[143] BCSEA Final Argument, para. 93.

Bylaw would need language to recognize Renewable Gas as an option. If the BCUC approves the rate design for the Renewable Gas Connections service, it will be FEI's responsibility to then work with the Province to have it recognized as a low carbon pathway for the new residential construction sector.

(b) Renewable Gas Connections Would Not Undercut Electric Heat-Pump Solutions

159. BCSEA submits that the Connections service would undercut the cost-competitiveness of electric heat-pump solutions.[144] There is, however, no evidence that Connections service would cost less than electric heat pump solutions.

160. Before subsidies and incentives for electric heat pump solutions, the costs of FEI's Connections and an electric would be broadly similar, with heat pumps having a cost advantage in almost all scenarios.[145]

161. After subsidies and incentives,[146] including lower taxes,[147] there is no question that electric heat pumps have a significant cost advantage.[148]

162. Therefore, Connections would not "undercut" electric heat-pump solutions.

(c) Renewable Gas Connections Would Not Distort the Market

163. BCSEA contends that there is a competitive "market for heating supply for new residential construction in BC." While this is not a material issue in this proceeding, FEI submits that BCSEA's analysis is incorrect. There is a competitive marketplace in BC for end-use heating supply equipment such as furnaces, heat pumps, boilers, hot water heaters and fireplaces. There is not, however, a competitive market in BC for the primary energy that is converted, via these

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144 BCSEA Final Argument, para. 66. GNAR appears to make a similar point regarding the cost advantage of heat pumps: GNAR Final Argument, p. 7.

145 Exhibit B-71, BCUC IR1 2.3 Rebuttal BCSEA; Exhibit B-62, Rebuttal Evidence to BCSEA, p. 6; Exhibit B-19, BCSEA IR1 2.4; Exhibit B-17, BCUC IR1 17.1.

146 Exhibit B-17, BCUC IR1 17.1.

147 As noted above, heat pumps are excluded from the definition of a "fossil fuel combustion system" and, therefore, are not taxed under the *Provincial Sales Tax Act*.

148 Exhibit B-17, BCUC IR1 17.1; FEI Final Argument, paras. 82-83.

appliances, into heat. The only two viable primary energy sources are electricity and natural gas (or Renewable Gas). The suppliers of both services are natural monopolies with rates set by the BCUC, and, as such, they do not operate in a workably competitive market.[149]

164. BCSEA also claims that gas competes with thermal energy systems, as well as electricity.[150] However, thermal energy systems that do not use gas or electricity are not a primary option for customers. FEI explained:[151]

> Historically, there have been two main sources of energy to heat buildings in British Columbia: natural gas and electricity. While there are homes that are heated with wood, propane and oil, these are fewer in number and are generally located in areas that might not have historically had access to the natural gas or electricity delivery systems.
>
> The two primary options for customers wanting a low-carbon energy solution are gas (in the form of Renewable Gas) and electricity (generated from "clean" sources). RNG provides the energy for furnaces/boilers on a large and small scale, while electricity powers heat pumps (geo and air source), fuel cells or baseboards, on a large and small scale.

165. BCSEA says that FEI contradicts itself when it says that the playing field is tilted in favour of electricity.[152] FEI, however, is referring specifically to the subsidies and incentives in place for heat pumps, which is the end-use equipment.[153]

166. BCSEA also claims that FEI's statement that the NGV marketplace is workably competitive is inconsistent.[154] However, fuels for vehicles are generally not provided by natural monopolies with rates set by the BCUC (e.g., gas, diesel, hydrogen, electricity). While electricity can be provided through public utility-owned charging stations and CNG and LNG through FEI-owned stations, these are the exceptions largely driven by government regulation (e.g., the GGRR), with

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149 Exhibit B-19, BCSEA IR1 9.1.

150 BCSEA Final Argument, para. 102.

151 Exhibit B-17, BCUC IR1 13.1.

152 BCSEA Final Argument, para. 103.

153 Exhibit B-17, BCUC IR1 17.1.

154 BCSEA Final Argument, para. 104.

the BCUC having determined that there is a competitive market for these services (e.g., the BCUC EV Inquiry Phase 1 Report, pp. 20 to 22.).[155]

167. BCSEA states that the Connections service is "aimed at distorting the market", saying that FEI has sought to justify the service based on leveling the playing field.[156] Similarly, GNAR notes that "subsidies" can lead to distortions in energy choices.[157] BCSEA and GNAR have misinterpreted FEI's position – FEI has never sought to justify the Connections service as a way to level the playing field or maintain a competitive position through a subsidized energy choice. FEI specifically disavowed this characterization in response to IRs from BCSEA:[158]

> … can it be said that the RG Connections proposal has two essential elements: (a) permanence, and (b) a pricing structure to counteract the available subsidies for electric water and space heating solutions?
>
> **Response:**
>
> Not confirmed. FEI did not design the Renewable Gas Connections service to counteract available subsidies for electric and water heating solutions and the Renewable Gas Connections service will not in fact counteract such subsidies.
>
> FEI designed the Renewable Gas Connections service to provide permanence in order to meet the policy and regulatory requirements implemented or adopted by municipalities (including through the opt-in Zero Carbon Step Code), with a rate design that is consistent with regulatory principles.
>
> …
>
> Is FEI asking the BCUC to approve a rate for RNG under the RG Connections proposal in which the rate is designed to maintain a competitive position for RNG in the BC new residential construction market?
>
> **Response:**
>
> No. …FEI did not design the rate to maintain a competitive position for RNG. As explained in the response to BCUC IR1 13.2 (Exhibit B-17), FEI designed the rate

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155 BCUC Inquiry into the Regulation of Electric Vehicle Charging Service – Phase 1 Report, dated November 26, 2018. Online: https://docs.bcuc.com/documents/proceedings/2018/doc_52916_2018-11-26-phaseone-report.pdf.

156 BCSEA Final Argument, paras. 105-110.

157 GNAR Final Argument, pp. 7-8.

158 Exhibit B-78, BCSEA IR1 38.3 and 39.1 Rebuttal.

> for the proposed Renewable Gas Connections service rate to maintain parity with other similarly situated gas customers and to avoid unjustly discriminating against new residential gas system customers.

168. To be clear, FEI's evidence is that the playing field will continue to be tilted in favour of electric heat pumps even if the Renewable Gas Connections service is approved.

169. BCSEA goes on to argue that Renewable Gas Connections customers would mean fewer electric heat pump or thermal energy installations, thus distorting the market.[159] FEI fundamentally disagrees with BCSEA's position, which appears premised on the assumption that RNG should not be used in the residential construction sector. In FEI's view, Renewable Gas is a viable low carbon solution for the residential construction market at a rolled in cost. This would not be a distortion of the market, but would align with accepted rate design principles and reflect a diversified approach to decarbonization that would result in a more affordable and resilient energy delivery system for British Columbians.

(d) Renewable Gas Connections Would Promote Affordability for Existing Customers

170. BCSEA argues that the Connections service cannot be justified on the basis of affordability as it would exacerbate the financial challenges of existing customers.[160] BCSEA's view ignores the affordability impacts if FEI is not permitted to continue to serve the residential construction sector and affordability benefits of a diversified approach to decarbonization. As FEI has submitted, the Connections service will leverage the multi-billion-dollar investment in the gas system to decarbonize the energy delivery system, which is an economically efficient approach, and an approach that will help maintain affordability of energy for all customers. FEI's rate impact analysis shows that its rates will be higher without the Connections service.[161] This was discussed further in paras 92 to 106 of FEI's Final Argument.

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[159] BCSEA Final Argument, paras. 111-112.

[160] BCSEA Final Argument, paras. 120-123.

[161] Exhibit B-19, BCSEA IR1 8.5.

J. Renewable Gas Connections Treats Residential Customers Equitably

171. BCOAPO considers that the Renewable Gas Connections service "effectively creates two residential customer classes: clean ratepayers and non-clean ratepayers" and creates undue uncertainty in FEI's existing ratepayer pool going forward.[162] MS2S similarly claims that the Renewable Gas Program "confers an unfair share of a major benefit (relief from carbon tax) on a small segment of (customers in new buildings)".[163] FEI submits that there would be no uncertainty or unfairness created by the Renewable Gas Connections service.

172. Under the Renewable Gas Connections service, new residential connection customers will pay the same effective rate for their gas service as existing customers in similar rate schedules. This is achieved by charging these customers a rate equal to the cost of conventional gas. Contrary to MS2S, and as outlined in the Rebuttal Evidence of Mr. Reid,[164] this approach avoids vintaged rates by charging customers requesting a new service for a residential dwelling the same rate as any other customer in a residential dwelling already connected to the gas system schedules.[165]

173. Further, over time, the percentage in the Renewable Gas Blend will increase and FEI will transition further to a low carbon future where all customers will have a low carbon service. However, if the Renewable Gas Connections service is not approved and FEI cannot serve new customers, the ability of gas system customers to afford the costs of the energy transition will be compromised, and all gas customers will be worse off.

K. Renewable Gas Connections Should be Approved as Proposed

174. As demonstrated above, the proposed Renewable Gas Connections service is just and reasonable and not unduly discriminatory and will provide numerous benefits in the public interest. Therefore, FEI submits that the Renewable Gas Connections service should be approved

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[162] BCOAPO Final Argument, p. 20.

[163] MS2S Final Argument, p. 9.

[164] Exhibit B-68, Rebuttal Evidence to CoV et al. (Mr. Strunk), Appendix A (Rebuttal Evidence of Mr. Reed), A23 (pp. 20-21).

[165] Exhibit B-11, Application, p. 100.

as filed and, in particular, consistent with the key attributes of the proposed service as described in the Part Three of FEI's Final Argument: (1) permanency for the life of the building; (2) providing 100 percent Renewable Gas to customers; (3) availability to all new residential connections across FEI's service territory; and (4) rolled-in pricing.

175. FEI respectfully requests that the BCUC only approve the Renewable Gas Connections service in its entirety (i.e., with the four attributes above). If the BCUC is unable to do so, FEI respectfully requests that the BCUC provide FEI with reasons for its decision and any directions or guidance on what may be an acceptable path forward for a low carbon gas service to serve new buildings in the province.

PART FOUR: VOLUNTARY RENEWABLE GAS

176. FEI submits that, overall, the final arguments filed by interveners indicate broad support for FEI's Voluntary Renewable Gas service. In this Part, FEI replies to the submissions of RCIA, BCOAPO, BrightSide and MS2S regarding the proposed changes to the Voluntary Renewable Gas service, organized around the following points:

(a) The existing $7/GJ premium remains the most reasonable pricing for non-NGV sales customers.

(b) A further proceeding to consider the BERC is not warranted.

(c) Average Cost of RNG Supply is the Appropriate Pricing for NGV Customers

(d) MS2S's arguments regarding undue discrimination are without merit.

A. Existing $7/GJ Premium Remains the Most Reasonable Pricing for Non-NGV Sales Customers

177. RCIA recommends that FEI charge Voluntary Renewable Gas customers a rate that fully recovers the costs of Renewable Gas, suggesting that the increase may be phased in over time "to continue encouraging participation in the rate and minimize rate volatility".[166] FEI submits that RCIA's recommendation would have significant adverse consequences for customers and should be rejected. FEI submits the existing short-term BERC of $7 per GJ premium over the cost of conventional natural gas plus carbon tax (CCRA + carbon tax + $7 per GJ premium), which has been successful since its introduction in 2016 and was recently reviewed by the BCUC, remains the most-reasonable pricing for all non-NGV sales customers. FEI replies in more detail to RCIA below.

(a) RCIA's Proposal Would Have Adverse Consequences for Customers

178. In Part Four, Section A of its Final Argument, FEI set out three key reasons why the Voluntary Renewable Gas service remains an important and beneficial component of the Renewable Gas Program. Specifically, the Voluntary Renewable Gas offering:

(a) meets the needs of gas customers seeking to reduce their GHG emissions;

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[166] RCIA Final Argument, p. 15.

(b) offsets the costs of the Renewable Gas Program for all sales customers; and

(c) helps maintain affordable rates and the long-term viability of the gas system by maintaining load on the system and supporting economically efficient use of FEI's infrastructure.

179. By proposing to charge customers the full RNG acquisition cost, RCIA would undermine these benefits and result in adverse consequences for customers.

180. RCIA's proposal to charge Voluntary customers the full cost of RNG acquisition would significantly decrease demand for, and the revenue generated by, Voluntary customers for the benefit of all sales customers.[167] FEI expects that the only customers who would take service under RCIA's proposed rate would be NGV customers.[168] This would:

(a) make the Voluntary Renewable Gas service unaffordable for non-NGV customers that are seeking to reduce their GHG emissions;[169]

(b) increase the costs to be borne by all sales customers through the S&T LC Rider;[170] and

(c) make it more difficult for FEI to maintain affordable rates and the long-term viability of the gas system, as customers seeking to reduce their GHG emissions beyond the Blend would likely leave the system.[171]

181. These impacts would not be softened by phasing in a more aggressive premium over time, as suggested by RCIA.[172] There would be little incentive for Voluntary customers to adopt Renewable Gas when they know the cost will continue to ramp up.

182. In summary, all sales customers stand to benefit from keeping the BERC at the existing level. RCIA proposes to remove those benefits, without any reasonable basis for doing so. RCIA has not pointed to any reliable information on the record that supports a change to the $7 per GJ premium for the Voluntary Renewable Gas service; nor has it identified an alternative means

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167 Exhibit B-17, BCUC IR1 28.7.

168 Exhibit B-17, BCUC IR1 28.7.

169 Exhibit B-17, BCUC IR1 11.1.

170 FEI Final Argument, para. 111. Exhibit B-11, Application, p. 88; Exhibit B-17, BCUC IR1 11.1.

171 Exhibit B-11, Application, p. 88; Exhibit B-17, BCUC IR1 11.1.

172 RCIA Final Argument, p. 13.

of estimating whether a change in price would be likely to prove beneficial or meet the overarching objectives established by the BCUC in setting the short-term BERC in Decision and Order G-133-16.[173]

(b) The $7 Premium Is Supported by Evidence and Is Consistent with the Objective of Maximizing Revenue

183. RCIA argues that it is "purely speculative" for FEI to suggest that $7 per GJ premium remains consistent with the objective of maximizing revenues.[174] FEI submits that RCIA mischaracterizes the evidence and that the $7 per GJ premium remains consistent with the objective maximizing revenues.

184. FEI addressed the topic of why the $7 per GJ premium should continue in Part Four, Section B of its Final Argument, including the following points:

(a) The historical success of the BERC is evidence that the $7 per GJ premium continues to be just and reasonable.

(b) The $7 per GJ premium is consistent with the objective to maximize revenue from the Voluntary Renewable Gas offerings.

(c) A higher price is likely to reduce revenue and increase rates for all sales customers.

(d) There is no reliable information on which to set a different rate.

(e) FEI's proposed differential pricing from the Renewable Gas Blend and Renewable Connections services is not unduly discriminatory.

(f) A consideration of Bonbright principles and other criteria supports the continued use of the $7/GJ premium.

185. RCIA's submission largely ignores and is unresponsive to FEI's arguments and evidence.

186. RCIA questions whether maximizing revenue remains a relevant objective to assess the BERC price setting methodology because "RNG purchases were small relative to the total natural

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[173] BCUC Decision and Order G-133-16, dated August 12, 2016. Online: https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/169164/1/document.do.

[174] RCIA Final Argument, p. 12.

gas consumption" when the objective was established by the BCUC.[175] The volume of RNG purchases relative to the total natural gas consumption, however, is irrelevant and had no bearing on the objective of maximizing revenue. The rationale for the objective of revenue maximization remains the same and relevant to the Voluntary Renewable Gas service. Just as was the case in 2016 when the BCUC first set the BERC, any volumes sold to Voluntary customers will have the effect of having more costs of RNG borne by customers voluntarily choosing to purchase it, rather than all sales customers.

187. Further, RCIA's position would not be consistent with the objective of maximizing revenues. The BCUC was clear in the 2016 BERC Decision that a higher premium, in that case a premium of $14.414 per GJ, was too high.[176] RCIA's proposal would be higher yet.

188. As FEI has submitted, the $7 per GJ premium remains consistent with the objective of maximizing revenues. The observed data (i.e., the historical success of the BERC since 2016) supports the view that the current BERC rate remains just and reasonable. In particular, since its introduction, the $7 per GJ premium has been successful by leading to positive net growth in: (1) customer participation; (2) RNG sales volumes; and (3) RNG revenues, thus shielding ratepayers, to the extent possible, from the costs of RNG supply acquisition.[177] For example, as shown in the table below, net customer additions have increased since the $7 per GJ premium was introduced in 2016, reversing a trend of declining customer enrolment:[178]

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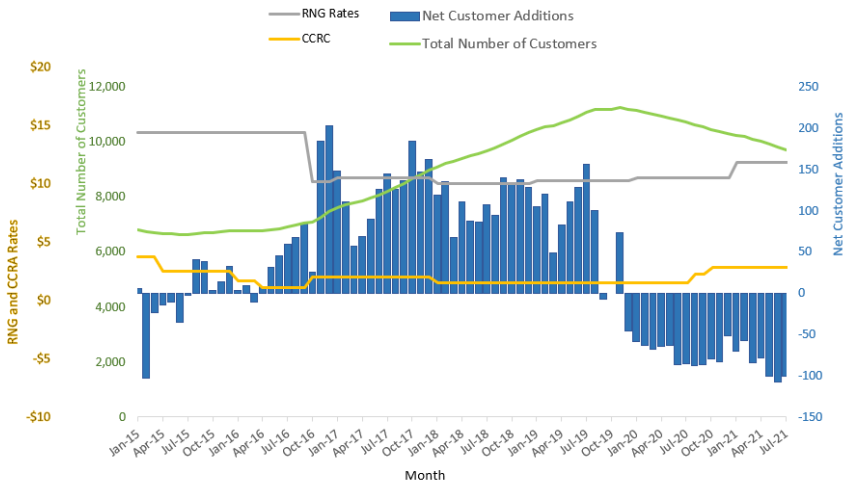
175 RCIA Final Argument, p. 13.

176 BCUC Decision and Order G-133-16, pp. 22 and 24.

177 Exhibit B-17, BCUC IR1 28.1.

178 Exhibit B-22, CEC IR1 6.1.

Revised Figure 2-2: Renewable Gas Program Monthly Net Customer Additions and Total Customers



189. The $7 per GJ premium continues to strike the appropriate balance by enabling a number of benefits that align with the best interests of FEI's customers, including retaining customers, encouraging new demand, enabling the sale of greater quantities of RNG, and leveraging existing gas infrastructure to advance GHG reductions.[179] There is no other reliable information upon which to base a change to the $7 per GJ premium.

190. With respect to the elasticity of RNG demand, FEI explained in its Rebuttal Evidence that while elasticity studies are not available for RNG[180] and, therefore, FEI is unable to estimate the effect of price elasticity on RNG demand.

191. RCIA's statement that it is unclear if FEI has considered the "data points" based on the rates at which it proposes to price Voluntary Renewable Gas demonstrates a lack of understanding of the issue.[181] FEI has no data points from rates that have not yet been approved.

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179 FEI Final Argument, para. 115.

180 Price elasticity studies require demand and price data that reflect market forces with consumer demand being driven by the pricing of competitive options that are not present. Exhibit B-66, Rebuttal Evidence to MS2S and Brattle, A3.

181 RCIA Final Argument, pp. 12-13.

192. However, this does not mean that conclusions cannot be drawn about the sensitivity of customers to the price charged for RNG generally. Indeed, the following evidence on the record in this proceeding supports FEI's submission that RNG demand is elastic:

- **Customer Survey Data and Anecdotal Feedback Collected by FEI Staff:** shows customers are sensitive to the price differential between conventional natural gas and RNG, especially as NG is a drop-in fuel that can be substituted for conventional natural gas and a customer can easily reduce or cease receiving RNG service.[182]

- **Prior Enrollment Patterns in the Existing RNG Program**: show that declining customer enrolment experienced in the early years of the program were reversed with the introduction of the $7 per GJ premium to address the apparent price sensitivity of customers.[183]

- **Brattle Study**: Brattle observes that the results of empirical studies outside of British Columbia are "broadly consistent" with the willingness of customers to pay a $7-8 premium for at least a share of their gas use, as demonstrated by FEI's existing voluntary RNG Program.[184]

There is therefore ample evidence on the record that RNG demand is elastic when considered relative to conventional natural gas. This also accords with the sensitivity of residential customers to changes in cost of gas and the concern of all customers about the price paid for energy services generally.[185] However, unlike conventional natural gas service, Voluntary Renewable Gas customers have an option to opt-out of receiving RNG.

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[182] Exhibit B-66, Rebuttal Evidence to MS2S and Brattle, A3.

[183] Exhibit B-1; Exhibit B-11, Application, pp. 18-21.

[184] Exhibit A2-4, Brattle Evidence, pp. 52-55.

[185] Exhibit B-11, Application, pp. 55 and 59.

193. Ultimately, the historical success of the $7 per GJ premium remains the best evidence to demonstrate that the current BERC strikes the appropriate balance, remains just and reasonable and is consistent with the objective of maximizing revenues.[186]

B. Further Review of the Appropriateness of the BERC is Not Needed at This Time

194. BCOAPO says that there is sufficient reason for residential ratepayers to support the continuation of the $7/GJ premium,[187] but nonetheless requests that the BCUC direct FEI to file evidence speaking to the appropriateness of the BERC as soon as possible, or at least as part of its next comprehensive RNG Program review.[188] However, the BERC was most recently assessed by the BCUC in August in Stage 1 of this proceeding,[189] and has been the subject of significant review in this stage of the proceeding, including the retention by the BCUC of a third party report regarding the elasticity of demand of RNG.[190] FEI submits that there is no reason to believe that a third consecutive review of the BERC, as requested by BCOAPO, would provide any more evidence or insight than what has been gathered in this proceeding.

195. Furthermore, despite data limitations making it impossible to perform an elasticity of demand analysis of RNG, FEI has justified maintaining the existing $7 per GJ premium as part of this stage of the proceeding, including providing new sources of information upon which to determine the sensitivity of customers to changes in the price for RNG service and the performance of the RNG Program since the current BERC was approved by the BCUC. Please refer to Part Four, Section B of FEI's Final Argument.

196. The continuing appropriateness of the BERC will, however, continue to be assessed by the BCUC as part of any future review of the Renewable Gas Program, which FEI submits satisfies BCOAPO's underlying concern.

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186 Exhibit B-17, BCUC IR1 28.1.

187 BCOAPO Final Argument, pp. 16 and 19

188 BCOAPO Final Argument, p. 22.

189 Stage 1 Comprehensive Review Decision, pp. 6-7.

190 Exhibit A2-4, Brattle Evidence.

C. Average Cost of RNG Supply is the Appropriate Pricing for NGV Customers

(a) BC-LCFS Credit Value is Not Necessary to Justify Proposed LGC for NGV Customers

197. BrightSide states that FEI's justification for charging higher pricing to natural gas for vehicle customers (NGV) customers[191] is that these customers earn Low Carbon Fuel Credits under the BC-LCFS, which have a higher commercial value than the proposed RNG premium.[192] BrightSide mischaracterizes FEI's evidence and submissions, which makes it clear that the eligibility of NGV customers to earn credits under the BC-LCFS (or the federal *Clean Fuel Regulation*) is not necessary to justify FEI's proposal. Rather, FEI's primary justification is that NGV customers will not contribute to the proposed CleanBC cap on GHG emissions for natural gas utilities (i.e., the GHGRS).

(b) Charging NGV Customers the Average Cost of RNG Supply is Just and Reasonable

198. BrightSide argues that the BCUC should keep the current premium for RNG at $7 per GJ for NGV customers, and provides three points in support of its view.[193] FEI submits that BrightSide's points fail to address FEI's primary rationale for charging NGV customers the average cost of RNG supply; namely, that any GHG emission reductions resulting from the sale of the significant volumes[194] of RNG to NGV customers will not contribute to achieving the GHG reduction policy for buildings and power industries, as described in the CleanBC Roadmap (i.e., the proposed emissions cap on natural gas utilities). While BrightSide recommends that the BCUC advocate for allowing sales of RNG to NGV contribute towards the public policy target,[195] this does not change the fact that, as it stands, charging NGV customers a discounted cost of acquisition (i.e., the $7 per GJ premium) will increase the costs borne by all other ratepayers as

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191 BrightSide uses a number of different terms, including "Transportation customers" and "Transport customers" throughout its Final Argument. For consistency, FEI uses the term NGV customers, which does not include T-Service customers.

192 BrightSide Final Argument, pp. 1-2.

193 BrightSide Final Argument, pp. 1-2.

194 For example, the consumption of Renewable Gas by NGV customers is 7.5 percent of the total NGV throughput for 2021: Exhibit B-19, BrightSide IR1 4.6.

195 BrightSide Final Argument, p. 4.

FEI will need to purchase more RNG to meet the GHG emission reduction cap described in the CleanBC Roadmap.

199. FEI addresses each of BrightSide's three points below.

Proposed Pricing for NGV Customers Does Not "Transfer" BC-LCFS Incentives

200. BrightSide contends that allowing FEI to charge more for RNG delivered to NGV customers, would effectively transfer this incentive from these customers to FEI's "entire customer base", which would be contrary to the purpose of the BC-LCFS to decarbonize the diesel and gasoline pools in British Columbia and encourage greater use of low carbon fuels in transportation.[196] FEI disagrees with the premise that charging NGV customers the average cost of RNG supply amounts to a "transfer" of BC-LCFS incentives to FEI's customer base.

201. The eligibility of NGV customers to generate credits under the BC-LCFS and the pricing of the RNG purchased are independent from one another. Therefore, the cost of the underlying commodity used to generate carbon credits under the BC-LCFS in no way contradicts the purpose of the BC-LCFS. In particular, FEI's proposal does not frustrate the intent of the BC-LCFS or the use of RNG in transportation applications, as NGV customers remain financially incentivized through the "economic lever" of the BC-LCFS to become fuel suppliers and purchase eligible low-carbon fuels, such as in-province RNG, to reduce their emissions while generating credits for sale in the carbon credit market.[197]

202. While the quantum of the incentive for NGV customers to switch to RNG eligible for credits under the BC-LCFS would be higher if NGV customers were charged a $7 per GJ premium, the BC-LCFS does not guarantee any particular quantum of incentive. Nor does the BC-LCFS impose any legal obligation on FEI to subsidize the cost of fuel used in the transportation sector.[198]

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196 BrightSide Final Argument, p. 2.

197 Exhibit B-18, BrightSide IR1 4ii and 7iii.

198 Exhibit B-18, BrightSide IR1 8iv.

203. Regarding of the quantum of incentive under the BC-LCFS by NGV customers, the incentive flowing from the BC-LCFS remains for the benefit of NGV customers and not FEI's customers, as suggested by BrightSide.

FEI Properly Designed the Revised Renewable Gas Program Based on Public Policy Direction

204. BrightSide argues that differential pricing is not consistent with normal utility ratemaking practices and, in particular, that gas users making high value products or services are generally not charged more than gas users making low value products or services.[199] BrightSide's suggestion that rates should be set based on the value of the product produced by the customers has no support in Bonbright principles or other accepted ratemaking practices and should be rejected. Generally, rates set based on the personal characteristics of customers (e.g. their ability to produce valued products) would be considered unduly discriminatory.

205. FEI notes that BrightSide did not raise this novel suggestion in its intervener evidence and therefore the record is not developed on this point.

206. BrightSide's position is also based on the flawed premise that differential pricing is inconsistent with ratemaking principles. To the contrary, as demonstrated by the evidence on the record and confirmed by the independent expert opinion of Mr. Reed, FEI's proposal to charge NGV customers the average cost of RNG supply is superior when assessed against Bonbright principles, including: (1) recovering FEI's revenue requirement; (2) fairly apportioning costs between customers; (3) sending an efficient price signal; (4) enabling revenue stability for the Renewable Gas Program; and, importantly, (5) avoiding *undue* discrimination because non-NGV and NGV sales customers which are not similarly situated.[200] As explained by Concentric:[201]

> The distinction here does not constitute unjust discrimination because the two groups of customers are very differently situated. Transportation customers operate in a workably competitive market where viable low-carbon options are provided by other unregulated providers and do not require the protection offered by regulated cost-based rates. FEI pricing its service to that segment on a

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199 BrightSide Final Argument, p. 2.

200 Exhibit B-42, BCUC IR2 62.11; Exhibit B-19, BCSEA IR1 4.15.

201 Exhibit B-46, BrightSide IR2 8i.

> value of service basis is appropriate in a competitive market. Conversely, only FEI provides RNG to non-transportation customers located on its network, and regulated rates apply to this service. For service to these customers, FEI has applied cost-based ratemaking principles on a consistent and equitable basis.

207. Ultimately, FEI's proposed rate setting mechanism framework considers both the cost of supply and the value to customers,[202] rather than the value of the products or services produced or provided by customers. BrightSide's contention that this approach is flawed should be rejected.

BrightSide's Analysis of Carbon Credit Sale Proceeds is Oversimplified

208. BrightSide observes that because BC-LCFS credit revenue can only be generated from in-province sources, FEI's proposed pricing would make the amount recouped by NGV customers through carbon credit sale proceeds negligible.[203] FEI submits that BrightSide's assessment of carbon credit sale proceeds is an oversimplification and, in any event, the quantum of carbon credit sale proceeds does not change the justification for charging NGV customers the average cost of acquisition.

209. First, even when only considering in-province RNG supply that is eligible for credits under the BC-LCFS, RNG still has a higher value to NGV customers than to other customer types.[204] In particular, BrightSide fails to acknowledge that NGV customers are currently eligible to generate credits under the BC-LCFS on the basis of conventional natural gas fuel codes and RNG fuel codes based on in-province RNG supply, as well as, potentially, RNG supplied from Alberta.[205] The value of these incentives is acknowledged by BrightSide who advocates for a common RNG price to all customers by noting that this would "allow the LCF transportation incentives to attract the RNG to the hard to decarbonize transport sectors".[206] FEI notes that it continues to engage with the

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202 Exhibit B-18, BrightSide IR1 8iv.

203 BrightSide Final Argument, p. 3.

204 Exhibit B-80, BCUC IR1 1.5 Rebuttal BrightSide.

205 Exhibit B-80, BCUC IR1 1.5 Rebuttal BrightSide.

206 BrightSide Final Argument, p. 3.

Province regarding establishing a registry to provide additional assurances regarding out-of-province RNG and its environmental attributes (i.e., GHG emission reductions).[207]

210. Second, BrightSide's analysis does not take into account the credit market established under the federal *Clean Fuel Regulations*, where each credit represents a lifecycle emission reduction of one tonne of CO2e. Unlike the BC-LCFS, the federal *Clean Fuel Regulations*, which are now in force, apply across Canada and are not limited to the use of low-carbon intensity fuels within a particular province and, subject to a number of conditions, also address supply imported into Canada from a foreign supplier.[208]

211. Third, NGV customers have also benefited from other programs. For example, through FEI' programs alone, NGV customers have received substantial incentives under the GGRR. These programs have been paid for by all FEI customers in order to encourage the use of natural gas in vehicles and, as a result, NGV customers and industry have benefitted from the lower cost of natural gas compared to diesel. These customers have also gained operational benefits that come from onsite energy delivery.[209]

212. Ultimately, despite the opportunity for NGV customers to offset commodity costs with provincial or federal credits, the potential to generate these credits is not necessary to justify pricing RNG for NGV customers at the average cost of acquisition. BrightSide's proposal to maintain the $7/ GJ premium for NGV customers would lead to increased and avoidable costs for all other ratepayers if FEI is to meet the proposed CleanBC emission reduction targets. FEI's proposal is a balanced approach that considers fairness from the perspective of all of FEI's customers, not only NGV customers.[210] FEI does not believe that it is the intention of provincial policy to impose additional cost burdens on home and business owners to the benefit of the transportation sector that already have incentives to decarbonize through the carbon market under the BC-LCFS.[211]

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207 Exhibit B-80, BCUC IR1 1.3 Rebuttal BrightSide.

208 Exhibit B-80, BCUC IR1 2.2 and 2.3 Rebuttal BrightSide.

209 Exhibit B-46, BrightSide IR2 3i.

210 Exhibit B-46, BrightSide IR2 3i.

211 Exhibit B-46, BrightSide IR2 6i.

(c) Allocating Supply Based on the Highest and Best Use of Renewable Gas Should Be Rejected

213. BrightSide advocates for RNG to be priced such that it attracts "hard to decarbonize sectors", thus achieving the greatest emission reductions.[212] While FEI recognizes the environmental benefits of providing RNG in the heavy duty transportation sector,[213] it equally considers that RNG should not necessarily be used to "target" specific markets, including by favouring the transportation sector above other customers.[214] As such, it designed the revised Renewable Gas Program to reduce emissions across a range of sectors, including heavy-duty freight and shipping.

214. Moreover, while BrightSide, who advocates on behalf of NGV customers, may consider the heavy duty transportation sector to be "highest and best use" for FEI's RNG supply, this directly contradicts the Province's policy direction which delineates between emissions reductions in the transportation sector through the BC-LCFS, on one hand, and the emissions reductions in the building and industrial sectors through the proposed cap on the emissions of natural gas utilities on the other.[215] This is evidenced by the that NGV emissions not being included in the proposed cap on the emissions of utilities (i.e., GHGRS) and, therefore, that the GHG reductions achieved from these users will not count towards the cap.[216] Ultimately, what constitutes the "highest and best use" is an uncertain and subjective standard, representing a shaky foundation upon which to design the revised Renewable Gas Program.

D. MS2S Arguments Regarding Undue Discrimination Are Without Merit

215. Despite supporting portions of the revised Renewable Gas Program, MS2S characterizes the Program as "unfair and discriminatory".[217] MS2S considers it to be discriminatory for Voluntary Renewable Gas customers to be charged a $7 per GJ premium without an associated

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212 RCIA Final Argument, p. 3.

213 Exhibit B-18, BrightSide IR1 4i.

214 Exhibit B-15, BC Hydro IR1 1.9.

215 Exhibit B-46, BrightSide IR2 5vi.

216 Exhibit B-17, BCUC IR1 1.1.

217 MS2S Final Argument, pp. 9-11.

"entitlement" of carbon tax exemption for the lifetime of their building.[218] FEI submits that the permanency of the Renewable Gas Connections service is not discriminatory to Voluntary Renewable Gas customers.

216. The Voluntary Renewable Gas service enables customers to subscribe to a 100 percent blend of Renewable Gas (the same as the Connections service) for as long as they choose, which *could* align with the life of the building. However, the structure of the Voluntary Renewable Gas is not tied to the building in the same way as the Renewable Gas Connections service. As such, a requirement connecting the service to a specific building would not align with the service's purpose; namely, to provide an option for customers seeking to purchase more Renewable Gas than may otherwise be sold through the Renewable Gas Blend. Voluntary Renewable Gas customers are also not necessarily residential customers. Ultimately, customers enrolled in both services would be exempt from the carbon tax and, therefore, are able to receive the same "entitlement" described by MS2S.

217. MS2S also states that NGV customers will be charged the rolled-in average cost of the RNG blend received, while T-Service "would escape paying any premium for the RNG injected by FEI into their delivered gas".[219] MS2S appears to misunderstand FEI's proposed modification to the Voluntary Renewable Gas Program that affects both NGV and T-Service customers. To be clear, FEI is proposing to charge both NGV and T-Service customers the average cost of Renewable Gas supply through the LCG Charge on the volumes of Renewable Gas they elect to receive. Therefore, T-Service customers do not, as MS2S suggests, "escape paying any premium". To the contrary, the price paid by both customer types on the portion of Renewable Gas they elect to receive will be the same.

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[218] MS2S Final Argument, p. 10.

[219] MS2S Final Argument, p. 10.

PART FIVE: GENERAL TOPICS

218. In this Part, FEI responds to the submissions of interveners that are general in nature, and do not clearly fall within one of the categories addressed in Parts Two to Four.

A. Customer Bills Will Be Easy to Understand

219. BCOAPO argues that the Application should not be denied on the basis of deficiencies related to administrative ease and customer understandability alone, but notes that customers' ability to understand their bills "may be far less than ideal".[220] MS2S believes that the Renewable Gas Program will "result in a patchwork of rates" that will be "unintelligible to most" despite being delivered "a uniform gas blend".[221] In particular, MS2S suggests that similarly situated residential customers will pay "entirely different amounts".[222] FEI disagrees and submits that the revised Renewable Gas Program represents a comprehensive yet simple and understandable means of reducing the emissions of gas customers.

220. First, contrary to MS2S' assertion, customers serviced under the Renewable Gas Connections tariff will pay the same effective rate for their gas service as existing customers in similar rate schedules receiving the Renewable Gas Blend.[223] The majority of similarly situated residential customers will therefore pay the same amount for their gas service. Those customers that elect to purchase amounts of Renewable Gas above the Renewable Gas Blend percentage will have an option to do so through the Voluntary Renewable Gas service and will pay the LCG Charge, equivalent to the current BERC, which is higher than other residential customers.[224] The difference in the amount paid by Voluntary Renewable Gas customers (in comparison to Connections and Blend customers) is therefore driven by a customer's choice to pay a premium to purchase additional amounts of Renewable Gas supply.

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220 BCOAPO Final Argument, pp. 14 and 18.

221 MS2S Final Argument, pp. 9-10.

222 MS2S Final Argument, p. 11. FEI addresses MS2S' other contentions regarding carbon tax exemptions, notional delivery and emission reductions in BC in Part Five, Section B below.

223 Exhibit B-11, Application, p. 100.

224 Exhibit B-11, Application, pp. 102-103.

221. Second, FEI carefully designed the Renewable Gas Connections service so that it could provide new residential connection customers with a single offering, which FEI submits is easier to understand for customers than offerings in different municipalities.[225]

222. Finally, while FEI has not finalized the bill design for the proposals in the Application, it intends to ensure any changes can be easily understood by its customers.[226]

B. MS2S' Final Argument Suffers from A Number of Deficiencies and Should be Given Minimal Weight

223. In this subsection, FEI addresses the Final Argument of MS2S.

224. MS2S' Final Argument references a number of sources, including evidence from other ongoing proceedings, websites, news stories, reports and "private correspondence", that are not on the evidentiary record of this proceeding. Other portions of MS2S' Final Argument are unattributed. The extent of these issues make it difficult and burdensome for FEI to determine which of MS2S' arguments are supported by evidence on the record and properly warrant reply. FEI submits that MS2S' Final Argument should be given little to no weight for these reasons.

225. FEI has responded to MS2S' submission on each component of the Program above. FEI has made its best efforts to reply to the more general submissions of MS2S below.

(a) FEI Plans to Meet Provincial GHG Emission Reduction Targets

226. MS2S argues that FEI has failed to demonstrate that the revised Renewable Gas Program will meet the emission reduction targets set by the Province.[227] However, this proceeding is a rate design application,[228] not a long-term resource plan proceeding. Meeting provincial GHG reduction targets is not solely to be addressed by the revisions to the Renewable Gas Program, and FEI has no burden in this proceeding to establish that the proposed revisions to the Renewable Gas Program will meet provincial GHG emission reduction targets. FEI's ability to

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225 Exhibit B-42, BCUC IR2 48.2.1.

226 Exhibit B-21, BCOAPO IR1 11.1.

227 MS2S Final Argument, pp. 4-5.

228 BCUC Decision and Order G-165-22A, Appendix A, p. 5.

assist in meeting provincial GHG reduction targets is a matter better addressed in the ongoing 2022 Long-Term Gas Resource Plan (LTGRP) proceeding. In that proceeding, FEI sets out its plan and framework to transition to a low-carbon energy future, as reflected in its Clean Growth Pathway, including how it intends to achieve provincial GHG emission reduction targets.

(b) The Revised Renewable Gas Program Accounts for the Practical Realities and Challenges of Decarbonization

227. MS2S considers primarily allocating Renewable Gas supply to the "Buildings and Communities" sector (i.e., residential customers) through the proposed Renewable Gas Connections service to be "poor energy strategy" as this is not a "hard-to-decarbonize" sector.[229] FEI disagrees for the reasons below.

228. First, FEI's existing RNG Program was designed to respond to the changes in governmental policies, including those that prevent new residential construction customers from accessing the gas system, and provides a means for FEI to deliver the increasing volumes of RNG supply that FEI is enabled to acquire under the GGRR.[230] Providing a service to new residential connection customers (a group historically served by the existing gas system), while complying with GHGi and other regulations, is an important component of a comprehensive Renewable Gas Program that continues to meet customers' needs as part of a diversified energy system.

229. Second, there are many sectors that will be difficult to decarbonize, including transportation and the industrial sectors identified by MS2S, but also the new and existing buildings sectors. In designing the revised Renewable Gas Program, FEI recognized that, at this stage of the decarbonization process, narrowly allocating Renewable Gas supply to specific sectors risked impeding a cost-effective, resilient and just energy transition, and the reduction of GHG emissions. As such, FEI designed the revised Renewable Gas Program to balance the interests of ratepayers in all sectors and to account for the practical realities and challenges of decarbonization in BC.[231] In particular, using the existing gas system to serve new residential

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229 MS2S Final Argument, p. 8.

230 Exhibit B-11, Application, p. 86.

231 Exhibit B-15, BC Hydro IR1 1.10.

connections: (1) increases the abundance of affordable, low carbon energy choices for customers; (2) leverages existing gas infrastructure, which contributes to lowering overall energy costs; and (3) supports the achievement of BC's climate targets.[232] These benefits directly contradict MS2S' contention that the Renewable Gas Connections service "encourages the inefficient use of RNG", which FEI submits should be rejected.

(c) The Objectives of the Revised Renewable Gas Program Support its Underlying Need

230. MS2S argues that FEI will "likely fail to fulfill" the three stated objectives of the revised Renewable Gas Program.[233] While FEI disagrees, as explained further below, the approvals sought in this Application are not conditional upon meeting each objective.

- **Meet provincial CleanBC targets for GHG emissions and balance Renewable Gas supply and demand:** As explained above, the rate design underlying the revised Renewable Gas Program supports achieving the CleanBC emission reduction targets, but FEI does not have a burden to prove that the Program will meet these targets as part of this proceeding. Even so, FEI submits that the Renewable Gas Connections, Renewable Gas Blend and Voluntary Renewable Gas services all contribute to the achievement of this objective in a relatively short time period.

- **Enable compliance with building regulations to maintain energy choice for New Residential construction:** Contrary to MS2S' view that the Renewable Gas Connections service "limits" energy choice by "impos[ing] involuntary 100% blend proportion", the Connections service was specifically designed to do just the opposite. As explained in Part Three, Section F(a) of FEI's Final Submission, without the Renewable Gas Connections service, builders, developers and new residential construction customers will have to rely on electricity for space and water heating applications which has a number of downsides that can be avoided by maintaining energy choice.

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[232] Exhibit B-15, BC Hydro IR1 1.10.

[233] MS2S Final Argument, pp. 12-13.

- **Meet customer requirements for Renewable Gas to maintain energy choice for existing customers:** While MS2S appears to focus its comments on the fluctuations of the Renewable Gas Blend service, this objective instead relates to meeting the needs of customers desiring greater amounts of Renewable Gas than is offered in the Renewable Gas Blend service, through the Voluntary Renewable Gas service.[234] In addition to MS2S misunderstanding this objective, it also incorrectly asserts that setting the Blend on a monthly basis will create "cost uncertainty". As FEI explained in its Evidentiary Update, setting the S&T LC rider annually in its Q4 Gas Cost Report avoids monthly bill volatility.[235] Finally, MS2S' comments regarding FEI's use of the term "Low Carbon Gas" are outside the scope of this proceeding.[236]

(d) MS2S Incorrectly Characterizes the Renewable Gas Program as "Depriving" the Province of Carbon Tax Revenue

231. MS2S contends that the revised Renewable Gas Program deprives the Province of carbon tax revenue because FEI's customers are generally exempted from paying a carbon tax on the proportion of RNG they receive.[237] As explained below, MS2S' opinion of the merits of carbon tax exemptions is not relevant for the purposes of this Application and should be rejected.

232. First, the revised Renewable Gas Program cannot be said to "deprive" the Province of carbon tax revenue; to the contrary, the Province has recognized the importance of RNG in achieving provincial policy objectives by exempting the biomethane (RNG) from the carbon tax in the *Carbon Tax Act* and the associated *Carbon Tax Regulation*. This exemption was first implemented in 2011 to provide a refund of the carbon tax paid on volumes of biomethane purchased in BC.[238] By exempting RNG from the carbon tax, the Province recognized the role RNG will play in decarbonizing the gas system, consistent with the mandate given to it by British

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234 Exhibit B-17, BCUC IR1 10.1.

235 Exhibit B-89, Evidentiary Update, pp. 9-10, 16-17.

236 BCUC Decision and Order G-165-22A, Appendix A, p. 5.

237 MS2S Final Argument, pp. 13-15.

238 Order-in-Council 245/2011 amended the *Carbon Tax Regulation*: Exhibit B-11, Application, p. 23.

Columbians. Subsequent governments have maintained this public policy decision. Moreover, both the CleanBC Plan and CleanBC Roadmap recognize RNG as a form of low-carbon energy.[239]

233. Second, MS2S incorrectly asserts that the emission reduction benefits of the revised Renewable Gas Program will be "paid for, but not realized" by the Province by exempting RNG from the carbon tax. In particular, MS2S provides no support for its assertion that the environmental attributes from RNG produced outside of BC can "only be traded and/or used and/or attributed to GHG reductions within the geography".[240] GNAR similarly contends that emission reductions are not occurring in BC.[241] To the contrary, as confirmed by the BCUC, RNG can currently be "acquired" under the GGRR as a prescribed undertaking regardless of the location of the underlying production and notionally delivered to the purchaser. The monitoring and quality control of the associated environmental attributes is currently assured through the terms of the underlying Biomethane Purchase Agreement.[242] Therefore, the emissions benefits of the revised Renewable Gas Program will be realized in BC.

234. Finally, MS2S incorrectly suggests that Voluntary Renewable Gas customers will be "financially better off" by avoiding the carbon tax and only paying a $7 per GJ premium over the CCRA. MS2S' assessment is incorrect as FEI has proposed that Voluntary Renewable Gas customers continue to be charged the BERC (renamed the LGC Charge) which represents a $7 per GJ premium over the CCRA plus the carbon tax. Therefore, the rate charged to Voluntary Renewable Gas customers will not provide the "carbon tax relief" in 2030 as MS2S suggests, despite RNG being exempt from the carbon tax.

(e) The BCUC Need Not Seek Clarification From the Province As Part of this Proceeding

235. MS2S seeks the BCUC to clarify the following with the Province: (1) the BCUC's role in advancing the CleanBC program through its decisions; (2) the BCUC's role in regulating out-of-province RNG acquisitions by BC's Gas Utilities; and (3) the inconsistency in the rules for physical

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239 CleanBC Plan (2018), p. 37; CleanBC Roadmap (2021), p. 26.

240 MS2S Final Argument, p. 14.

241 GNAR Final Argument, p. 8.

242 BCUC RNG Inquiry - Phase 2 Report, pp. 38-39.

delivery of fuels for the BC-LCFS and notional delivery of biomethane and other low-carbon gases sourced outside of BC.[243] MS2S appears to be under the misapprehension that this relatively narrowly focused rate design proceeding is instead a wide-ranging inquiry into provincial policy decisions and the regulatory function of the BCUC, which it is not. FEI submits that the clarification sought by MS2S is beyond the scope of the proceeding and, in any event, would not impede the Panel's ability to make a determination regarding the approvals sought by FEI.

C. New Evidence in GNAR's Final Argument Should be Given No Weight

236. Like MS2S, GNAR's Final Argument introduces new evidence into the evidentiary record, including but not limited to: (1) providing "professional commentary" contrasting the construction of new homes and the retrofitting of existing homes to argue that FEI's proposed cost recovery is unduly discriminatory;[244] and (2) describing what "might" occur with respect to RNG supply in other jurisdictions to argue RNG supplied from outside of BC could be restricted in the future.[245] FEI submits that these portions of GNAR's Final Argument should be given no weight.

D. Terminology Is Out of Scope and In Any Case Is Reasonably Understood

237. GNAR argues that FEI's use of the terminology "natural" (e.g., conventional and renewable *natural* gases), "low carbon gas" and the concept of "notional supply" are difficult for customers to understand.[246] In reply, the BCUC has determined that the terminology used to describe RNG and its specification, as well as the nature of notional delivery, is beyond the scope of this proceeding.[247] In any event, the naming conventions used in the Application are well-accepted, have been used in a manner consistent with their common usage and are not difficult to understand or misleading. The meaning of RNG, for example, was recently reviewed and accepted by the BCUC as part of its Inquiry into the Acquisition of Renewable Natural Gas by

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243 MS2S Final Argument, pp. 16-17.

244 GNAR Final Argument, pp. 4-5.

245 GNAR Final Argument, pp. 8-9.

246 GNAR Final Argument, pp. 5-7.

247 BCUC Decision and Order G-165-22A, Appendix A, p. 5.

Public Utilities in British Columbia.[248] Regarding labelling biomethane (RNG) as a "low carbon gas", the Province describes RNG as a form of "low carbon energy" in the CleanBC Roadmap.[249] FEI nonetheless intends to undertake marketing and education activities to improve customer awareness of the Renewable Gas Program.[250]

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[248] BCUC Inquiry into the Acquisition of Renewable Natural Gas by Public Utilities in British Columbia – Phase 1 Report, dated July 28, 2022, pp. 18-19. Online: https://docs.bcuc.com/documents/other/2022/doc_67310_final-rng-report.pdf; BCUC RNG Inquiry - Phase 2 Report, pp. 11-12 and 24-25.

[249] CleanBC Roadmap (2021), p. 26.

[250] Exhibit B-17, BCUC IR1 43.2.

PART SIX: CONCLUSION

238. FEI submits that its Application is just and reasonable and in the public interest and respectfully requests its approval.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: December 13, 2023

[original signed by Chris Bystrom]
Chris Bystrom
Counsel for FortisBC Energy Inc.

December 13, 2023

[original signed by Niall Rand]
Niall Rand
Counsel for FortisBC Energy Inc.

BRITISH COLUMBIA UTILITIES COMMISSION

FORTISBC ENERGY INC.

COMPREHENSIVE REVIEW OF A REVISED RENEWABLE GAS PROGRAM

BOOK OF AUTHORITIES

Reply Submission

of

FortisBC Energy Inc.

INDEX

TAB 1

City of Calgary *Appellant/Respondent on cross-appeal*

v.

ATCO Gas and Pipelines Ltd. *Respondent/ Appellant on cross-appeal*

and

Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited *Interveners*

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

ATCO Gas and Pipelines Ltd. *Intimée/ Appelante au pourvoi incident*

et

Alberta Energy and Utilities Board, Commission de l'énergie de l'Ontario, Enbridge Gas Distribution Inc. et Union Gas Limited *Intervenantes*

Indexed as: ATCO Gas and Pipelines Ltd. *v.* Alberta (Energy and Utilities Board)

Neutral citation: 2006 SCC 4.

Répertorié : ATCO Gas and Pipelines Ltd. *c.* Alberta (Energy and Utilities Board)

Référence neutre : 2006 CSC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

N^{o} du greffe : 30247.

2005 : 11 mai; 2006 : 9 février.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Charron.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Administrative law — Boards and tribunals — Regulatory boards — Jurisdiction — Doctrine of jurisdiction by necessary implication — Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas — Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility — Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale — If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Droit administratif — Organismes et tribunaux administratifs — Organismes de réglementation — Compétence — Doctrine de la compétence par déduction nécessaire — Demande présentée à l'Alberta Energy and Utilities Board par un service public de gaz naturel pour obtenir l'autorisation de vendre des bâtiments et un terrain ne servant plus à la fourniture de gaz naturel — Autorisation accordée à la condition qu'une partie du produit de la vente soit attribuée aux clients du service public — L'organisme avait-il le pouvoir exprès ou tacite d'attribuer le produit de la vente? — Dans l'affirmative, sa décision d'exercer son pouvoir discrétionnaire de protéger l'intérêt public en attribuant aux clients une partie du produit de la vente était-elle raisonnable? — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard

Droit administratif — Contrôle judiciaire — Norme de contrôle — Alberta Energy and Utilities Board

of review applicable to Board's jurisdiction to allocate proceeds from sale of public utility assets to ratepayers — Standard of review applicable to Board's decision to exercise discretion to allocate proceeds of sale — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

ATCO is a public utility in Alberta which delivers natural gas. A division of ATCO filed an application with the Alberta Energy and Utilities Board for approval of the sale of buildings and land located in Calgary, as required by the *Gas Utilities Act* ("GUA"). According to ATCO, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to ratepaying customers. ATCO requested that the Board approve the sale transaction, as well as the proposed disposition of the sale proceeds: to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize that the balance of the profits resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

Persuaded that customers would not be harmed by the sale, the Board approved the sale transaction on the basis that customers would not "be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding". In a second decision, the Board determined the allocation of net sale proceeds. The Board held that it had the jurisdiction to approve a proposed disposition of sale proceeds subject to appropriate conditions to protect the public interest, pursuant to the powers granted to it under s. 15(3) of the *Alberta Energy and Utilities Board Act* ("AEUBA"). The Board applied a formula which recognizes profits realized when proceeds of sale exceed the original cost can be shared between customers and shareholders, and allocated a portion of the net gain on the sale to the ratepaying customers. The Alberta Court of Appeal set aside the Board's decision, referring the matter back to the Board to allocate the entire remainder of the proceeds to ATCO.

Held (McLachlin C.J. and Binnie and Fish JJ. dissenting): The appeal is dismissed and the cross-appeal is allowed.

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of

— Norme de contrôle applicable à la décision de l'organisme concernant son pouvoir d'attribuer aux clients le produit de la vente des biens d'un service public — Norme de contrôle applicable à la décision de l'organisme d'exercer son pouvoir discrétionnaire en attribuant le produit de la vente — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

ATCO est un service public albertain de distribution de gaz naturel. L'une de ses filiales a demandé à l'Alberta Energy and Utilities Board (« Commission ») l'autorisation de vendre des bâtiments et un terrain situés à Calgary, comme l'exigeait la *Gas Utilities Act* (« GUA »). ATCO a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. Elle a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement de la valeur comptable et au recouvrement des frais d'aliénation, et de reconnaître le droit de ses actionnaires au profit net. La ville de Calgary a défendu les intérêts des clients, s'opposant à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

Convaincue que la vente ne serait pas préjudiciable aux clients, la Commission l'a autorisée au motif que « la vente ne risquait pas de leur infliger un préjudice financier qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure ». Dans une deuxième décision, elle a décidé de l'attribution du produit net de la vente. Elle a conclu qu'elle avait le pouvoir d'autoriser l'aliénation projetée en l'assortissant de conditions aptes à protéger l'intérêt public, suivant le par. 15(3) de l'*Alberta Energy and Utilities Board Act* (« AEUBA »). Elle a appliqué une formule reconnaissant que le profit réalisé lorsque le produit de la vente excède le coût historique peut être réparti entre les clients et les actionnaires et elle a attribué aux clients une partie du gain net tiré de la vente. La Cour d'appel de l'Alberta a annulé la décision et renvoyé l'affaire à la Commission en lui enjoignant d'attribuer à ATCO la totalité du produit net.

Arrêt (la juge en chef McLachlin et les juges Binnie et Fish sont dissidents) : Le pourvoi est rejeté et le pourvoi incident est accueilli.

Les juges Bastarache, LeBel, Deschamps et Charron : Compte tenu des facteurs pertinents de l'analyse pragmatique et fonctionnelle, la norme de contrôle

review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [21-34]

The interpretation of the AEUBA, the *Public Utilities Board Act* ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. On their grammatical and ordinary meaning, s. 26(2) GUA, s. 15(3) AEUBA and s. 37 PUBA are silent as to the Board's power to deal with sale proceeds. Section 26(2) GUA conferred on the Board the power to approve a transaction without more. The intended meaning of the Board's power pursuant to s. 15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s. 37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes. While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations. These seemingly broad powers must be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The context indicates that the limits of the Board's powers are grounded in its main function of fixing just and reasonable rates and in protecting the integrity and dependability of the supply system. [7] [41] [43] [46]

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA,

applicable à la décision de la Commission portant sur sa compétence est celle de la décision correcte. En l'espèce, la Commission n'avait pas le pouvoir d'attribuer le produit de la vente des biens de l'entreprise de services publics. La Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui conféraient la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients quelque partie du produit de la vente des biens. [21-34]

L'analyse de l'AEUBA, de la *Public Utilities Board Act* (« PUBA ») et de la GUA mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Suivant le sens grammatical et ordinaire des mots qui y sont employés, le par. 26(2) de la GUA, le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA sont silencieux en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente. Le paragraphe 26(2) de la GUA lui conférait le pouvoir d'autoriser une opération, sans plus. La véritable portée du par. 15(3) de l'AEUBA, qui confère à la Commission le pouvoir d'assortir une ordonnance des conditions qu'elle juge nécessaires dans l'intérêt public, et celle de l'art. 37 de la PUBA, qui l'investit d'un pouvoir général, est occultée lorsque l'on considère isolément ces dispositions. En elles-mêmes, les dispositions sont vagues et sujettes à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. La notion d'« intérêt public » est très large et élastique, mais la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites. Son pouvoir apparemment vaste doit être interprété dans le contexte global des lois en cause, qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Il appert du contexte que les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables et à préserver l'intégrité et la fiabilité du réseau d'alimentation. [7] [41] [43] [46]

Ni l'historique de la réglementation des services publics de l'Alberta en général ni les dispositions législatives conférant ses pouvoirs à l'Alberta Energy and Utilities Board en particulier ne font mention du pouvoir de la Commission d'attribuer le produit de la vente ou de son pouvoir discrétionnaire de porter atteinte au droit de propriété. Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la

the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price — nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. [54-69]

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [39] [77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded

GUA que son principal mandat à l'égard des entreprises de services publics est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première. Les objectifs de viabilité, d'équité et d'efficacité, qui expliquent le mode de fixation des tarifs, sont à l'origine d'un arrangement économique et social qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus. Le paiement du tarif par le client n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens du service public. L'objet de la législation est de protéger le client et l'investisseur, et la Commission a pour mandat d'établir une tarification qui favorise les avantages financiers de l'un et de l'autre. Toutefois, ce subtil compromis ne supprime pas le caractère privé de l'entreprise. Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. Sans compter que l'entreprise n'est pas à l'abri de la perte pouvant en découler. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. [54-69]

Non seulement le pouvoir d'attribuer le produit de la vente n'est pas expressément prévu par la loi, mais on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Pour que s'applique la doctrine de la compétence par déduction nécessaire, la preuve doit établir que l'exercice de ce pouvoir est nécessaire dans les faits à la Commission pour que soient atteints les objectifs de la loi, ce qui n'est pas le cas en l'espèce. Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini, comme celui prévu dans l'AEUBA, la GUA ou la PUBA, d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits. Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut adopter une disposition le prévoyant expressément. [39] [77-80]

Indépendamment de la conclusion que la Commission n'avait pas compétence, la décision d'exercer le pouvoir discrétionnaire de protéger l'intérêt public en répartissant le produit de la vente comme elle l'a fait ne satisfaisait pas à la norme de la raisonnabilité. Lorsqu'elle

that no harm would ensue to customers from the sale of the asset, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Finally, it cannot be concluded that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process. [82-85]

Per McLachlin C.J. and Binnie and Fish JJ. (dissenting): The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's discretion is not unlimited and must be exercised in good faith for its intended purpose. Here, in allocating one third of the net gain to ATCO and two thirds to the rate base, the Board explained that it was proper to balance the interests of both shareholders and ratepayers. In the Board's view to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs, but on the other hand to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business. Although it was open to the Board to allow ATCO's application for the entire profit, the solution it adopted in this case is well within the range of reasonable options. The "public interest" is largely and inherently a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, Alberta's grant of authority to its Board is more generous than most. The Court should not substitute its own view of what is "necessary in the public interest". The Board's decision made in the exercise of its jurisdiction was within the range of established regulatory opinion, whether the proper standard of review in that regard is patent unreasonableness or simple reasonableness. [91-92] [98-99] [110] [113] [122] [148]

a conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients, la Commission n'a pas cerné d'intérêt public à protéger et aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Enfin, on ne peut conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs. [82-85]

La juge en chef McLachlin et les juges Binnie et Fish (dissidents) : La décision de la Commission devrait être rétablie. Le paragraphe 15(3) de l'AEUBA conférait à la Commission le pouvoir d'« imposer les conditions supplémentaires qu'elle juge[ait] nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de vendre le terrain et les bâtiments en cause présentée par ATCO. Dans l'exercice de ce pouvoir, et vu la « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait suivant le par. 22(1) de la GUA, la Commission a réparti le gain net en se fondant sur des considérations d'intérêt public. Son pouvoir discrétionnaire n'est pas illimité et elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré. Dans la présente affaire, en attribuant un tiers du gain net à ATCO et deux tiers à la base tarifaire, la Commission a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients. Selon elle, attribuer aux clients la totalité du profit n'aurait pas incité l'entreprise à accroître son efficacité et à réduire ses coûts et l'attribuer à l'entreprise aurait pu encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'était accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée. La Commission pouvait accueillir la demande d'ATCO et lui attribuer la totalité du profit, mais la solution qu'elle a retenue en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. L'« intérêt public » tient essentiellement et intrinsèquement à l'opinion et au pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. Il n'appartient pas à notre Cour de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer son opinion à celle de la Commission. La décision que la Commission a rendue dans l'exercice de son pouvoir se situe dans les limites des opinions exprimées par les organismes de réglementation, que la norme applicable soit celle du manifestement déraisonnable ou celle du raisonnable simpliciter. [91-92] [98-99] [110] [113] [122] [148]

ATCO's submission that an allocation of profit to the customers would amount to a confiscation of the corporation's property overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the ratepayers carry the costs and the regulator sets the return on investment, not the marketplace. The Board's response cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what is regarded in comparable jurisdictions as an appropriate regulatory allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. Similarly, ATCO's argument that the Board engaged in impermissible retroactive rate making should not be accepted. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective not retroactive. Fixing the going-forward rate of return, as well as general supervision of "all gas utilities, and the owners of them", were matters squarely within the Board's statutory mandate. ATCO also submits in its cross-appeal that the Court of Appeal erred in drawing a distinction between gains on sale of land whose original cost is not depreciated and depreciated property, such as buildings. A review of regulatory practice shows that many, but not all, regulators reject the relevance of this distinction. The point is not that the regulator must reject any such distinction but, rather, that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. Finally, ATCO's contention that it alone is burdened with the risk on land that declines in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. Further, it seems such losses are taken into account in the ongoing rate-setting process. [93] [123-147]

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La prétention d'ATCO selon laquelle attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé; dans ce dernier cas, les clients supportent les coûts et le taux de rendement est fixé par un organisme de réglementation, et non par le marché. La mesure retenue par la Commission ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. On ne peut non plus faire droit à la prétention d'ATCO voulant que la Commission se soit indûment livrée à une tarification rétroactive. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission. Dans son pourvoi incident, ATCO prétend en outre que la Cour d'appel de l'Alberta a établi à tort une distinction entre le profit tiré de la vente d'un terrain dont le coût historique n'est pas amorti et le profit tiré de la vente d'un bien amorti, comme un bâtiment. Il ressort de la pratique réglementaire que de nombreux organismes de réglementation, mais pas tous, jugent cette distinction non pertinente. Ce n'est pas que l'organisme de réglementation doive l'écarter systématiquement, mais elle n'est pas aussi déterminante que le prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. Enfin, la prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain diminue ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. De plus, il appert qu'une telle perte est prise en considération dans la procédure d'établissement des tarifs. [93] [123-147]

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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (Wittmann J.A. and LoVecchio J. (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, reversing a decision of the Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Appeal dismissed and cross-appeal allowed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

Brian K. O'Ferrall and *Daron K. Naffin*, for the appellant/respondent on cross-appeal.

Clifton D. O'Brien, *Q.C.*, *Lawrence E. Smith*, *Q.C.*, *H. Martin Kay*, *Q.C.*, and *Laurie A. Goldbach*, for the respondent/appellant on cross-appeal.

J. Richard McKee and *Renée Marx*, for the intervener the Alberta Energy and Utilities Board.

Written submissions only by *George Vegh* and *Michael W. Lyle*, for the intervener the Ontario Energy Board.

Written submissions only by *J. L. McDougall*, *Q.C.*, and *Michael D. Schafler*, for the intervener Enbridge Gas Distribution Inc.

Written submissions only by *Michael A. Penny* and *Susan Kushneryk*, for the intervener Union Gas Limited.

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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (les juges Wittmann et LoVecchio (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, qui a infirmé une décision de l'Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Pourvoi rejeté et pourvoi incident accueilli, la juge en chef McLachlin et les juges Binnie et Fish sont dissidents.

Brian K. O'Ferrall et *Daron K. Naffin*, pour l'appelante/intimée au pourvoi incident.

Clifton D. O'Brien, *c.r.*, *Lawrence E. Smith*, *c.r.*, *H. Martin Kay*, *c.r.*, et *Laurie A. Goldbach*, pour l'intimée/appelante au pourvoi incident.

J. Richard McKee et *Renée Marx*, pour l'intervenante Alberta Energy and Utilities Board.

Argumentation écrite seulement par *George Vegh* et *Michael W. Lyle*, pour l'intervenante la Commission de l'énergie de l'Ontario.

Argumentation écrite seulement par *J. L. McDougall*, *c.r.*, et *Michael D. Schafler*, pour l'intervenante Enbridge Gas Distribution Inc.

Argumentation écrite seulement par *Michael A. Penny* et *Susan Kushneryk*, pour l'intervenante Union Gas Limited.

The judgment of Bastarache, LeBel, Deschamps and Charron JJ. was delivered by

BASTARACHE J. —

1. Introduction

1 At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.

2 Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the

Version française du jugement des juges Bastarache, LeBel, Deschamps et Charron rendu par

LE JUGE BASTARACHE —

1. Introduction

Le présent pourvoi a pour objet la compétence d'un tribunal administratif. Plus précisément, notre Cour doit déterminer, selon la norme de contrôle appropriée, si l'organisme de réglementation a correctement circonscrit ses attributions et son pouvoir discrétionnaire.

De nos jours, rares sont les facettes de notre vie qui échappent à la réglementation. Le service téléphonique, les transports ferroviaire et aérien, le camionnage, l'investissement étranger, l'assurance, le marché des capitaux, la radiodiffusion (licences et contenu), les activités bancaires, les aliments, les médicaments et les normes de sécurité ne constituent que quelques-uns des objets de la réglementation au Canada : M. J. Trebilcock, « The Consumer Interest and Regulatory Reform », dans G. B. Doern, dir., *The Regulatory Process in Canada* (1978), 94. Le pouvoir discrétionnaire est au cœur de l'élaboration des politiques des organismes administratifs, mais son étendue varie d'un organisme à l'autre (voir C. L. Brown-John, *Canadian Regulatory Agencies : Quis custodiet ipsos custodes?* (1981), p. 29). Et, plus important encore, dans l'exercice de son pouvoir discrétionnaire, l'organisme créé par voie législative doit s'en tenir à son domaine de compétence : il ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence (voir D. J. Mullan, *Administrative Law* (2001), p. 9-10).

Le secteur de l'énergie et des services publics n'y échappe pas. En l'espèce, l'intimée est un service public albertain de distribution de gaz naturel. Il ne s'agit en fait que d'une société privée assujettie à certaines contraintes réglementaires. Essentiellement, elle est dans la même situation que toute société privée : elle obtient son financement par l'émission d'actions et d'obligations; ses ressources, ses terrains et ses autres biens lui

sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board ("Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell

appartiennent en propre; elle construit des installations, achète du matériel et, pour fournir ses services, conclut des contrats avec des employés; elle réalise des profits en pratiquant des tarifs approuvés par l'Alberta Energy and Utilities Board (« Commission ») (voir P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234). Cela dit, on ne peut faire abstraction de la caractéristique importante qui rend un service public si distinct : il doit rendre compte à un organisme de réglementation. Les services publics sont habituellement des monopoles naturels : la technologie requise et la demande sont telles que les coûts fixes sont moindres lorsque le marché est desservi par une seule entreprise au lieu de plusieurs faisant double-emploi dans un contexte concurrentiel (voir A. E. Kahn, *The Economics of Regulation : Principles and Institutions* (1988), vol. 1, p. 11; B. W. F. Depoorter, « Regulation of Natural Monopoly », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, « Price Regulation : A (Non-Technical) Overview », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 396, p. 398; A. J. Black, « Responsible Regulation : Incentive Rates for Natural Gas Pipelines » (1992), 28 *Tulsa L.J.* 349, p. 351). Ce modèle favorise l'efficience de la production. Toutefois, les gouvernements ont voulu s'éloigner du concept théorique et ont opté pour ce qu'il convient d'appeler un « monopole réglementé ». La réglementation des services publics vise à protéger la population contre un comportement monopolistique et l'inélasticité de la demande qui en résulte tout en assurant la qualité constante d'un service essentiel (voir Kahn, p. 11).

Comme toute autre entreprise, un service public prend des décisions d'affaires, son objectif ultime étant de maximiser les profits revenant aux actionnaires. Cependant, l'organisme de réglementation restreint son pouvoir discrétionnaire à l'égard de certains éléments clés, dont les prix, les services offerts et l'opportunité d'investir dans des installations et du matériel. Et, plus important encore dans la présente affaire, il restreint également son

assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying customers of the utility when approving the sale. Subsequently, if this first question is answered affirmatively, the Court must consider whether the Board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction: was it allowed, in the circumstances of this case, to allocate a portion of the net gain on the sale of the utility to the rate-paying customers?

6 The customers' interests are represented in this case by the City of Calgary ("City") which argues that the Board can determine how to allocate the proceeds pursuant to its power to approve the sale and protect the public interest. I find this position unconvincing.

7 The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

pouvoir de vendre ses biens en dehors du cours normal de ses activités : son autorisation doit être obtenue pour la vente d'un bien affecté jusqu'alors à la prestation d'un service réglementé (voir MacAvoy et Sidak, p. 234).

C'est dans ce contexte qu'on demande à notre Cour de déterminer si, lorsqu'elle autorise un service public à vendre un bien désaffecté, la Commission peut, suivant ses lois habilitantes, attribuer aux clients une partie du gain net obtenu. Dans l'affirmative, il nous faut décider si la Commission a raisonnablement exercé son pouvoir et respecté les limites de sa compétence : était-elle autorisée, en l'espèce, à attribuer une partie du gain net aux clients?

La ville de Calgary (« Ville ») défend les intérêts des clients dans le cadre du présent pourvoi. Elle soutient que la Commission peut décider de l'attribution du produit de la vente en vertu de son pouvoir d'autoriser ou non l'opération et de protéger l'intérêt public. Cette thèse me paraît peu convaincante.

L'analyse de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45 (« PUBA »), et de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA ») (voir leurs dispositions pertinentes en annexe) mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Son pouvoir apparemment vaste de rendre toute décision et d'imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public doit être interprété dans le contexte global des lois en cause qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables (la tarification) et à préserver l'intégrité et la fiabilité du réseau d'alimentation.

1.1 *Overview of the Facts*

ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land. According to AGS, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners, who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed. The Board was of the view that the test had been satisfied. It was

1.1 *Aperçu des faits*

8 ATCO Gas - South (« AGS »), une filiale d'ATCO Gas and Pipelines Ltd. (« ATCO »), a fait parvenir à la Commission une lettre dans laquelle elle lui demandait, en application du par. 25.1(2) (l'actuel par. 26(2)) de la GUA, l'autorisation de vendre des biens situés à Calgary (le *Calgary Stores Block*). Ces biens étaient constitués d'un terrain et de bâtiments, mais c'est le terrain qui présentait le plus grand intérêt, et l'acquéreur comptait démolir les bâtiments et réaménager le terrain, ce qu'il a d'ailleurs fait. Devant la Commission, AGS a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. AGS a en fait laissé entendre que l'opération se traduirait par une économie pour les clients du fait que la valeur comptable nette des biens ne serait plus prise en compte dans l'établissement de la base tarifaire, diminuant d'autant les tarifs. ATCO a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement du solde de la valeur comptable et au recouvrement des frais d'aliénation, puis de permettre le versement du gain net aux actionnaires. La Commission a examiné la demande sur dossier sans entendre de témoins ni tenir d'audience. La Ville, Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. et des intervenants municipaux ont déposé des observations écrites. Tous s'opposaient à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

1.2 *Historique judiciaire*

1.2.1 La Commission

1.2.1.1 *Décision 2001-78*

9 Dans une première décision relative à la demande d'autorisation de la vente des biens, la Commission a appliqué le critère de l'« absence de préjudice » et soupesé les répercussions possibles sur les tarifs et la qualité des services offerts aux clients, ainsi que l'opportunité de l'opération, compte tenu de l'acquéreur et de la procédure d'appel d'offres ou de vente suivie. Elle a conclu à l'« absence de

persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that those costs could be reviewed by the Board in a future general rate application brought by interested parties.

1.2.1.2 *Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

10 In a second decision, the Board determined the allocation of net sale proceeds. It reviewed the regulatory policy and general principles which affected the decision, although no specific matters are enumerated for consideration in the applicable legislative provisions. The Board had previously developed a "no-harm" test, and it reviewed the rationale for the test as summarized in its Decision 2001-65 (*Re ATCO Gas-North*): "The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest" (p. 16).

11 The Board went on to discuss the implications of the Alberta Court of Appeal decision in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, referring to various decisions it had rendered in the past. Quoting from its Decision 2000-41 (*Re TransAlta Utilities Corp.*), the Board summarized the "*TransAlta Formula*":

> In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between

préjudice ». Elle s'est dite convaincue que la vente ne serait pas préjudiciable aux clients étant donné l'entente de location judicieusement conclue en vue du remplacement des installations vendues. Elle a estimé qu'il n'y aurait pas d'effet négatif sur les tarifs exigés des clients, du moins les cinq premières années de la location. La Commission a en fait jugé que la vente permettrait aux clients d'obtenir les mêmes services à meilleur prix. Elle ne s'est pas prononcée sur les effets de l'opération sur les frais d'exploitation futurs; à titre d'exemple, elle n'a pas tenu compte des frais liés à l'entente de location conclue par ATCO. La Commission a dit que les parties intéressées et elle pourraient se pencher sur ces frais dans le cadre d'une demande générale d'approbation de tarifs.

1.2.1.2 *Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

Dans une deuxième décision, la Commission a décidé de l'attribution du produit net de la vente. Elle a fait état de la politique réglementaire et des principes généraux présidant à la décision, même si les dispositions législatives applicables n'énumèrent pas les facteurs précis devant être pris en compte. Elle a fait mention du critère de l'« absence de préjudice » élaboré auparavant et dont elle avait résumé la raison d'être dans sa décision 2001-65 (*Re ATCO Gas-North*) : [TRADUCTION] « La Commission estime que son pouvoir de limiter ou de compenser le préjudice que pourraient subir les clients en leur attribuant tout ou partie du produit de la vente découle de son vaste mandat de protéger les clients dans l'intérêt public » (p. 16).

La Commission a ensuite analysé les répercussions de l'arrêt *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, de la Cour d'appel de l'Alberta, en se référant à différentes décisions qu'elle avait rendues. Citant sa décision 2000-41 (*Re TransAlta Utilities Corp.*), voici comment elle a résumé la « *formule TransAlta* » :

> [TRADUCTION] Dans des décisions subséquentes, la Commission a conclu que pour la Cour d'appel, lorsque le prix de vente des biens est plus élevé que leur coût historique, les actionnaires ont droit à la valeur comptable nette (en fonction de la valeur historique),

net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale. [para. 27]

les clients ont droit à la différence entre la valeur comptable nette et le coût historique, et toute appréciation des biens (c.-à-d. la différence entre le coût historique et le prix de vente) est répartie entre les actionnaires et les clients. Le montant attribué aux actionnaires est calculé en multipliant le ratio prix de vente/coût historique par la valeur comptable nette et celui qui revient aux clients est obtenu en multipliant ce ratio par la différence entre le coût historique et la valeur comptable nette. Toutefois, lorsque le prix de vente n'est pas supérieur au coût historique, les clients ont droit à la totalité du gain réalisé lors de la vente. [par. 27]

The Board also referred to Decision 2001-65, where it had clarified the following:

La Commission a également cité la décision 2001-65 renfermant les explications suivantes :

In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the TransAlta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula. [para. 28]

[TRADUCTION] Selon la Commission, lorsque l'application de la formule TransAlta donne un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit au montant plus élevé. Par contre, lorsqu'elle débouche sur un montant inférieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit à ce dernier montant. De plus, cette approche est compatible avec la manière dont elle a appliqué jusqu'à maintenant la formule TransAlta. [par. 28]

On the issue of its jurisdiction to allocate the net proceeds of a sale, the Board in the present case stated:

12

En ce qui concerne son pouvoir de répartir le produit net de la vente, la Commission a dit :

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

[TRADUCTION] Le fait qu'un service public réglementé doive obtenir de la Commission l'autorisation de se départir d'un bien montre que l'assemblée législative a voulu limiter son droit de propriété. Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher un service public de se départir d'un bien. Selon nous, il s'ensuit également que la Commission peut autoriser une aliénation en l'assortissant de conditions aptes à protéger les intérêts des clients.

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

Pour ce qui est de l'argument d'AGS selon lequel l'attribution aux clients d'un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice équivaudrait à une tarification rétroactive, la Commission cite à nouveau l'arrêt *TransAlta* dans lequel la Cour d'appel a reconnu que la Commission pouvait assimiler à un « revenu » un montant payable aux clients pour les indemniser de l'amortissement excédentaire pris en compte dans la tarification antérieure. Il ne saurait y avoir de tarification rétroactive lorsqu'un service public se dessaisit d'un bien auparavant inclus dans la base tarifaire et que la Commission applique la formule TransAlta.

The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset. [paras. 47-49]

L'argument de la société voulant que les biens (le *Calgary Stores Block*) ne soient plus des biens du service public parce qu'ils ne sont plus requis pour fournir le service ne nous convainc pas. La Commission signale que les biens pourraient encore servir à la prestation de services destinés aux clients de l'entreprise réglementée. En fait, les services anciennement fournis grâce aux biens demeurent requis, mais leur prestation sera assurée par des installations existantes et des installations récemment louées. La Commission note de plus que même dans le cas où un bien et le service qu'il fournissait aux clients ne sont plus requis, elle a déjà attribué plus que le montant obtenu par l'application du critère de l'absence de préjudice lorsque le produit de l'aliénation a été supérieur au coût historique. [par. 47-49]

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

La Commission a ensuite appliqué le critère de l'absence de préjudice aux faits de l'espèce. Elle a signalé que, dans sa décision relative à la demande d'autorisation, elle avait conclu au respect de ce critère, mais n'avait alors tiré aucune conclusion concernant l'incidence sur les frais d'exploitation, notamment l'entente de location obtenue par ATCO.

14 The Board then reviewed the submissions with respect to the allocation of the net gain and rejected the submission that if the new owner had no use of the buildings on the land, this should affect the allocation of net proceeds. The Board held that the buildings did have some present value but did not find it necessary to fix a specific value. The Board recognized and confirmed that the *TransAlta Formula* was one whereby the "windfall" realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. It held that it should apply the formula in this case and that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings.

Puis, après avoir examiné les observations portant sur l'attribution du gain net, la Commission a rejeté l'argument selon lequel le fait que le nouveau propriétaire n'utiliserait pas les bâtiments situés sur le terrain était déterminant à cet égard. Elle a conclu que les bâtiments avaient alors une certaine valeur, mais elle n'a pas jugé nécessaire de la préciser. Elle a reconnu et confirmé que suivant la *formule TransAlta*, le profit inattendu réalisé lorsque le produit de la vente excède le coût historique pouvait être réparti entre les clients et les actionnaires. Elle a estimé qu'il y avait lieu en l'espèce d'appliquer la formule et de tenir compte de la totalité du gain issu de l'opération sans dissocier la partie attribuable au terrain et celle correspondant aux bâtiments.

15 With respect to allocation of the gain between customers and shareholders of ATCO, the Board tried to balance the interests of both the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on the investment made by the company:

Pour ce qui est de la répartition du gain entre les clients et les actionnaires d'ATCO, la Commission a tenté de mettre en balance la volonté des clients d'obtenir des services à la fois sûrs et fiables à un prix raisonnable et celle des investisseurs de toucher un rendement raisonnable :

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

Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred. [paras. 112-13]

The Board went on to conclude that the sharing of the net gain on the sale of the land and buildings collectively, in accordance with the *TransAlta Formula*, was equitable in the circumstances of this application and was consistent with past Board decisions.

The Board determined that from the gross proceeds of $6,550,000, ATCO should receive $465,000 to cover the cost of disposition ($265,000) and the provision for environmental remediation ($200,000), the shareholders should receive $2,014,690, and $4,070,310 should go to the customers. Of the amount credited to shareholders, $225,245 was to be used to remove the remaining net book value of the property from ATCO's accounts. Of the amount allocated to customers, $3,045,813 was allocated to ATCO Gas - South customers and $1,024,497 to ATCO Pipelines - South customers.

1.2.2 Court of Appeal of Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, allowing the appeal and setting aside the Board's decision. The

[TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.

À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation. [par. 112-113]

16 La Commission a poursuivi en concluant que le partage du gain net résultant globalement de la vente du terrain et des bâtiments, selon la *formule TransAlta*, était équitable dans les circonstances et conforme à ses décisions antérieures.

17 Elle a décidé de répartir le produit brut de la vente (6 550 000 $) comme suit : 465 000 $ à ATCO pour les frais d'aliénation (265 000 $) et la dépollution (200 000 $), 2 014 690 $ aux actionnaires et 4 070 310 $ aux clients. Un montant de 225 245 $ devait être prélevé de la somme attribuée aux actionnaires pour radier des registres d'ATCO la valeur comptable nette des biens vendus. De la somme attribuée aux clients, 3 045 813 $ étaient alloués aux clients d'ATCO Gas - South et 1 024 497 $ à ceux d'ATCO Pipelines - South.

1.2.2 La Cour d'appel de l'Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

18 ATCO a interjeté appel de la décision. Elle a fait valoir que la Commission n'avait pas compétence pour attribuer le produit de la vente, qui aurait dû revenir en entier aux actionnaires. Selon elle, en touchant une partie du produit de la vente, les clients gagnaient sur tous les tableaux puisqu'ils n'avaient pas supporté le coût de la rénovation des biens vendus et qu'ils profiteraient d'économies grâce à l'entente de location. La Cour d'appel de l'Alberta lui a donné raison, accueillant l'appel et annulant la décision. Elle a renvoyé l'affaire à la

matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled "Remainder to be Shared" to ATCO. For the reasons that follow, the Court of Appeal's decision should be upheld, in part; it did not err when it held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 *Issues*

19 There is an appeal and a cross-appeal in this case: an appeal by the City in which it submits that, contrary to the Court of Appeal's decision, the Board had jurisdiction to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the Board approved the sale, and a cross-appeal by ATCO in which it questions the Board's jurisdiction to allocate any of ATCO's proceeds from the sale to customers. In particular, ATCO contends that the Board has no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years. No matter how the issue is framed, it is evident that the crux of this appeal lies in whether the Board has the jurisdiction to distribute the gain on the sale of a utility company's asset.

20 Given my conclusion on this issue, it is not necessary for me to consider whether the Board's allocation of the proceeds in this case was reasonable. Nevertheless, as I note at para. 82, I will direct my attention briefly to the question of the exercise of discretion in view of my colleague's reasons.

2.2 *Standard of Review*

21 As this appeal stems from an administrative body's decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittmann J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board's

Commission, lui enjoignant d'attribuer à ATCO la totalité du solde à répartir selon la ligne 11 du tableau d'attribution du produit de la vente. Pour les motifs qui suivent, il y a lieu de confirmer en partie le jugement de la Cour d'appel, qui n'a pas eu tort de statuer que la Commission n'avait pas le pouvoir d'attribuer le produit de la vente aux clients.

2. Analyse

2.1 *Questions en litige*

Nous sommes saisis d'un pourvoi et d'un pourvoi incident. Dans son pourvoi, la Ville affirme que contrairement à ce qu'a estimé la Cour d'appel, la Commission avait le pouvoir d'attribuer aux clients une partie du gain net résultant de la vente d'un bien affecté au service public même si elle avait conclu, au moment d'autoriser la vente, qu'aucun préjudice ne serait causé au public. Dans son pourvoi incident, ATCO conteste le pouvoir de la Commission d'attribuer aux clients toute partie du produit de la vente. Elle soutient en particulier que la Commission n'a pas le pouvoir de leur attribuer l'équivalent de l'amortissement calculé les années antérieures. Peu importe la formulation de la question en litige, notre Cour est appelée en l'espèce à décider si la Commission a le pouvoir d'attribuer le gain net tiré de la vente d'un bien d'une entreprise de services publics.

Vu la conclusion à laquelle j'arrive, point n'est besoin de se demander si la Commission a raisonnablement réparti le produit de la vente. Néanmoins, comme je le signale au par. 82, vu les motifs de mon collègue, je me penche brièvement sur la question de l'exercice du pouvoir discrétionnaire.

2.2 *Norme de contrôle*

Une décision administrative étant à l'origine du présent pourvoi, il faut déterminer le degré de déférence auquel a droit l'organisme qui l'a rendue. S'exprimant au nom de la Cour d'appel, le juge Wittmann a conclu que la question de la compétence de la Commission commandait l'application de la norme de la décision correcte. ATCO en convient, et moi aussi. Il n'y a pas lieu de faire preuve de

decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

Although it is not necessary to conduct a full analysis of the standard of review in this case, I will address the issue briefly in light of the fact that Binnie J. deals with the exercise of discretion in his reasons for judgment. The four factors that need to be canvassed in order to determine the appropriate standard of review of an administrative tribunal decision are: (1) the existence of a privative clause; (2) the expertise of the tribunal/board; (3) the purpose of the governing legislation and the particular provisions; and (4) the nature of the problem (*Pushpanathan*, at paras. 29-38).

In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

First, s. 26(1) of the AEUBA grants a right of appeal, but in a limited way. Appeals are allowed on a question of jurisdiction or law and only after leave to appeal is obtained from a judge:

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

déférence à l'égard de la décision de la Commission concernant son pouvoir d'attribuer le gain net tiré de la vente des biens. L'examen des facteurs énoncés par notre Cour dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, confirme cette conclusion, tout comme son raisonnement dans l'arrêt *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19.

22 Bien qu'il ne soit pas nécessaire d'approfondir la question de la norme de contrôle applicable en l'espèce, je l'examinerai brièvement puisque, dans ses motifs, le juge Binnie se prononce sur l'exercice du pouvoir discrétionnaire. Les quatre facteurs à considérer pour déterminer la norme de contrôle applicable à la décision d'un tribunal administratif sont les suivants : (1) l'existence d'une clause privative; (2) l'expertise du tribunal ou de l'organisme; (3) l'objet de la loi applicable et des dispositions en cause; (4) la nature du problème (*Pushpanathan*, par. 29-38).

23 Dans la présente affaire, il faut se garder de conclure hâtivement que la question en litige en est une de « compétence » puis de laisser tomber l'analyse pragmatique et fonctionnelle. L'examen exhaustif des facteurs s'impose.

24 Premièrement, le par. 26(1) de l'AEUBA prévoit un droit d'appel restreint qui ne peut être exercé que sur une question de compétence ou de droit et seulement avec l'autorisation d'un juge :

[TRADUCTION]

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

In addition, the AEUBA includes a privative clause which states that every action, order, ruling or decision of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court (s. 27).

25 The presence of a statutory right of appeal on questions of jurisdiction and law suggests a more searching standard of review and less deference to the Board on those questions (see *Pushpanathan*, at para. 30). However, the presence of the privative clause and right to appeal are not decisive, and one must proceed with the examination of the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (Div. Ct.), at para. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), at para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilities.

27 Nevertheless, the Court is concerned not with the general expertise of the administrative decision maker, but with its expertise in relation to the specific nature of the issue before it. Consequently, while normally one would have assumed that the Board's expertise is far greater than that of a court, the nature of the problem at bar, to adopt the language of the Court of Appeal (para. 35), "neutralizes" this deference. As I will elaborate below, the expertise of the Board is not engaged when deciding the scope of its powers.

De plus, l'AEUBA renferme une clause d'immunité de contrôle (ou clause privative) prévoyant que toute mesure, ordonnance ou décision de la Commission est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire (art. 27).

Le fait que la loi prévoit un droit d'appel sur une question de compétence ou de droit seulement permet de conclure à l'application d'une norme de contrôle plus stricte et donne à penser que notre Cour doit se montrer moins déférente vis-à-vis de la Commission relativement à ces questions (voir *Pushpanathan*, par. 30). Cependant, l'existence d'une clause d'immunité de contrôle et d'un droit d'appel n'est pas décisive, de sorte qu'il nous faut examiner la nature de la question à trancher et l'expertise relative du tribunal administratif à cet égard.

Deuxièmement, comme l'a fait remarquer la Cour d'appel, nul ne conteste que la Commission est un organisme spécialisé doté d'une grande expertise en ce qui concerne les ressources et les services publics de l'Alberta dans le domaine énergétique (voir, p. ex., *Consumers' Gas Co. c. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (C. div.), par. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant c. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), par. 14. Il s'agit en fait d'un tribunal administratif permanent qui régit depuis nombre d'années les services publics réglementés.

Quoi qu'il en soit, notre Cour s'intéresse non pas à l'expertise générale de l'instance administrative, mais à son expertise quant à la question précise dont elle est saisie. Par conséquent, même si l'on tiendrait normalement pour acquis que l'expertise de la Commission est beaucoup plus grande que celle d'une cour de justice, la nature de la question en litige « neutralise », pour reprendre le terme employé par la Cour d'appel (par. 35), la déférence qu'appelle cette considération. Comme je l'explique plus loin, l'expertise de la Commission n'est pas mise à contribution lorsqu'elle se prononce sur l'étendue de ses pouvoirs.

Third, the present case is governed by three pieces of legislation: the PUBA, the GUA and the AEUBA. These statutes give the Board a mandate to safeguard the public interest in the nature and quality of the service provided to the community by public utilities: *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), at paras. 20-22, aff'd [1977] 2 S.C.R. 822. The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting, as I will explain later.

28 Troisièmement, trois lois s'appliquent en l'espèce : la PUBA, la GUA et l'AEUBA. Suivant ces lois, la Commission a pour mission de protéger l'intérêt public quant à la nature et à la qualité des services fournis à la collectivité par les entreprises de services publics : *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576; *Dome Petroleum Ltd. c. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), par. 20-22, conf. par [1977] 2 R.C.S. 822. L'objet premier de ce cadre législatif est de réglementer adéquatement un service de gaz dans l'intérêt public ou, plus précisément, de réglementer un monopole dans l'intérêt public, grâce principalement à l'établissement des tarifs. J'y reviendrai.

The particular provision at issue, s. 26(2)(d)(i) of the GUA, which requires a utility to obtain the approval of the regulator before it sells an asset, serves to protect the customers from adverse results brought about by any of the utility's transactions by ensuring that the economic benefits to customers are enhanced (MacAvoy and Sidak, at pp. 234-36).

29 La disposition qui nous intéresse au premier chef, le sous-al. 26(2)d)(i) de la GUA, qui exige qu'un service public obtienne de l'organisme de réglementation l'autorisation de vendre un bien, vise à protéger les clients contre les effets préjudiciables de toute opération de l'entreprise en veillant à l'accroissement des avantages financiers qu'ils en tirent (MacAvoy et Sidak, p. 234-236).

While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

30 Même si, à première vue, on peut considérer que l'objet des lois pertinentes et la raison d'être de la Commission sont de réaliser un équilibre délicat entre divers intéressés — le service public et les clients — et, par conséquent, qu'ils impliquent un processus décisionnel polycentrique (*Pushpanathan*, par. 36), l'interprétation des lois habilitantes et des dispositions en cause (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) n'est pas, contrairement à ce qu'a conclu la Cour d'appel, une question polycentrique. Il s'agit plutôt de déterminer si, interprétées correctement, les lois habilitantes confèrent à la Commission le pouvoir d'attribuer le profit tiré de la vente d'un bien. Lorsque aucune question de principe n'est soulevée, le mandat premier de la Commission n'est pas d'interpréter l'AEUBA, la GUA ou la PUBA de manière abstraite, mais de veiller à ce que la tarification soit toujours juste et raisonnable (voir *Atco Ltd.*, p. 576). En l'espèce, ce rôle de protection n'entre pas en jeu. Partant, le troisième facteur commande l'application d'une norme de contrôle moins déférente.

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

Quatrièmement, la nature du problème n'est pas la même pour chacune des questions en litige. Les parties demandent en substance à notre Cour de répondre à deux questions (énoncées précédemment). Premièrement, le pouvoir d'attribuer le produit de la vente relève-t-il du mandat légal de la Commission? Dans sa décision, cette dernière a statué qu'elle avait le pouvoir d'attribuer aux clients une partie du produit de la vente des biens d'un service public. Elle a invoqué à l'appui ses pouvoirs légaux, les principes d'équité inhérents au « pacte réglementaire » (voir par. 63 des présents motifs) et ses décisions antérieures. Il s'agit clairement d'une question de droit et de compétence. L'on pourrait soutenir que la Commission ne possède pas une plus grande expertise qu'une cour de justice à cet égard. Une cour de justice est appelée à interpréter des dispositions ne comportant aucun aspect technique, ce qui n'était pas le cas de la disposition en litige dans l'arrêt *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28, par. 86. Qui plus est, l'interprétation de notions générales comme l'« intérêt public » et l'« imposition de conditions » (que l'on retrouve à l'al. 15(3)d) de l'AEUBA), n'est pas étrangère à une cour de justice et n'appartient pas à un domaine dans lequel il a été jugé qu'un tribunal administratif avait une plus grande expertise qu'une cour de justice. Deuxièmement, la méthode employée en l'espèce et l'attribution en résultant étaient-elles raisonnables? Pour répondre à cette question, il faut examiner la jurisprudence, les considérations de principe et la pratique d'autres organismes, ainsi que le détail de l'attribution en l'espèce. Il s'agit en somme d'une question mixte de fait et de droit.

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction"

Au vu des quatre facteurs, je conclus que chacune des questions en litige appelle une norme de contrôle distincte. Statuer sur le pouvoir de la Commission d'attribuer le produit de la vente d'un bien d'un service public requiert l'application de la norme de la décision correcte. Comme l'a dit la Cour d'appel, l'accent est mis sur les dispositions invoquées et interprétées par la Commission (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) et la

(*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

> . . . the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

As will be shown in the analysis below, I am of the view that the Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate *any* portion of the proceeds of sale of the property to ratepayers.

2.3 *Was the Board's Decision as to Its Jurisdiction Correct?*

Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they

question « touche la compétence » (*Pushpanathan*, par. 28). De plus, gardant présents à l'esprit tous les facteurs considérés, le caractère général de la proposition est un autre élément qui milite en faveur de la norme de la décision correcte, comme je l'ai dit dans l'arrêt *Pushpanathan* (par. 38) :

> . . . plus les propositions avancées sont générales, et plus les répercussions de ces décisions s'écartent du domaine d'expertise fondamental du tribunal, moins il est vraisemblable qu'on fasse preuve de retenue. En l'absence d'une intention législative implicite ou expresse à l'effet contraire manifestée dans les critères qui précèdent, on présumera que le législateur a voulu laisser aux cours de justice la compétence de formuler des énoncés de droit fortement généralisés.

33 La deuxième question, qui porte sur la méthode employée par la Commission pour attribuer le produit de la vente, appelle vraisemblablement une norme de contrôle plus déférente. D'une part, l'expertise de la Commission, dans ce domaine en particulier, son vaste mandat, la technicité de la question et l'objet général des lois en cause portent à croire que sa décision justifie un degré relativement élevé de déférence. D'autre part, l'absence d'une clause d'immunité de contrôle visant les questions de compétence et la nécessité de se référer au droit pour trancher la question, appellent l'application d'une norme de contrôle moins déférente privilégiant le caractère raisonnable de la décision. Il n'est toutefois pas nécessaire que je précise quelle norme de contrôle aurait été applicable en l'espèce.

34 Comme le montre l'analyse qui suit, je suis d'avis que la Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui confèrent la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients *quelque* partie du produit de la vente des biens.

2.3 *La Commission a-t-elle rendu une décision correcte au sujet de sa compétence?*

35 Un tribunal ou un organisme administratif est une création de la loi : il ne peut outrepasser les pouvoirs que lui confère sa loi habilitante, il doit

must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada* (3rd ed. 2001), at pp. 183-84).

36 In order to determine whether the Board's decision that it had the jurisdiction to allocate proceeds from the sale of a utility's asset was correct, I am required to interpret the legislative framework by which the Board derives its powers and actions.

2.3.1 General Principles of Statutory Interpretation

37 For a number of years now, the Court has adopted E. A. Driedger's modern approach as the method to follow for statutory interpretation (*Construction of Statutes* (2nd ed. 1983), at p. 87):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 186-87; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 54; *Barrie Public Utilities*, at paras. 20 and 86; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63, at para. 19.)

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

39 The City submits that it is both implicit and explicit within the express jurisdiction that has been

[TRADUCTION] « s'en tenir à son domaine de compétence et ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence » : Mullan, p. 9-10 (voir également S. Blake, *Administrative Law in Canada* (3e éd. 2001), p. 183-184).

Pour décider si la Commission a eu raison de conclure qu'elle avait le pouvoir d'attribuer le produit de la vente des biens d'un service public, je dois interpréter le cadre législatif à l'origine de ses attributions et de ses actes.

2.3.1 Principes généraux d'interprétation législative

Depuis un certain nombre d'années, notre Cour fait sienne l'approche moderne d'E. A. Driedger en matière d'interprétation des lois (*Construction of Statutes* (2e éd. 1983), p. 87) :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

(Voir, p. ex., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 186-187; *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6, par. 54; *Barrie Public Utilities*, par. 20 et 86; *Contino c. Leonelli-Contino*, [2005] 3 R.C.S. 217, 2005 CSC 63, par. 19.)

Toutefois, dans le domaine du droit administratif, plus particulièrement, la compétence des tribunaux et des organismes administratifs a deux sources : (1) l'octroi exprès par une loi (pouvoir explicite) et (2) la common law, suivant la doctrine de la déduction nécessaire (pouvoir implicite) (voir également D. M. Brown, *Energy Regulation in Ontario* (éd. feuilles mobiles), p. 2-15).

La Ville soutient que le pouvoir exprès de la Commission d'autoriser la vente des biens d'un

conferred upon the Board to approve or refuse to approve the sale of utility assets, that the Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be "implied" from the statutory regime as necessarily incidental to the explicit powers. I agree with ATCO's submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

As a preliminary submission, the City argues that given that ATCO applied to the Board for approval of both the sale transaction *and* the disposition of the proceeds of sale, this suggests that ATCO recognized that the Board has authority to allocate the proceeds as a condition of a proposed sale. This argument does not hold any weight in my view. First, the application for approval cannot be considered on its own an admission by ATCO of the jurisdiction of the Board. In any event, an admission of this nature would not have any bearing on the applicable law. Moreover, knowing that in the past the Board had decided that it had jurisdiction to allocate the proceeds of a sale of assets and had acted on this power, one can assume that ATCO was asking for the approval of the disposition of the proceeds should the Board not accept their argument on jurisdiction. In fact, a review of past Board decisions on the approval of sales shows that utility companies have constantly challenged the Board's jurisdiction to allocate the net gain on the sale of assets (see, e.g., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and 15(3)(d) of the AEUBA and

service public englobe — implicitement et explicitement — celui de décider de l'attribution du produit de la vente. ATCO réplique que non seulement ce pouvoir n'est pas expressément prévu par la loi, mais qu'on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Je suis d'accord avec elle et voici pourquoi.

2.3.2 Pouvoir explicite : sens grammatical et ordinaire

40 La Ville soutient à titre préliminaire qu'en lui demandant d'autoriser la vente des biens *et* l'attribution du produit de l'opération, ATCO a reconnu le pouvoir de la Commission d'imposer, comme condition de l'autorisation, une certaine attribution du produit de la vente projetée. À mon avis, l'argument ne tient pas. D'abord, la demande d'autorisation ne peut à elle seule être considérée comme une reconnaissance de la compétence de la Commission. De toute manière, une telle reconnaissance ne serait pas déterminante quant au droit applicable. De plus, sachant que, par le passé, la Commission avait jugé être investie du pouvoir d'attribuer le produit de la vente et avait exercé ce pouvoir, on peut présumer qu'ATCO lui a demandé d'autoriser l'attribution du produit de la vente pour le cas où elle rejetterait sa prétention relative à la compétence. En fait, il appert des décisions antérieures de la Commission d'autoriser ou non une opération que les entreprises de services publics contestent systématiquement son pouvoir d'attribuer le gain net en résultant (voir, p. ex., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

41 L'analyse exige au départ qu'on se penche sur le sens ordinaire des dispositions au cœur du litige, savoir le sous-al. 26(2)d)(i) de la GUA, le par. 15(1) et l'al. 15(3)d) de l'AEUBA et l'art. 37 de la

s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

GUA

26. . . .

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

. . .

(d) without the approval of the Board,

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

. . .

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

AEUBA

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB [Energy Resources Conservation Board] and the PUB [Public Utilities Board] that are granted or provided for by any enactment or by law.

. . .

(3) Without restricting subsection (1), the Board may do all or any of the following:

. . .

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

. . .

PUBA. Pour faciliter leur consultation, en voici le texte :

[TRADUCTION]

GUA

26. . . .

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

. . .

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

. . .

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

AEUBA

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB [Energy Resources Conservation Board] et à la PUB [Public Utilities Board].

. . .

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

. . .

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

. . .

PUBA

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

Some of the above provisions are duplicated in the other two statutes (see, e.g., PUBA, ss. 85(1) and 101(2)(d)(i); GUA, s. 22(1); see Appendix).

There is no dispute that s. 26(2) of the GUA contains a prohibition against, among other things, the owner of a utility selling, leasing, mortgaging or otherwise disposing of its property outside of the ordinary course of business without the approval of the Board. As submitted by ATCO, the power conferred is to approve without more. There is no mention in s. 26 of the grounds for granting or denying approval or of the ability to grant conditional approval, let alone the power of the Board to allocate the net profit of an asset sale. I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm"

PUBA

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

42 Certaines de ces dispositions figurent également dans les deux autres lois (voir, p. ex., le par. 85(1) et le sous-al. 101(2)d)(i) de la PUBA; le par. 22(1) de la GUA; texte en annexe).

43 Nul ne conteste que le par. 26(2) de la GUA interdit entre autres au propriétaire d'un service public d'aliéner ses biens, notamment par vente, location ou constitution d'hypothèque, sans l'autorisation de la Commission, sauf dans le cours normal des activités de l'entreprise. Comme l'a fait valoir ATCO, la Commission a le pouvoir d'autoriser l'opération, sans plus. L'article 26 ne fait aucune mention des raisons pour lesquelles l'autorisation peut être accordée ou refusée ni de la faculté d'autoriser l'opération à certaines conditions, encore moins du pouvoir d'attribuer le profit net réalisé. Je signale au passage que le pouvoir conféré au par. 26(2) suffit à dissiper la crainte de la Commission que le service public soit tenté de vendre ses biens à fort profit, au détriment des clients, si le bénéfice tiré de la vente lui revient entièrement.

44 Il est intéressant de noter que le par. 26(2) ne s'applique pas à tous les types de vente (ainsi que de location, de constitution d'hypothèque, d'aliénation, de grèvement ou de fusion). En effet, il prévoit une exception pour la vente effectuée dans le cours normal des activités de l'entreprise. Si le régime législatif conférait à la Commission le pouvoir d'attribuer le produit de la vente des biens d'un service public, comme on le prétend en l'espèce, il va de soi que le par. 26(2) s'appliquerait à toute vente de biens ou, à tout le moins, ne prévoirait une exception que pour la vente n'excédant pas un certain montant. Il appert que l'attribution du produit de la vente aux clients n'est pas l'un de ses objets.

test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

45 Therefore, a simple reading of s. 26(2) of the GUA does permit one to conclude that the Board does not have the power to allocate the proceeds of an asset sale.

46 The City does not limit its arguments to s. 26(2); it also submits that the AEUBA, pursuant to s. 15(3), is an express grant of jurisdiction because it authorizes the Board to impose any condition to any order so long as the condition is necessary in the public interest. In addition, it relies on the general power in s. 37 of the PUBA for the proposition that the Board may, in any matter within its jurisdiction, make any order pertaining to that matter that is not inconsistent with any applicable statute. The intended meaning of these two provisions, however, is lost when the provisions are simply read in isolation as proposed by the City: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735; *Marche*, at paras. 59-60; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26, at para. 105. These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of "public interest" found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale

D'ailleurs, en ce qui concerne les biens non affectés au service public et étrangers à la prestation du service, l'application de cette disposition, à supposer qu'elle s'applique, est nécessairement limitée (surtout lorsque la vente satisfait au critère de l'« absence de préjudice »). Le paragraphe 26(2) ne peut avoir qu'un seul objet, soit garantir que le bien n'est pas affecté au service public, de manière que son aliénation ne nuise ni à la prestation du service ni à sa qualité.

Par conséquent, la simple lecture du par. 26(2) de la GUA permet de conclure que la Commission n'a pas le pouvoir d'attribuer le produit de la vente d'un bien.

La Ville ne fonde pas son argumentation que sur le par. 26(2); elle fait aussi valoir que le par. 15(3) de l'AEUBA, qui autorise la Commission à assortir ses ordonnances des conditions qu'elle estime nécessaires dans l'intérêt public, confère un pouvoir exprès à la Commission. De plus, elle invoque le pouvoir général que prévoit l'art. 37 de la PUBA pour soutenir que la Commission peut, dans les domaines de sa compétence, rendre toute ordonnance qui n'est pas incompatible avec une disposition législative applicable. Or, considérer ces deux dispositions isolément comme le préconise la Ville fait perdre de vue leur véritable portée : R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 21; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735; *Marche*, par. 59-60; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26, par. 105. En eux-mêmes, le par. 15(3) et l'art. 37 sont vagues et sujets à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. De plus, la notion d'« intérêt public » à laquelle renvoie le par. 15(3) est très large et élastique; la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites.

Même si, à l'issue de la première étape du processus d'interprétation législative, je suis enclin à

proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

2.3.3 Implicit Powers: Entire Context

The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:

> As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

conclure que la loi est silencieuse en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente, je poursuis l'analyse car on peut néanmoins soutenir que les dispositions sont jusqu'à un certain point ambiguës et incohérentes.

48 Notre Cour a affirmé maintes fois que le sens grammatical et ordinaire d'une disposition n'est pas déterminant et ne met pas fin à l'analyse. Il faut tenir compte du contexte global de la disposition, même si, à première vue, le sens de son libellé peut paraître évident (voir *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3, par. 34; Sullivan, p. 20-21). Je vais donc examiner l'objet et l'esprit des lois habilitantes, l'intention du législateur et les normes juridiques pertinentes.

2.3.3 Pouvoir implicite : contexte global

49 Les dispositions en cause figurent dans des lois qui font elles-mêmes partie d'un cadre législatif plus large dont on ne peut faire abstraction :

> Œuvre d'un législateur rationnel et logique, la loi est censée former un système : chaque élément contribue au sens de l'ensemble et l'ensemble, au sens de chacun des éléments : « chaque disposition légale doit être envisagée, relativement aux autres, comme la fraction d'un ensemble complet » . . .
>
> (P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 388)

Comme dans le cadre de toute interprétation législative, appelée à circonscrire les pouvoirs d'un organisme administratif, une cour de justice doit tenir compte du contexte qui colore les mots et du cadre législatif. L'objectif ultime consiste à dégager l'intention manifeste du législateur et l'objet véritable de la loi tout en préservant l'harmonie, la cohérence et l'uniformité des lois en cause (*Bell ExpressVu*, par. 27; voir également l'*Interpretation Act*, R.S.A. 2000, ch. I-8, art. 10, à l'annexe). « L'interprétation législative est [. . .] l'art de découvrir l'esprit du législateur qui imprègne les textes législatifs » : *Bristol-Myers Squibb Co.*, par. 102.

50 Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Le pouvoir discrétionnaire que le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA confèrent à la Commission n'est donc pas absolu. Comme le dit ATCO, la Commission doit l'exercer en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois (voir Sullivan, p. 154-155). Dans le même ordre d'idées, le passage suivant de l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1756, se révèle pertinent :

> Les pouvoirs d'un tribunal administratif doivent évidemment être énoncés dans sa loi habilitante, mais ils peuvent également découler implicitement du texte de la loi, de son économie et de son objet. Bien que les tribunaux doivent s'abstenir de trop élargir les pouvoirs de ces organismes de réglementation par législation judiciaire, ils doivent également éviter de les rendre stériles en interprétant les lois habilitantes de façon trop formaliste.

Il incombe à notre Cour de déterminer l'intention du législateur et d'y donner effet (*Bell ExpressVu*, par. 62) sans franchir la ligne qui sépare l'interprétation judiciaire de la formulation législative (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 26; *Bristol-Myers Squibb Co.*, par. 174). Cela dit, cette règle permet l'application de « la doctrine de la compétence par déduction nécessaire » : sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l'objectif du régime législatif : voir Brown, p. 2-16.2; *Bell Canada*, p. 1756. Par le passé, les cours de justice canadiennes ont appliqué la doctrine de manière à investir les organismes administratifs de la compétence nécessaire à l'exécution de leur mandat légal :

> [TRADUCTION] Lorsque l'objet de la législation est de créer un vaste cadre réglementaire, le tribunal administratif doit posséder les pouvoirs qui, par nécessité pratique et déduction nécessaire, découlent du pouvoir réglementaire qui lui est expressément conféré.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

I understand the City's arguments to be as follows: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 *Historical Background and Broader Context*

The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

Pursuant to *The Public Utilities Act*, the first public utility board was established as a

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (H.C. Ont.), p. 658-659, conf. par (1983), 42 O.R. (2d) 731 (C.A.) (voir également *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601 (C.A.); *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174).

52 Voici quelles sont selon moi les prétentions de la Ville : (1) en acquittant leurs factures, les clients acquièrent un droit sur les biens du propriétaire du service public et ont donc droit à une partie du profit tiré de leur vente; (2) le pouvoir de la Commission d'autoriser ou non la vente des biens d'un service public emporte, par nécessité, celui d'assujettir l'autorisation à une certaine répartition du produit de la vente. La doctrine de la compétence par déduction nécessaire est au cœur de la deuxième prétention de la Ville. Je ne peux faire droit ni à l'une ni à l'autre de ces prétentions qui, à mon avis, sont diamétralement contraires au droit applicable, comme le révèle ci-après l'examen du contexte global.

53 Après un bref rappel historique, je me pencherai sur la principale fonction de la Commission, l'établissement des tarifs, puis sur les pouvoirs accessoires qui peuvent être déduits du contexte.

2.3.3.1 *Historique et contexte général*

54 Les services publics sont réglementés en Alberta depuis la création en 1915 de l'organisme appelé Board of Public Utility Commissioners en vertu de la loi intitulée *The Public Utilities Act*, S.A. 1915, ch. 6, inspirée d'une loi américaine similaire : H. R. Milner, « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101, p. 101. Bien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question.

55 Suivant *The Public Utilities Act*, la première commission des services publics, composée de

three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

56 The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

57 In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA, the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b));

2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a); PUBA, s. 101(2)(a));

3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));

4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and

trois membres, surveillait de manière générale tous les services publics (art. 21), enquêtait sur les tarifs (art. 23), rendait des ordonnances concernant l'équipement (art. 24) et exigeait que chacun des services publics lui remette la liste complète de ses tarifs (art. 23). Signalons pour les besoins du présent pourvoi que la loi de 1915 exigeait également d'un service public qu'il obtienne de l'organisme l'autorisation de vendre un bien en dehors du cours normal de ses activités (al. 29g)).

La Commission a été créée en février 1995 par le fusionnement de l'Energy Resources Conservation Board et de la Public Utilities Board (voir Institut canadien du droit des ressources, *Canada Energy Law Service : Alberta* (éd. feuilles mobiles), p. 30-3101). Dès lors, toutes les affaires qui étaient du ressort des organismes fusionnés relevaient de sa compétence exclusive. La Commission a tous les pouvoirs, les droits et les privilèges des organismes auxquels elle a succédé (AEUBA, art. 13, par. 15(1); GUA, art. 59).

Outre les pouvoirs prévus dans la loi de 1915, qui sont pratiquement identiques à ceux que confère actuellement la PUBA, la Commission est aujourd'hui investie des pouvoirs exprès suivants :

1. rendre une ordonnance concernant l'amélioration du service ou du produit (PUBA, al. 80b));

2. autoriser l'entreprise de services publics à émettre des actions, des obligations ou d'autres titres d'emprunt (GUA, al. 26(2)a); PUBA, al. 101(2)a));

3. autoriser l'entreprise de services publics à aliéner ou à grever ses biens, concessions, privilèges ou droits, notamment en les louant ou en les hypothéquant (GUA, sous-al. 26(2)d)(i); PUBA, sous-al. 101(2)d)(i));

4. autoriser la fusion ou le regroupement des biens, concessions, privilèges ou droits de l'entreprise de services publics (GUA, sous-al. 26(2)d)(ii); PUBA, sous-al. 101(2)d)(ii));

5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50 percent of the outstanding capital stock of the owner of the public utility (GUA, s. 27(1); PUBA, s. 102(1)).

It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the

5. autoriser la vente d'actions de l'entreprise de services publics à une société ou l'inscription dans ses registres de toute cession d'actions à une société lorsque la vente ou la cession ferait en sorte que cette société détienne plus de 50 pour 100 des actions en circulation du propriétaire de l'entreprise de services publics (GUA, par. 27(1); PUBA, par. 102(1)).

58 Il appert donc de cette énumération qu'une entreprise de services publics a une marge de manœuvre très limitée. Il n'est fait mention ni du pouvoir d'attribuer le produit de la vente ni du pouvoir discrétionnaire de porter atteinte au droit de propriété.

59 Même lorsque le législateur a décidé de créer la Commission en 1995, il n'a pas jugé opportun de modifier la PUBA ou la GUA pour donner au nouvel organisme le pouvoir d'attribuer le produit d'une vente. Pourtant, la question suscitait déjà la controverse (voir, p. ex., *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, et *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116). Selon un principe bien établi, le législateur est présumé connaître parfaitement le droit existant, qu'il s'agisse de la common law ou du droit d'origine législative (voir Sullivan, p. 154-155). Il est également censé être au fait de toutes les circonstances entourant l'adoption de la nouvelle loi.

60 Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la GUA que son principal mandat, à l'égard des entreprises de services publics, est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première (voir Milner, p. 102; Brown, p. 2-16.6). S'exprimant au nom des juges majoritaires dans *Atco Ltd.*, le juge Estey a abondé dans ce sens (p. 576) :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par

community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board. [Emphasis added.]

In fact, even the Board itself, on its website (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm), describes its functions as follows:

> We regulate the safe, responsible, and efficient development of Alberta's energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City's first argument.

2.3.3.2 *Rate Setting*

62 Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:

> . . . the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. . . . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".

(R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory

les entreprises de services publics. Un régime de réglementation aussi vaste doit, pour être efficace, comprendre le droit de contrôler les réunions ou, pour reprendre l'expression du législateur, « l'union » des entreprises et installations existantes. Cela a sans aucun doute un rapport direct avec la fonction de fixation des tarifs qui constitue un des pouvoirs les plus importants attribués à la Commission. [Je souligne.]

Voici d'ailleurs comment la Commission décrit elle-même ses fonctions sur son site Internet (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm) :

> [TRADUCTION] La Commission réglemente l'exploitation sûre, responsable et efficiente des ressources énergétiques de l'Alberta — pétrole, gaz naturel, sables bitumineux, charbon et électricité — ainsi que les pipelines et les lignes de transport servant à l'acheminement vers les marchés. En ce qui a trait aux services publics, elle réglemente les tarifs des services de gaz naturel, d'électricité et d'eau appartenant au privé et le niveau de service y afférent, ainsi que les principaux réseaux de transport de gaz en Alberta, afin que les clients obtiennent des services sûrs et fiables à un prix juste et raisonnable. [Je souligne.]

Le processus par lequel la Commission fixe les tarifs est donc fondamental et son examen s'impose pour statuer sur la première prétention de la Ville.

2.3.3.2 *Établissement des tarifs*

La réglementation tarifaire a plusieurs objectifs — viabilité, équité et efficacité — qui expliquent le mode de fixation des tarifs :

> [TRADUCTION] . . . l'entreprise réglementée doit être en mesure de financer ses activités et tout investissement nécessaire à la poursuite de ses activités. [. . .] L'équité est liée à la redistribution de la richesse dans la société. L'objectif de la viabilité suppose déjà que les actionnaires ne doivent pas réaliser un « trop faible » rendement (défini comme la gratification requise pour assurer l'investissement continu dans l'entreprise), alors que celui de l'équité implique qu'ils ne doivent pas obtenir un rendement « trop élevé ».

(R. Green et M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities : A Manual for Regulators* (1999), p. 5)

Ces objectifs sont à l'origine d'un arrangement économique et social appelé « pacte

compact", which ensures that all customers have access to the utility at a fair price — nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 ("*Northwestern 1929*"), at pp. 192-93).

Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer *and* the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable . . . rates" (PUBA, s. 89(a); GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern 1979*"), at p. 691, adopted the following description of the process:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to

réglementaire » qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus, et qui, je l'explique plus loin, ne transmet aucun droit de propriété aux clients. Le pacte réglementaire accorde en fait aux entreprises réglementées le droit exclusif de vendre leurs services dans une région donnée à des tarifs leur permettant de réaliser un juste rendement au bénéfice de leurs actionnaires. En contrepartie de ce monopole, elles ont l'obligation d'offrir un service adéquat et fiable à tous les clients d'un territoire donné et voient leurs tarifs et certaines de leurs activités assujettis à la réglementation (voir Black, p. 356-357; Milner, p. 101; *Atco Ltd.*, p. 576; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186 (« *Northwestern 1929* »), p. 192-193).

64 Par conséquent, lorsqu'il s'agit d'interpréter les vastes pouvoirs de la Commission, on ne peut faire abstraction de ce subtil compromis servant de toile de fond à l'interprétation contextuelle. L'objet de la législation est de protéger le client *et* l'investisseur (Milner, p. 101). Le pacte ne supprime pas le caractère privé de l'entreprise. La Commission a essentiellement pour mandat d'établir une tarification qui accroît les avantages financiers des consommateurs et des investisseurs.

65 Elle tient son pouvoir de fixer les tarifs à la fois de la GUA (art. 16 et 17 et art. 36 à 45) et de la PUBA (art. 89 à 95). Il lui incombe de fixer des [TRADUCTION] « tarifs [. . .] justes et raisonnables » (PUBA, al. 89a); GUA, al. 36a)). Pour le faire, elle doit [TRADUCTION] « établi[r] une base tarifaire pour les biens du propriétaire » et « fixe[r] un juste rendement par rapport à cette base tarifaire » (GUA, par. 37(1)). Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern 1979* »), p. 691, notre Cour a décrit le processus comme suit :

> La PUB approuve ou fixe pour les services publics des tarifs destinés à couvrir les dépenses et à permettre à l'entreprise d'obtenir un taux de rendement ou profit convenable. Le processus s'accomplit en deux étapes. Dans la première étape, la PUB établit une base de tarification en calculant le montant des fonds investis par la compagnie en terrains, usines et équipements, plus le montant alloué au fonds de roulement, sommes dont

provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-2.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process:

il faut établir la nécessité dans l'exploitation de l'entreprise. C'est également à cette première étape qu'est calculé le revenu nécessaire pour couvrir les dépenses d'exploitation raisonnables et procurer un rendement convenable sur la base de tarification. Le total des dépenses d'exploitation et du rendement donne un montant appelé le revenu nécessaire. Dans une deuxième étape, les tarifs sont établis de façon à pouvoir produire, dans des conditions météorologiques normales, « le revenu nécessaire prévu ». Ces tarifs restent en vigueur tant qu'ils ne sont pas modifiés à la suite d'une nouvelle requête ou d'une plainte, ou sur intervention de la Commission. C'est également à cette seconde étape que les tarifs provisoires sont confirmés ou réduits et, dans ce dernier cas, qu'un remboursement est ordonné.

(Voir également *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984, p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (C. div. Ont.), p. 701-702.)

Pour établir la base tarifaire, la Commission tient donc compte (GUA, par. 37(2)) :

[TRADUCTION]

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. L'entreprise n'est d'ailleurs pas non plus à l'abri de la perte pouvant en découler. Il ressort du libellé des dispositions précitées que les biens appartiennent à l'entreprise de services publics. Droit de propriété sur les biens et droit au profit ou à la perte lors de leur réalisation vont de pair. L'investisseur s'attend à toucher le produit net, une fois tous les frais payés, soit l'équivalent de la valeur actualisée de l'investissement initial. Le versement aux clients d'une partie du produit net restant, à l'issue d'une nouvelle répartition, sape le processus d'investissement : MacAvoy et Sidak, p. 244. À vrai dire, les

MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

Wittmann J.A., at the Court of Appeal, said it best when he stated:

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the

opérations de spéculation seraient encore plus fréquentes si le service public et ses actionnaires ne touchaient pas le profit éventuel, car les investisseurs s'attendraient à obtenir une meilleure prime de la seule manière alors possible, le rendement de la mise de fonds initiale; en outre, ils seraient moins disposés à courir un risque.

68 La Ville a-t-elle raison alors de prétendre que les clients ont un droit de propriété sur le service public? Absolument pas. Sinon, les principes fondamentaux du droit des sociétés seraient dénaturés. En acquittant sa facture, le client paie pour le service réglementé un montant équivalant au coût du service et des ressources nécessaires. Il ne se porte pas implicitement acquéreur des biens des investisseurs. Le paiement n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens. Le client acquitte le prix du service, à l'exclusion du coût de possession des biens eux-mêmes : [TRADUCTION] « Le client d'un service public n'en est pas le propriétaire puisqu'il n'a pas droit au reliquat des biens » : MacAvoy et Sidak, p. 245 (voir également p. 237). Le client n'a rien investi. Les actionnaires, eux, ont investi des fonds et assument tous les risques car ils touchent le profit restant. Le client court seulement le [TRADUCTION] « risque que le prix change par suite de la modification (autorisée) du coût du service, ce qui n'arrive que périodiquement lors de la révision des tarifs par l'organisme de réglementation » (MacAvoy et Sidak, p. 245).

69 Je suis d'accord avec ce qu'affirme ATCO à ce sujet au par. 38 de son mémoire :

> [TRADUCTION] Les biens en cause appartiennent au propriétaire du service public tout comme ses autres biens. Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

Comme l'a si bien dit le juge Wittmann, de la Cour d'appel :

> [TRADUCTION] Le client d'un service public paie un service, mais n'obtient aucun droit de propriété sur les

assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945).

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case,

biens de cette entreprise. Lorsque le tarif établi correspond au prix du service pour la période considérée, le client n'acquiert à l'égard des biens non amortissables aucun droit fondé sur l'equity ou issu de la loi lorsqu'il n'a payé que pour l'utilisation de ces biens. [Je souligne; par. 64.]

Je suis entièrement d'accord. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. Alors que l'entreprise a été rémunérée pour le service fourni, les clients n'ont versé aucune contrepartie en échange du profit tiré de la vente des biens. L'argument voulant que les biens achetés soient pris en compte dans l'établissement de la base tarifaire ne doit pas embrouiller la question de savoir qui est le véritable titulaire du droit de propriété sur les biens et qui supporte les risques y afférents. Les biens comptent effectivement parmi les facteurs considérés pour fixer les tarifs, et un service public ne peut vendre un bien affecté à la prestation du service pour réaliser un profit et, ce faisant, diminuer la qualité du service ou majorer son prix. Même si les biens du service public sont pris en compte dans l'établissement de la base tarifaire, les actionnaires sont les seuls touchés lorsque la vente donne lieu à un profit ou à une perte. L'entreprise absorbe les pertes et les gains, l'appréciation ou la dépréciation des biens, eu égard à la conjoncture économique et aux défaillances techniques imprévues, mais elle continue de fournir un service fiable sur le plan de la qualité et du prix. Le client peut courir le risque que l'entreprise manque à ses obligations, mais cela ne lui donne pas droit au reliquat des biens. Sans m'appuyer indûment sur la jurisprudence américaine, je signale qu'aux États-Unis, l'arrêt de principe en la matière est *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), qui s'appuie sur le même principe que celui appliqué dans l'arrêt *Market St. Ry. Co. c. Railroad Commission of State of California*, 324 U.S. 548 (1945).

De plus, il faut reconnaître qu'une entreprise de services publics n'est pas une société d'État, une association d'assistance mutuelle, une coopérative ou une société mutuelle même si elle sert « l'intérêt public » en fournissant à la collectivité un service

the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 *The Power to Attach Conditions*

As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It

nécessaire (en l'occurrence, la distribution du gaz naturel). Son capital ne provient pas des pouvoirs publics ou des clients, mais d'investisseurs privés qui escomptent un rendement aussi élevé que celui offert par d'autres placements présentant les mêmes caractéristiques d'attractivité, de stabilité et de certitude (voir *Northwestern 1929*, p. 192). Les actionnaires s'attendent donc nécessairement à toucher le gain ou à subir la perte résultant de l'aliénation d'un élément d'actif de l'entreprise, comme un terrain ou un bâtiment.

71 Il appert de l'analyse qui précède portant sur le droit de propriété que la Commission ne pouvait effectuer un remboursement tacite en attribuant aux clients le profit tiré de la vente des biens au motif que les tarifs avaient été excessifs dans le passé. C'est pourquoi la première prétention de la Ville doit être rejetée. La Commission a tenté de remédier à une supposée rétribution excessive de l'entreprise de services publics par ses clients. Or, aucune des lois applicables ne lui confère le pouvoir d'effectuer un tel remboursement à partir d'une telle perception erronée. La jurisprudence des différentes provinces confirme que les organismes de réglementation n'ont pas le pouvoir de modifier les tarifs rétroactivement (*Northwestern 1979*, p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (C.A. Alb.), p. 715, autorisation d'appel refusée, [1981] 2 R.C.S. vii; *Re Dow Chemical Canada Inc.* (C.A.), p. 734-735). Qui plus est, on ne peut même pas dire qu'il y a eu paiement excessif : la tarification est un processus conjectural où clients et actionnaires assument ensemble leur part du risque lié aux activités de l'entreprise de services publics (voir MacAvoy et Sidak, p. 238-239).

2.3.3.3 *Le pouvoir d'imposer des conditions*

72 La Ville soutient en second lieu que le pouvoir d'attribuer le produit de la vente des biens d'un service public est nécessairement accessoire aux pouvoirs exprès que confèrent à la Commission l'AEUBA, la GUA et la PUBA. Elle fait valoir que la Commission a nécessairement ce pouvoir lorsqu'elle exerce celui — discrétionnaire — d'autoriser ou non la vente d'éléments d'actifs, puisqu'elle

submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

* [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
* [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
* [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
* [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
* [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

(See also Brown, at p. 2-16.3.)

74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the

peut assortir de toute condition l'ordonnance autorisant la vente. Je ne suis pas d'accord.

La Ville semble tenir pour acquis que la doctrine de la compétence par déduction nécessaire s'applique tout autant aux pouvoirs « définis largement » qu'à ceux qui sont « biens circonscrits ». Ce ne saurait être le cas. Dans sa décision *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, 23 mars 1987, par. 4.73, la Commission de l'énergie de l'Ontario a énuméré les situations dans lesquelles s'applique la doctrine de la compétence par déduction nécessaire :

[TRADUCTION]

* la compétence alléguée est nécessaire à la réalisation des objectifs du régime législatif et essentielle à l'exécution du mandat de la Commission;
* la loi habilitante ne confère pas expressément le pouvoir de réaliser l'objectif législatif;
* le mandat de la Commission est suffisamment large pour donner à penser que l'intention du législateur était de lui conférer une compétence tacite;
* la Commission n'a pas à exercer la compétence alléguée en s'appuyant sur des pouvoirs expressément conférés, démontrant ainsi l'absence de nécessité;
* le législateur n'a pas envisagé la question et ne s'est pas prononcé contre l'octroi du pouvoir à la Commission.

(Voir également Brown, p. 2-16.3.)

Il est donc clair que la doctrine de la compétence par déduction nécessaire sera moins utile dans le cas de pouvoirs largement définis que dans celui de pouvoirs bien circonscrits. Les premiers seront nécessairement interprétés de manière à ne s'appliquer qu'à ce qui est rationnellement lié à l'objet de la réglementation. C'est ce qu'explique la professeure Sullivan, à la p. 228 :

[TRADUCTION] En pratique, toutefois, l'analyse téléologique rend les pouvoirs conférés aux organismes administratifs presque infiniment élastiques. Un pouvoir bien circonscrit peut englober, par « déduction nécessaire », tout ce qui est requis pour que le responsable

purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;

2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and

3. It specifically seeks to prevent favoritism toward investors.

Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in

ou l'organisme puisse accomplir l'objet de son octroi. À l'inverse, on considère qu'un pouvoir largement défini vise uniquement ce qui est rationnellement lié à son objet. Il s'ensuit qu'un pouvoir a une portée qui augmente ou diminue au besoin, en fonction de son objet. [Je souligne.]

75 En l'espèce, l'art. 15 de l'AEUBA, qui permet à la Commission d'imposer des conditions supplémentaires dans le cadre d'une ordonnance, paraît à première vue conférer un pouvoir dont la portée est infiniment élastique. J'estime cependant que la Ville ne saurait y avoir recours pour accroître les pouvoirs que le par. 26(2) de la GUA confère à la Commission. Notre Cour doit interpréter le par. 15(3) de l'AEUBA conformément à l'objet du par. 26(2).

76 Dans leur article, MacAvoy et Sidak avancent trois raisons principales d'exiger qu'une vente soit autorisée par la Commission (p. 234-236) :

1. éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients;

2. garantir que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou d'autres intéressés;

3. éviter précisément que les investisseurs ne soient favorisés.

77 Par conséquent, pour qu'un organisme de réglementation ait le pouvoir d'attribuer le produit d'une vente, la preuve doit établir que ce pouvoir lui est nécessaire dans les faits pour atteindre les objectifs de la loi, ce qui n'est pas le cas en l'espèce (voir l'arrêt *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275 (C.A.)). Pour satisfaire aux trois exigences susmentionnées, il n'est pas nécessaire que la Commission détermine qui touchera le produit de la vente. Le volet intérêt public ne peut à lui seul lui conférer le pouvoir d'attribuer la totalité du profit tiré de la vente de biens. En fait, il n'est pas nécessaire à l'accomplissement de son mandat qu'elle puisse ordonner à l'entreprise de services

carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the

publics de céder la plus grande partie du produit de la vente en contrepartie de l'autorisation accordée. La Commission dispose, dans les limites de sa compétence, d'autres moyens que l'appropriation du produit de la vente, le plus évident étant le refus d'autoriser une vente qui, à son avis, nuira à la qualité ou à la quantité des services offerts ou occasionnera des frais d'exploitation supplémentaires. Ce qui ne veut pas dire qu'elle ne peut jamais assujettir son autorisation à une condition. Par exemple, elle pourrait autoriser la vente à la condition que l'entreprise prenne des engagements en ce qui concerne le remplacement des biens en cause et leur rentabilité. Elle pourrait aussi exiger le réinvestissement d'une partie du produit de la vente dans l'entreprise afin de préserver un système d'exploitation moderne assurant une croissance optimale.

J'estime que permettre la confiscation du gain net tiré de la vente sous prétexte de protéger les clients et d'agir dans l'« intérêt public » c'est se méprendre grandement sur le pouvoir de la Commission d'autoriser ou non une vente et faire totalement abstraction des fondements économiques de la tarification exposés précédemment. S'approprier ainsi un produit net extraordinaire pour le compte des clients serait d'un opportunisme très poussé qui, en fin de compte, se traduirait par une hausse du coût du capital pour l'entreprise (MacAvoy et Sidak, p. 246). Au risque de me répéter, une entreprise de services publics est avant tout une entreprise privée dont l'objectif est de réaliser des profits. Cela n'est pas contraire au régime législatif, même si le pacte réglementaire modifie les principes économiques habituellement applicables, les lois habilitantes prévoyant explicitement différentes limitations. Aucune des trois lois pertinentes en l'espèce ne confère à la Commission le pouvoir d'attribuer le produit de la vente d'un bien et d'empiéter de la sorte sur le droit de propriété de l'entreprise de services publics.

Il est bien établi qu'une disposition législative susceptible d'avoir un effet confiscatoire doit être interprétée avec prudence afin de ne pas dépouiller les parties intéressées de leurs droits lorsque ce

legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 *Other Considerations*

Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 *If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?*

In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether

n'est pas l'intention manifeste du législateur (voir Sullivan, p. 400-403; Côté, p. 607-613; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64, par. 26; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349, p. 357; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167, p. 197). Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits, ce qui irait à l'encontre des principes d'interprétation susmentionnés.

80 Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut le prévoir expressément dans la loi, à l'instar de certains États américains (le Connecticut, par exemple).

2.4 *Autres considérations*

81 Dans le cadre du pacte réglementaire, les clients sont protégés par la procédure d'établissement des tarifs à l'issue de laquelle la Commission doit rendre une décision pondérée. Il appert du dossier que la Ville n'a pas saisi la Commission d'une demande d'approbation du tarif général en réponse à celle présentée par ATCO afin d'obtenir l'autorisation de vendre des biens. Néanmoins, si elle l'avait fait, la Commission aurait pu, de son propre chef, convoquer les parties intéressées à une audience afin de fixer de nouveaux tarifs justes et raisonnables tenant dûment compte de la situation financière nouvelle devant résulter de la vente (PUBA, al. 89a); GUA, art. 24, al. 36a), par. 37(3), art. 40) (texte en annexe).

2.5 *À supposer que la Commission ait eu le pouvoir de répartir le produit de la vente, a-t-elle exercé ce pouvoir de manière raisonnable?*

82 Vu ma conclusion touchant à la compétence, il n'est pas nécessaire de déterminer si la Commission

the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to *protect the customers* (i.e., was the order *necessary in the public interest*?); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine *if it should allocate* part of the sale proceeds to ratepayers. Rather, it merely guides the Board on *what to allocate and how to allocate it* (if it should do so in the first place). It is also interesting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed

a exercé son pouvoir discrétionnaire de façon raisonnable en répartissant le produit de la vente comme elle l'a fait. Toutefois, vu les motifs de mon collègue le juge Binnie, je me penche très brièvement sur la question. Le règlement du pourvoi aurait été le même si j'avais conclu que la Commission avait ce pouvoir, car j'estime que la décision qu'elle a rendue sur son fondement ne satisfaisait pas à la norme de la raisonnabilité.

Je ne vois pas très bien comment on pourrait conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs et ayant en outre conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients. À mon avis, une cour de justice appelée à contrôler la décision au fond doit se livrer à une analyse en deux étapes. Premièrement, elle doit déterminer si l'ordonnance était justifiée au vu de l'obligation de la Commission de *protéger les clients* (c.-à-d. l'ordonnance était-elle *nécessaire dans l'intérêt public*?). Deuxièmement, dans l'affirmative, elle doit déterminer si la Commission a bien appliqué la *formule TransAlta* (voir le par. 12 des présents motifs), qui renvoie à la différence entre la valeur comptable nette des biens et leur coût historique, d'une part, et à l'appréciation des biens, d'autre part. Pour les besoins de l'analyse, je ne vois dans la deuxième étape qu'une opération mathématique, rien de plus. Je ne crois pas que la *formule TransAlta* oriente la décision de la Commission *d'attribuer ou non* une partie du produit de la vente aux clients. Elle ne préside qu'à la détermination de *ce qui sera attribué et des modalités d'attribution* (lorsqu'elle a décidé qu'il y avait lieu d'attribuer le produit de la vente). Il importe également de signaler que nul ne conteste que seule la valeur comptable figurant dans les états financiers de l'entreprise de services publics doit être utilisée pour le calcul.

Je le répète, la Commission n'était même pas justifiée, à mon sens, d'exercer le pouvoir d'attribuer le produit de la vente. Suivant son raisonnement même, elle ne doit exercer son pouvoir discrétionnaire d'agir dans l'intérêt public que lorsque les

or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation:

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

(Decision 2002-037, at para. 54)

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude

clients subiraient ou seraient susceptibles de subir un préjudice. Or sa conclusion à ce sujet est claire : aucun préjudice ou risque de préjudice n'était associé à l'opération projetée :

> [TRADUCTION] Comme les mêmes services seront offerts à partir d'autres installations, et vu l'acceptation de ce transfert par les clients, la Commission est convaincue que la vente ne devrait pas avoir de répercussions sur le niveau de service. Quoi qu'il en soit, elle considère que le niveau de service offert pourra au besoin faire l'objet d'un examen et d'une mesure corrective dans le cadre d'une procédure ultérieure.

(Décision 2002-037, par. 54)

Après avoir déclaré que, tout bien considéré, les clients ne seraient pas lésés, la Commission a statué au vu des éléments de preuve présentés qu'ils réaliseraient apparemment des économies. Aucun droit légitime des clients ne pouvait ni ne devait être protégé par un refus d'autorisation ou un octroi assorti de la condition de répartir le produit de la vente d'une certaine manière. Même si la Commission avait conclu à la possibilité que la vente ait un effet préjudiciable, comment pouvait-elle, à ce stade, attribuer le produit de la vente en fonction d'une perte éventuelle indéterminée? La mauvaise foi présumée d'ATCO qui paraît sous-tendre la détermination de la Commission à protéger le public contre un risque éventuel, en l'absence de tout fondement factuel, me préoccupe également. De toute manière, je l'ai déjà dit, cette détermination à protéger l'intérêt public est également difficile à concilier avec le pouvoir exprès de la Commission de prévenir tout préjudice causé aux clients en refusant d'autoriser la vente des biens d'un service public. Je rappelle que la Commission jouit d'un pouvoir discrétionnaire considérable dans l'établissement des tarifs futurs afin de protéger l'intérêt public.

Par conséquent, je suis d'avis que la Commission n'a pas cerné d'intérêt public à protéger et qu'aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Indépendamment de ma conclusion au sujet de la compétence de la Commission, je conclus que sa décision d'exercer son pouvoir discrétionnaire

that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e., context, legislative intention and objective. Going further than required by reading in *unnecessary* powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

88 BINNIE J. (dissenting) — The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board ("Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the

de protéger l'intérêt public ne satisfaisait pas à la norme de la raisonnabilité.

3. Conclusion

Le rôle de notre Cour dans le présent pourvoi a été d'interpréter les lois habilitantes en tenant compte comme il se doit du contexte, de l'intention du législateur et de l'objectif législatif. Aller plus loin et conclure à l'issue d'une interprétation large que l'organisme administratif jouit de pouvoirs *non nécessaires* n'est pas conforme aux règles d'interprétation législative. Une telle approche est particulièrement dangereuse lorsqu'un droit de propriété est en jeu.

La Commission n'avait pas le pouvoir d'attribuer le produit de la vente d'un bien du service public; sa décision ne satisfaisait pas à la norme de la décision correcte. Par conséquent, je suis d'avis de rejeter le pourvoi de la Ville et d'accueillir le pourvoi incident d'ATCO, avec dépens dans les deux instances. Je suis également d'avis d'annuler la décision de la Commission et de lui renvoyer l'affaire en lui enjoignant d'autoriser la vente des biens d'ATCO et de reconnaître son droit au produit de la vente.

Version française des motifs de la juge en chef McLachlin et des juges Binnie et Fish rendus par

LE JUGE BINNIE (dissident) — L'intimée, ATCO Gas and Pipelines Ltd. (« ATCO »), fait partie d'une grande société qui, directement et par l'entremise de diverses filiales, exploite à la fois des entreprises réglementées et des entreprises non réglementées. L'Alberta Energy and Utilities Board (« Commission ») estime qu'il n'est pas dans l'intérêt public d'encourager les entreprises de services publics à jumeler leurs activités dans les deux secteurs. Plus particulièrement, elle a adopté des politiques afin de dissuader les entreprises de services publics de faire de leur secteur réglementé un lieu de spéculation foncière et d'augmenter ainsi le rendement de leurs investissements indépendamment du cadre réglementaire. En attribuant une partie du profit à l'entreprise de services publics (et à ses actionnaires), la Commission récompense la diligence avec laquelle elle se départit de biens qui ne sont

profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

I. Analysis

ATCO's argument boils down to the proposition announced at the outset of its factum:

In the absence of any property right or interest and of any harm to the customers arising from the

plus productifs ou qui pourraient l'être davantage s'ils étaient employés autrement. Toutefois, en portant une partie du profit au crédit de la base tarifaire de l'entreprise (c.-à-d. en la déduisant d'autres coûts), la Commission tente d'empêcher les entreprises de services publics de céder à la tentation d'infléchir les décisions afférentes à leurs activités réglementées pour favoriser la réalisation de profits indus. De son point de vue, un tel compromis est nécessaire dans l'intérêt du public, celui-ci conférant à ATCO un monopole dans un secteur d'activité. Dans la recherche de ce compromis, la Commission a autorisé ATCO à vendre un terrain et un entrepôt situés au centre-ville de Calgary, mais refusé qu'elle conserve, au bénéfice de ses actionnaires, la totalité du profit découlant de l'appréciation du terrain dont le coût d'acquisition était pris en compte, depuis 1922, pour la tarification du gaz naturel. La Commission a ordonné que le profit tiré de la vente soit attribué à raison d'un tiers à ATCO et que les deux tiers servent à réduire ses coûts, contribuant à contenir toute hausse des tarifs et favorisant ainsi la clientèle.

89 J'ai lu avec intérêt les motifs de mon collègue le juge Bastarache, mais, en toute déférence, je ne suis pas d'accord avec ses conclusions. Comme nous le verrons, le par. 15(3) de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), confère à la Commission le pouvoir d'assujettir la vente aux [TRADUCTION] « conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Il appartenait à la Commission de décider de la nécessité d'imposer des conditions dans l'intérêt public. La Cour d'appel de l'Alberta a infirmé la décision de la Commission. En toute déférence, j'estime que la Commission était mieux placée que la Cour d'appel ou que notre Cour pour juger de la nécessité de protéger l'intérêt public dans ce domaine. J'accueillerais le pourvoi et rétablirais la décision de la Commission.

I. Analyse

90 La thèse d'ATCO se résume à ce qu'elle affirme au début de son mémoire :

[TRADUCTION] À défaut de tout droit de propriété et de tout préjudice causé à la clientèle par le

withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.

(Respondent's factum, at para. 2)

91 For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "conside[r] necessary in the public interest".

A. *The Board's Statutory Authority*

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA"), provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them . . .". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions):

In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property.

dessaisissement, rien ne justifiait qu'on puise dans les poches de l'entreprise. En fait, le présent pourvoi doit être réglé au regard du droit de propriété.

(Mémoire de l'intimée, par. 2)

Pour les motifs qui suivent, je ne crois pas que le litige ressortisse au droit de propriété. ATCO a choisi d'investir dans un secteur réglementé, celui de la distribution du gaz, où le rendement est établi par la Commission, et non par le marché. À mon avis, la question en litige est essentiellement de savoir si la Cour d'appel de l'Alberta était justifiée de restreindre les conditions que la Commission pouvait « juge[r] nécessaires dans l'intérêt public ».

A. *Les pouvoirs légaux de la Commission*

La première question qui se pose est celle de la compétence. D'où la Commission tient-elle le pouvoir de rendre l'ordonnance que conteste ATCO? La réponse de la Commission comporte trois volets. Le paragraphe 22(1) de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA »), prévoit entre autres que [TRADUCTION] « [l]a Commission assure la surveillance générale des services de gaz et de leurs propriétaires . . . ». Selon la Commission, cette disposition lui confère le vaste pouvoir d'établir des politiques qui débordent le cadre du règlement de demandes au cas par cas (approbation de tarifs, etc.). Élément plus pertinent encore, le sous-al. 26(2)d)(i) de la même loi interdit à l'entreprise réglementée de vendre ses biens, de les louer ou de les grever par ailleurs sans l'autorisation de la Commission. (Voir dans le même sens le sous-al. 101(2)d)(i) de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45.) Tous conviennent que cette limitation s'applique à la vente projetée par ATCO du terrain et de l'entrepôt situés au centre-ville de Calgary et que si les circonstances l'avaient justifié, la Commission aurait pu simplement refuser son autorisation. En l'espèce, la Commission a décidé d'autoriser la vente et de l'assujettir à certaines conditions. Elle a statué que le pouvoir plus large de refuser d'autoriser la vente englobait celui, plus restreint, de l'autoriser en l'assujettissant à certaines conditions :

[TRADUCTION] Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher une

In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

(Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576, Estey J., for the majority, stated:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what *the Board* considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. ATCO says the Board overstepped even these generous limits. In ATCO's submission:

> Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

(Respondent's factum, at para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate

entreprise de services publics de se départir d'un bien. Il s'ensuit donc qu'elle peut autoriser une aliénation et l'assortir de conditions susceptibles de bien protéger les intérêts du consommateur.

(Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), par. 47)

Il n'est toutefois pas nécessaire qu'elle s'appuie sur un tel pouvoir implicite pour établir des conditions. Je le répète, le par. 15(3) de l'AEUBA confère explicitement à la Commission le pouvoir de [TRADUCTION] « rendre toute autre ordonnance et [d']imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Dans *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576, le juge Estey a dit au nom des juges majoritaires :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par les entreprises de services publics. [Je souligne.]

Le paragraphe 15(3) dispose que les conditions fixées sont celles que *la Commission* juge nécessaires. Évidemment, son pouvoir discrétionnaire n'est pas illimité. Elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré : *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29. ATCO prétend que la Commission a même outrepassé un aussi large pouvoir. Voici un extrait de son mémoire :

> [TRADUCTION] Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

(Mémoire de l'intimée, par. 38)

À mon avis, toutefois, la Commission devait déterminer la hauteur du profit qu'ATCO était admise à tirer de son investissement dans une entreprise réglementée.

Subsidiairement, ATCO soutient que la Commission s'est indûment livrée à une

making". But Alberta is an "original cost" jurisdiction, and no one suggests that the Board's original cost rate making during the 80-plus years this investment has been reflected in ATCO's ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of "all gas utilities, and the owners of them" were matters squarely within the Board's statutory mandate.

B. *The Board's Decision*

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate-making responsibilities. However, I do not agree that the hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

> the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the Board was not engaged in fixing rates (if that could provide any justification, which is denied).
>
> (Respondent's factum, at para. 98)

95 It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171. That case (which I will refer to as *TransAlta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174:

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve

« tarification rétroactive ». Or, l'Alberta a opté pour la tarification selon le « coût historique » et personne ne laisse entendre que, depuis plus de 80 ans, la Commission applique à tort cette méthode qui prend en compte l'investissement d'ATCO pour l'établissement de sa base tarifaire. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale [TRADUCTION] « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission.

B. *La décision de la Commission*

ATCO soutient que la décision de la Commission doit être considérée isolément, sans égard aux attributions de l'organisme en matière de tarification. Toutefois, je ne crois pas que l'audience tenue pour l'application de l'art. 26 puisse être ainsi dissociée des attributions générales de la Commission à titre d'organisme de réglementation. Dans son mémoire, ATCO fait valoir ce qui suit :

> [TRADUCTION] . . . la demande d'[ATCO] n'avait rien à voir avec l'approbation de tarifs et la Commission n'était pas engagée dans un processus de tarification (à supposer que cela ait pu la justifier, ce qui est nié).
>
> (Mémoire de l'intimée, par. 98)

Il semble que la Commission ait entendu la demande d'autorisation fondée sur l'art. 26 indépendamment d'une demande d'approbation de tarifs en raison, premièrement, de la manière dont ATCO avait engagé l'instance et, deuxièmement, de l'approbation de cette démarche par la Cour d'appel de l'Alberta dans *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171 (« *TransAlta (1986)* »). Il s'agit de l'arrêt de principe albertain en ce qui concerne l'attribution du profit réalisé lors de l'aliénation d'un bien affecté à un service public, et la Cour d'appel y a énoncé la *formule TransAlta* que la Commission a appliquée en l'espèce. Voici ce qu'a dit le juge Kerans à ce sujet (p. 174) :

> [TRADUCTION] Je signale en passant que je comprends maintenant que toutes les parties ont intérêt à ce que

issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted:

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding.* On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Underlining and italics added.]

(Decision 2002-037, at para. 13)

In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

les questions de cette nature soient, si possible, résolues avant l'audition de la demande générale de majoration tarifaire de manière à ne pas alourdir cette procédure déjà complexe.

96 Fort de ces propos de la Cour d'appel de l'Alberta, j'accorderais peu d'importance à l'argument procédural d'ATCO. Nous le verrons, la décision de la Commission est directement liée à la tarification générale, les deux tiers du profit étant déduits des coûts à partir desquels sont ultimement déterminés les besoins en revenus d'ATCO. Je l'ai déjà dit, le profit tiré de la vente des biens d'ATCO situés à Calgary constituera une rentrée courante (et non historique), et si la décision de la Commission est confirmée, les deux tiers du profit tiré de l'opération seront pris en compte pour la tarification ultérieure (et non de manière rétroactive).

97 L'audience tenue pour l'application de l'art. 26 s'est déroulée en deux étapes. La Commission a d'abord décidé qu'elle ne refusait pas d'autoriser la vente projetée vu l'« absence de préjudice », un critère qu'elle avait élaboré au fil des ans, mais qui n'était pas prévu dans les lois (décision 2001-78). Cependant, elle a lié son autorisation à l'examen subséquent des conséquences financières. Comme elle l'a elle-même fait remarquer :

> [TRADUCTION] Dans la décision 2001-78, la Commission a autorisé la vente parce qu'il avait été établi que les clients ne s'opposaient pas à l'opération, qu'ils ne subiraient pas une diminution de service et que la vente ne risquait pas de leur infliger un préjudice financier *qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure.* Elle a donc conclu à l'absence de préjudice et décidé que la vente pouvait avoir lieu. [Soulignements et italiques ajoutés.]

(Décision 2002-037, par. 13)

98 ATCO fait abstraction de ce qui figure en italique dans cet extrait. Elle soutient que la Commission était *functus officio* après la première étape de l'audience. Or, elle avait elle-même consenti au déroulement de la procédure en deux étapes, et la deuxième partie de l'audience a effectivement été consacrée à sa demande d'attribution du profit tiré de la vente.

99 In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called "the regulatory compact" (Decision 2002-037, at para. 44). In the Board's view:

(a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;

(b) decisions made about the utility should be driven by both parties' interests;

(c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and

(d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

100 For purposes of this appeal, it is important to set out the Board's policy reasons in its own words:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.
>
> The Board believes that some method of balancing both parties' interests will result in optimization

Au cours de la deuxième étape de l'audition de la demande fondée sur l'art. 26, la Commission a attribué un tiers du profit net à ATCO et deux tiers à la base tarifaire (au bénéfice des clients). Elle a exposé les raisons pour lesquelles elle jugeait cette répartition nécessaire à la protection de l'intérêt public. Elle a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients dans le cadre de ce qu'elle a appelé [TRADUCTION] « le pacte réglementaire » (décision 2002-037, par. 44). Selon la Commission :

a) il faut mettre en balance les intérêts des clients et ceux des propriétaires de l'entreprise de services publics;

b) les décisions visant l'entreprise doivent tenir compte des intérêts des deux parties;

c) attribuer aux clients la totalité du profit tiré de la vente n'inciterait pas l'entreprise à accroître son efficacité et à réduire ses coûts;

d) en attribuer la totalité à l'entreprise pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée.

Pour les besoins du présent pourvoi, il importe de rappeler les considérations de principe invoquées par la Commission :

> [TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.
>
> À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation.
>
> La Commission croit qu'une certaine mise en balance des intérêts des deux parties permettra la

of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. *Standard of Review*

The Court's modern approach to this vexed question was recently set out by McLachlin C.J. in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that the Board considers necessary in the public interest" (s. 15(3)(d) of the AEUBA).

réalisation optimale des objectifs de l'entreprise dans son propre intérêt et dans celui de ses clients. Par conséquent, elle estime équitable en l'espèce et conforme à ses décisions antérieures de partager selon la formule TransAlta le profit net tiré de la vente du terrain et des bâtiments. [Je souligne; par. 112-114.]

101 On a informé notre Cour que les deux tiers du profit attribués aux clients seraient déduits des coûts considérés pour l'établissement de la base tarifaire d'ATCO, puis amortis sur un certain nombre d'années.

C. *La norme de contrôle*

102 L'approche actuelle de notre Cour à l'égard de cette question épineuse a récemment été précisée par la juge en chef McLachlin dans l'arrêt *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26 :

> Selon l'analyse pragmatique et fonctionnelle, la norme de contrôle est déterminée en fonction de quatre facteurs contextuels — la présence ou l'absence dans la loi d'une clause privative ou d'un droit d'appel; l'expertise du tribunal relativement à celle de la cour de révision sur la question en litige; l'objet de la loi et de la disposition particulière; la nature de la question — de droit, de fait ou mixte de fait et de droit. Les facteurs peuvent se chevaucher. L'objectif global est de cerner l'intention du législateur, sans perdre de vue le rôle constitutionnel des tribunaux judiciaires dans le maintien de la légalité.

103 Je n'entends pas reprendre les propos de mon collègue le juge Bastarache à ce sujet. Nous convenons que la norme applicable en matière de compétence est celle de la décision correcte. Nous convenons également qu'en ce qui a trait à l'*exercice* de sa compétence par la Commission, une déférence accrue s'impose. Il ne peut être interjeté appel d'une décision de la Commission que sur une question de droit ou de compétence. La Commission en sait bien davantage qu'une cour de justice sur les services de gaz et les limites qui doivent leur être imposées « dans l'intérêt public » lorsqu'ils effectuent des opérations relatives à des biens dont le coût est inclus dans la base tarifaire. De plus, il est difficile d'imaginer un pouvoir discrétionnaire plus vaste que celui

The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, at p. 34:

> The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), vol. 1, at para. 14:2622: "'*Objective' and 'Subjective' Grants of Discretion*".

105 The expert qualifications of a regulatory Board are of "utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause", as stated by Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335. He continued:

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.
>
> (This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

— conféré à la Commission — d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » (al. 15(3)d) de l'AEUBA). L'élément subjectif de ce pouvoir (« qu'elle juge nécessaires »), l'expertise du décideur et la nature de la décision (« dans l'intérêt public ») appellent à mon avis la plus grande déférence et l'application de la norme de la décision manifestement déraisonnable.

En ce qui a trait à l'élément « qu'elle juge nécessaires », le juge Martland a dit ce qui suit dans l'arrêt *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24, p. 34 :

> [TRADUCTION] En l'espèce, il n'appartient pas à une cour de justice de déterminer si les terrains de l'intimé étaient ou non « nécessaires », mais bien si le ministre a « estimé » qu'ils l'étaient.

Voir également D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (éd. feuilles mobiles), vol. 1, par. 14:2622 : « *"Objective" and "Subjective" Grants of Discretion* ».

Comme l'a dit le juge Sopinka dans l'arrêt *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 335, l'expertise que possède un organisme de réglementation est « de la plus haute importance pour ce qui est de déterminer l'intention du législateur quant au degré de retenue dont il faut faire preuve à l'égard de la décision d'un tribunal en l'absence d'une clause privative intégrale ». Il a ajouté :

> Même lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel, comme c'était le cas dans l'affaire *Bell Canada* [*c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722], on a souligné qu'il y avait lieu pour le tribunal d'appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.
>
> (Cette opinion incidente a été citée avec approbation dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 592.)

A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In *TransAlta (1986)*, the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, where this Court stated, at p. 357:

> [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest . . . . [Emphasis added.]

This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185, at p. 190:

> It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R. F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)), who wrote in *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

106 L'exercice d'un pouvoir de réglementation « dans l'intérêt public » exige nécessairement la conciliation d'intérêts économiques divergents. Il est depuis longtemps établi que la question de savoir ce qui est « dans l'intérêt public » n'est pas véritablement une question de droit ou de fait, mais relève plutôt de l'opinion. Dans *TransAlta (1986)*, la Cour d'appel de l'Alberta a fait (au par. 24) un parallèle entre la portée des mots « intérêt public » et celle de l'expression bien connue « la commodité et les besoins du public » en citant l'arrêt *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353, où notre Cour avait dit ce qui suit à la p. 357 :

> [TRADUCTION] [L]a question de savoir si la commodité et les besoins du public nécessitent l'accomplissement de certains actes n'est pas une question de fait. C'est avant tout l'expression d'une opinion. Il faut évidemment que la décision de la Commission se fonde sur des faits mis en preuve, mais cette décision ne peut être prise sans que la discrétion administrative y joue un rôle important. En conférant à la Commission ce pouvoir discrétionnaire, la Législature a délégué à cet organisme la responsabilité de décider, dans l'intérêt du public . . . [Je souligne.]

107 Dans cet extrait, notre Cour reprenait l'opinion incidente du juge Rand dans l'arrêt *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185, p. 190 :

> [TRADUCTION] On a prétendu, et la Cour a semblé d'accord, que l'appréciation de la commodité et des besoins du public est elle-même une question de fait, mais je ne puis souscrire à cette opinion : il ne s'agit pas de déterminer si objectivement telle situation existe. La décision consiste à exprimer une opinion, en l'espèce, l'opinion du Comité et du Comité seulement. [Je souligne.]

108 Évidemment, même un pouvoir aussi vaste n'est pas absolu. Mais reconnaître qu'il puisse faire l'objet d'abus n'implique pas qu'il doive être restreint. Je suis d'accord sur ce point avec l'avis exprimé par le juge Reid (coauteur de R. F. Reid et H. David, *Administrative Law and Practice* (2e éd. 1978), et coéditeur de P. Anisman et R. F. Reid, *Administrative Law Issues and Practice* (1995)), dans la décision *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (C. div.), p. 97, au sujet des pouvoirs de la Commission des valeurs mobilières de l'Ontario :

. . . when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 42.)

109 "Patent unreasonableness" is a highly deferential standard:

A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.

(*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my colleague sees it). As will be seen, the Board's response is well within the range of established regulatory opinions. Hence, even if the Board's conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. *Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order "In the Public Interest"?*

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from

[TRADUCTION] . . . lorsque la Commission a agi de bonne foi en se souciant clairement et véritablement de l'intérêt public et en fondant son opinion sur des éléments de preuve, le risque que l'étendue de son pouvoir discrétionnaire puisse un jour l'inciter à l'exercer abusivement et à se placer ainsi au-dessus de la loi ne fait pas de l'existence de ce pouvoir une mauvaise chose en soi et n'exige pas l'annulation de la décision de la Commission.

(Notre Cour a fait mention, apparemment avec approbation, de la décision *C.T.C. Dealer Holdings* dans l'arrêt *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37, par. 42.)

La norme du « manifestement déraisonnable » appelle un degré élevé de déférence judiciaire :

La méthode de la décision correcte signifie qu'il n'y a qu'une seule réponse appropriée. La méthode du caractère manifestement déraisonnable signifie que de nombreuses réponses appropriées étaient possibles, sauf celle donnée par le décideur.

(*S.C.F.P.*, par. 164)

Cela dit, il importe peu à mon sens que la norme applicable soit celle du manifestement déraisonnable (comme je le pense) ou celle du raisonnable *simpliciter* (comme le croit mon collègue). Nous le verrons, la décision de la Commission se situe dans les limites des opinions exprimées par les organismes de réglementation. Même si une norme moins déférente s'appliquait aux conditions imposées par la Commission, je ne verrais aucune raison d'intervenir.

D. *La Commission avait-elle le pouvoir d'assortir son autorisation des conditions en cause « dans l'intérêt public »?*

ATCO prétend que la Commission n'avait pas le pouvoir d'imposer des conditions ayant un effet « confiscatoire ». Or, en s'exprimant ainsi, elle présume de la question en litige. La bonne démarche n'est pas de supposer qu'ATCO avait droit au profit net tiré de la vente, puis de se demander si la Commission pouvait le confisquer. L'investissement de 83 000 $ d'ATCO a graduellement été pris en

time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

I do not think the legal debate is assisted by talk of "confiscation". ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board's jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

E. *Did the Board Improperly Exercise the Jurisdiction It Possessed to Impose Conditions the Board Considered "Necessary in the Public Interest"?*

There is no doubt that there are many approaches to "the public interest". Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most. ATCO concedes that its "property" claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers

compte dans sa base tarifaire réglementaire puisque l'acquisition du terrain s'est échelonnée de 1922 à 1965. Dans un secteur réglementé, le rendement juste et équitable est déterminé par l'organisme de réglementation compétent et non par le marché spéculatif et aléatoire de l'immobilier.

112 Je ne crois pas que l'allégation d'effet « confiscatoire » apporte quoi que ce soit au débat juridique. La loi interdit à ATCO de se départir de ses biens sans l'autorisation de la Commission et investit cette dernière du pouvoir d'assortir son autorisation de conditions. Ce n'est donc pas l'*existence* de la compétence qui est en litige, mais plutôt la manière dont la Commission l'a *exercée* en imposant des conditions et, plus particulièrement, en répartissant le profit net tiré de la vente.

E. *La Commission a-t-elle exercé sa compétence irrégulièrement en imposant les conditions qu'elle jugeait « nécessaires dans l'intérêt public »?*

113 Il y a évidemment de nombreuses façons de concevoir « l'intérêt public ». Celle de la Commission tient essentiellement (et de manière inhérente) à son opinion et à son pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre et qu'aux États-Unis, la pratique doit être interprétée à la lumière de la protection constitutionnelle du droit de propriété, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. ATCO reconnaît que sa prétention fondée sur le « droit de propriété » ne saurait tenir face à l'intention contraire du législateur, mais elle affirme qu'une telle intention ne ressort pas des lois.

114 La plupart des organismes de réglementation, sinon tous, sont appelés à décider de l'attribution du profit tiré d'un bien dont le coût historique est inclus dans la base tarifaire, mais qui n'est plus nécessaire pour fournir le service. Lorsqu'elle formule ses politiques, la Commission peut tenir compte (et elle tient compte) d'une foule de précédents provenant de nombreux ressorts. Trouver le bon

and investors is a common preoccupation of comparable boards and agencies:

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favoritism toward investors to the detriment of ratepayers affected by the transaction.

(P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234)

115 The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over $2 million. The Board stated:

> The Station "B" property was not purchased by Consumers' for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital. In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

116 Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), the regulator allocated a gain on the sale of land to ratepayers, stating:

compromis dans la répartition du profit entre les clients et les investisseurs est une préoccupation commune aux organismes apparentés à la Commission :

> [TRADUCTION] D'abord, cela permet d'éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients. Deuxièmement, elle garantit que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou à d'autres intéressés. Troisièmement, elle vise précisément à ce que les investisseurs ne soient pas favorisés au détriment des clients touchés par l'opération.

(P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234)

Ce n'est pas d'hier que les organismes de réglementation canadiens examinent de près les opérations de spéculation foncière auxquelles se livrent les services publics qui leur sont assujettis. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976, la Commission de l'énergie de l'Ontario s'est demandé comment devait être considéré le profit de 2 millions de dollars, après impôt, tiré de la vente d'un terrain par une entreprise de services publics. Elle a dit :

> [TRADUCTION] Consumers' n'a pas acquis le bien-fonds (Station B) à des fins de spéculation, mais bien pour les besoins d'un service public. Même si cet investissement n'était pas amortissable, des intérêts et un risque lié à leur taux devaient être absorbés par les revenus et, jusqu'à ce que l'usine de production de gaz ne devienne obsolescente, l'aliénation du bien-fonds n'était pas possible. Par conséquent, si la commission permettait que seuls les actionnaires bénéficient du profit tiré de la vente d'un terrain, elle encouragerait la spéculation sur les biens des services publics. À son avis, ces gains en capital doivent être partagés entre les actionnaires et les clients. [Je souligne; par. 326.]

Certains organismes de réglementation américains jugent également opportun de déduire le profit, en tout ou en partie, de coûts pris en compte dans la base tarifaire. Dans *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), l'organisme de réglementation a attribué aux clients le profit tiré de la vente d'un terrain :

The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

[TRADUCTION] La société et ses actionnaires ont touché un rendement sur l'utilisation de ces parcelles de terrain le temps que leur coût a été inclus dans la base tarifaire, et ils n'ont droit à aucun rendement supplémentaire découlant de leur vente. Conclure le contraire équivaudrait à dire qu'une entreprise de services publics peut tirer avantage d'un bien non amortissable et que même si elle a obtenu de ses clients un rendement raisonnable à l'égard de ce bien, elle peut toucher en sus un profit inattendu en le vendant. Nous estimons que, dans le cas d'une installation en service, il s'agirait d'une situation risques/avantages inhabituelle pour une entreprise réglementée. [Je souligne; p. 26.]

117 Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991, the Ontario Energy Board determined that a $1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

117 Au Canada, d'autres organismes de réglementation que la Commission craignent que la perspective de vendre des terrains à profit n'infléchisse les décisions des entreprises de services publics en ce qui concerne leurs activités réglementées. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 465, 1er mars 1991, la Commission de l'énergie de l'Ontario a statué que le profit de 1,9 million de dollars réalisé lors de la vente d'un terrain devait être réparti également entre les actionnaires et les clients :

> the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary. [para. 3.3.8]

> [TRADUCTION] . . . attribuer 100 p. 100 du profit tiré de la vente d'un terrain soit aux actionnaires de l'entreprise, soit à ses clients, pourrait diminuer l'attention accordée aux préoccupations légitimes de la partie exclue. Par exemple, le moment de l'acquisition d'un terrain et l'intensité des négociations la précédant pourraient être déterminés de façon à favoriser le bénéficiaire ultime de l'opération, ou à en faire fi. [par. 3.3.8]

118 The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, June 27, 2003, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

118 Le principe appliqué par la Commission, soit le partage du profit entre les investisseurs et les clients, est également conforme à la décision *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, 27 juin 2003, dans laquelle la Commission de l'énergie de l'Ontario, après s'être penchée sur la question du profit tiré de la vente d'un terrain et de bâtiments, a de nouveau conclu :

> The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction. [para. 45]

> [TRADUCTION] La Commission juge raisonnable, dans les circonstances, de répartir les gains en capital à parts égales entre l'entreprise et ses clients. Pour arriver à cette conclusion, elle a tenu compte du caractère non récurrent de l'opération. [par. 45]

119 The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta (1986)*, at pp. 175-76, including *Re Boston Gas Co.*

119 Dans *TransAlta (1986)*, p. 175-176, le juge Kerans a signalé que le sort réservé à de tels gains variait considérablement d'un organisme de

mentioned earlier. In *TransAlta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

> I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58 (Y.C.A.), at para. 85.

120 A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions

réglementation à l'autre, mentionnant à titre d'exemple la décision *Re Boston Gas Co.*, précitée. Dans cette affaire, la Commission avait assimilé à un « revenu » au sens de la *Hydro and Electric Energy Act*, R.S.A. 1980, ch. H-13, le profit réalisé par TransAlta lors de la vente d'un terrain et de bâtiments appartenant à sa « concession » d'Edmonton. (La décision ne portait donc pas sur le pouvoir de la Commission d'imposer les conditions qu'« elle juge nécessaires dans l'intérêt public ».) Le juge Kerans a précisé (p. 176) :

> [TRADUCTION] Pour les motifs exposés ci-après, je ne suis pas d'accord avec la décision de la Commission, mais il serait absurde de ne pas reconnaître que [le mot « revenu »] puisse raisonnablement avoir le sens qu'elle lui prête.

Il a ajouté que [TRADUCTION] « l'indemnisation visait, à toutes fins utiles, à compenser la perte d'une concession » (p. 180), de sorte que, dans « ces circonstances exceptionnelles » (p. 179), le gain ne pouvait en droit être qualifié de revenu suivant la norme de la décision correcte. Dans l'arrêt *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58 (C.A.Y.), par. 85, le juge Goldie a lui aussi relevé la diversité de la pratique réglementaire à l'égard du « gain tiré d'une vente ».

Les décisions récentes d'organismes de réglementation des États-Unis révèlent que le sort réservé au gain réalisé lors de la vente d'un terrain non amorti y est aussi très variable et comprend tant la solution préconisée par ATCO que celle retenue par la Commission :

> [TRADUCTION] Certains ressorts ont conclu que, sur le plan de l'équité, seuls les actionnaires doivent bénéficier du gain tiré d'un terrain qui s'est apprécié, car en général, les clients des entreprises de services publics paient les taxes foncières et non le coût d'acquisition et les charges d'amortissement. Suivant ce raisonnement, les clients n'assument aucun risque de perte et n'acquièrent aucun droit sur le bien, y compris en equity.
>
> D'autres estiment que les clients ont droit à une partie des profits résultant de la vente d'un terrain affecté à un service public. Les ressorts qui ont opté pour une répartition équitable conviennent que l'examen des décisions des organismes de réglementation et des cours de

on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.

(P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44, at p. 44)

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), at p. 361:

To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility's stockholders are not *automatically* entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility's rates. [Emphasis in original.]

Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders.

The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at

justice sur la question ne permet pas de dégager l'exigence générale que le profit soit attribué aux seuls actionnaires, mais seulement une interdiction générale de le répartir lorsque le coût du terrain n'a jamais été inclus dans la base tarifaire.

(P. S. Cross, « Rate Treatment of Gain on Sale of Land : Ratepayer Indifference, A New Standard? » (1990), 126 *Pub. Util. Fort.* 44, p. 44)

La décision *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), illustre le point de vue américain favorable à la solution retenue par la Commission dans la présente affaire (p. 361) :

[TRADUCTION] Les principes généraux qui peuvent être dégagés des décisions rendues dans d'autres ressorts, s'il en est, sont les suivants : (1) les actionnaires d'une entreprise de services publics n'ont pas *automatiquement* droit au gain réalisé lors de toute vente d'un bien affecté au service public; (2) les clients n'ont pas droit à la totalité ou à une partie du profit tiré lors de la vente d'un bien qui n'a jamais été pris en compte pour l'établissement des tarifs. [En italique dans l'original.]

121 La composition de l'actif dont le coût est pris en compte dans la base tarifaire varie au gré des acquisitions et des aliénations, mais l'entreprise, elle, demeure. La démarche de la Commission en l'espèce est tout à fait compatible avec le principe de la « pérennité de l'entreprise » appliqué notamment dans *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). Dans cette affaire, Southern California Water avait sollicité l'autorisation de vendre un vieil établissement, et la commission devait décider de l'attribution du profit tiré de l'opération. La commission a conclu :

[TRADUCTION] Partant du principe de la « pérennité de l'entreprise », le profit tiré de l'opération doit être affecté à l'exploitation du service public, et non attribué à court terme aux actionnaires ou aux clients directement.

Ce principe n'est ni nouveau ni absolu. Il a clairement été énoncé dans la décision de principe que la commission a rendue en 1989 concernant le gain réalisé lors d'une vente (D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*)). En termes simples, lorsqu'une entreprise de services publics réalise un profit en vendant un bien qu'elle remplace par un autre ou par un titre de créance,

the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation. [p. 604]

122 In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. *ATCO's Arguments*

123 Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

124 Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount to a confiscation of the corporation's property.

125 Secondly, ATCO says its retention of 100 percent of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

126 Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

sans que son obligation de servir la clientèle ne soit supprimée ou réduite, le profit doit être affecté à l'exploitation de l'entreprise. [p. 604]

À mon avis, ni les lois de l'Alberta ni la pratique réglementaire dans cette province et dans d'autres ressorts ne commandaient une décision en particulier. La Commission aurait pu accueillir la demande d'ATCO et lui attribuer la totalité du profit. Mais la solution qu'elle a retenue n'outrepassait aucunement sa compétence légale et ne justifie pas une intervention judiciaire.

F. *L'argumentation d'ATCO*

Les principaux arguments d'ATCO ont pour la plupart été abordés, mais, par souci de clarté, je les rappellerai. ATCO ne conteste pas vraiment le pouvoir de la Commission d'assortir de conditions la vente d'un terrain. Elle soutient plutôt que la Commission a violé en l'espèce un certain nombre de garanties et nous demande de restreindre sa marge de manœuvre.

Premièrement, ATCO prétend que les clients n'acquièrent aucun droit de propriété sur les biens de l'entreprise. C'est elle, et non ses clients, qui a initialement acheté le bien en question et qui en est devenue propriétaire, ce qui lui donnait droit à tout profit tiré de sa vente. Selon elle, attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise.

Deuxièmement, ATCO prétend que son droit à la totalité du profit n'a rien à voir avec le « pacte réglementaire ». Ses clients ont payé un prix que, d'une année à l'autre, la Commission a jugé raisonnable en contrepartie d'un service sûr et fiable. C'est ce qu'ils ont obtenu et c'est tout ce à quoi ils avaient droit. En leur attribuant une partie du profit, la Commission s'est indûment livrée à une tarification « rétroactive ».

Troisièmement, une entreprise de services publics ne peut *amortir* un terrain dans sa base tarifaire, de sorte que les clients n'ont pas défrayé ATCO de quelque partie du coût historique du terrain en question, encore moins en fonction de sa valeur actuelle. Le traitement réservé au profit tiré de la vente d'un bien amorti ne s'applique donc pas.

Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

Quatrièmement, ATCO reproche à la solution de la Commission de créer une disparité. Les clients se voient attribuer une partie du profit résultant de l'appréciation d'un terrain sans pour autant être tenus, advenant une contraction du marché, d'assumer une partie des pertes subies lors de son aliénation. 127

In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

À mon avis, ce sont toutes des prétentions qui devaient être dûment formulées devant la Commission (et qui l'ont été). Certaines décisions d'organismes de réglementation étayent la thèse d'ATCO, d'autres appuient celle de ses clients. Il appartenait à la Commission de décider, au vu des circonstances, quelles conditions étaient nécessaires dans l'intérêt public. Comme je vais m'efforcer de le démontrer, la solution adoptée par la Commission en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. 128

1. The Confiscation Issue

1. La question de l'effet confiscatoire

In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, at para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. In *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) ("*SoCalGas*"), the regulator pointed out:

Dans son mémoire, ATCO affirme que [TRADUCTION] « [l]es biens appartenaient au propriétaire du service public et que la répartition projetée par la Commission ne peut avoir qu'un effet confiscatoire » (mémoire de l'intimée, par. 6). Cet argument ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. Dans la décision *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) (« *SoCalGas* »), l'organisme de réglementation a fait remarquer : 129

In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation

[TRADUCTION] Dans le secteur privé, qui exclut donc les services publics, l'investisseur n'est pas assuré d'un rendement raisonnable sur un tel investissement irrécupérable. Bien que les actionnaires et les détenteurs d'obligations fournissent le capital initial, les clients paient au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du bien, de sorte que la personne qui investit dans un service public ne risque pas d'avoir à supporter ces coûts. Les clients paient également un rendement raisonnable pendant que le bien (terrain

accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

compris) est inclus dans la base tarifaire, ils indemnisent l'entreprise de la dépréciation d'un bien amortissable selon la méthode de la prise en charge par amortissement et ils courent le risque de payer l'amortissement et un rendement pour un bien inclus dans la base tarifaire qui est mis hors service prématurément. [p. 103]

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate-making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

(La Commission ne fait évidemment pas main basse sur le produit de la vente. Pour les besoins de la tarification, un montant *équivalant* aux deux tiers du profit est en fait pris en compte pour établir la base tarifaire actuelle d'ATCO. Le profit est donc réparti de manière abstraite entre les intéressés concurrents.)

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). In that case, the assets at issue were parcels of real estate which had been employed in mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

L'argument d'ATCO est fréquemment invoqué aux États-Unis sur le fondement de la protection constitutionnelle du « droit de propriété », laquelle n'a toutefois pas empêché que tout ou partie du profit en cause soit attribué aux clients de services publics américains. L'un des arrêts de principe aux États-Unis est *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). Dans cette affaire, des parcelles de terrain affectées au transport en commun étaient devenues superflues lorsque l'entreprise avait remplacé ses trolleybus par des autobus. L'organisme de réglementation a attribué aux actionnaires le profit tiré de la vente des terrains dont la valeur s'était appréciée, mais la cour d'appel a infirmé la décision en tenant un raisonnement directement applicable à l'effet « confiscatoire » allégué par ATCO :

We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis — sometimes articulated, sometimes implicit — that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful

[TRADUCTION] Nous ne voyons aucun obstacle, constitutionnel ou autre, à la reconnaissance d'un principe de tarification permettant aux clients de bénéficier de l'appréciation d'un bien survenue pendant son affectation au service public. Nous croyons que la doctrine fondant essentiellement les décisions contraires n'est plus pertinente. Un principe juridique et économique fondamental — parfois formulé en termes exprès, parfois implicite —, sous-tend ces décisions, savoir qu'un bien affecté à un service public demeure la propriété des seuls investisseurs de l'entreprise et que son appréciation est un élément indissociable et inviolable de ce droit de propriété. La notion de propriété privée qui imprègne notre jurisprudence a naturellement mené à l'application de ce principe, lequel a obtenu un certain appui dans les premières décisions en matière de tarification. S'il est encore valable, ce principe étaye la

exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away. [p. 800]

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. [p. 32]

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Re Arizona Public Service Co.*:

> In *New York Telephone*, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. . . . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay

prétention de l'investisseur. Après mûre réflexion, nous pensons que ses fondements se sont depuis longtemps effrités et que la conclusion qu'il semblait dicter ne vaut plus. [p. 800]

Ces « décisions » qui ne sont « plus pertinente[s] » englobent sans doute *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976), une décision invoquée par ATCO en l'espèce et dans laquelle la Cour suprême des États-Unis a dit :

> [TRADUCTION] Les clients paient un service, et non le bien servant à sa prestation. Leurs paiements ne sont pas affectés à l'amortissement ou aux autres frais d'exploitation, non plus qu'au capital de l'entreprise. En acquittant leurs factures, les clients n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service ou sur les fonds de l'entreprise. Les biens acquis avec les sommes reçues en contrepartie des services appartiennent à l'entreprise, tout comme ceux achetés avec les fonds obtenus par l'émission d'actions et d'obligations. [p. 32]

Dans cette affaire, ayant conclu tardivement que l'amortissement autorisé pour New York Telephone Company les années précédentes était trop élevé, l'organisme de réglementation avait tenté de corriger la situation pendant l'exercice en cours en rajustant rétroactivement la base tarifaire. La cour a statué que l'organisme n'avait pas le pouvoir de réviser une tarification antérieure. Les avantages financiers découlant des erreurs commises par l'organisme étaient désormais acquis à l'entreprise. Le contexte n'est pas le même en l'espèce. Nul ne prétend que la tarification antérieure établie par la Commission en fonction du coût historique était erronée. En 2001, lorsqu'elle a été saisie de l'affaire, la Commission avait le pouvoir d'autoriser ou non la vente projetée. L'opération n'avait pas encore été conclue. La réalisation d'un profit par ATCO n'était qu'une possibilité. Comme on l'a expliqué dans *Re Arizona Public Service Co.* :

> [TRADUCTION] Dans *New York Telephone*, le tribunal devait déterminer si l'organisme de réglementation de l'État en question pouvait affecter à la réduction des tarifs l'excédent accumulé aux fins d'amortissement les années précédentes et ainsi fixer des tarifs qui ne produisaient pas un rendement raisonnable. [. . .] [L]a Cour a simplement repris un truisme en l'expliquant : les

current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

tarifs doivent être établis de façon que les revenus permettent d'acquitter les charges (raisonnables) d'exploitation courantes et que les investisseurs de l'entreprise obtiennent un rendement raisonnable. Lorsque, pour une raison ou une autre, les tarifs fixés produisent trop de revenus ou pas assez, on ne peut revenir en arrière. On augmente les tarifs ou on les réduit pour tenir compte de la situation actuelle; leur fixation ne vise pas la restitution de profits excessifs antérieurs ou la compensation de pertes d'exploitation antérieures. En l'espèce, il s'agit plutôt de déterminer si, pour l'établissement des tarifs, le revenu provenant de la fourniture d'un service public pendant une année de référence peut comprendre le produit de la vente de biens de l'entreprise de services publics. La décision *New York Telephone* de la Cour suprême des États-Unis ne porte pas sur cette question. [Je souligne; p. 361.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

Plus récemment, dans la décision *SoCalGas*, la commission californienne de surveillance des services publics s'est penchée sur la question de l'attribution du profit tiré d'une aliénation. Comme dans la présente affaire, l'entreprise de services publics (SoCalGas) souhaitait vendre un terrain et des bâtiments situés (dans ce cas) au centre-ville de Los Angeles. La commission a réparti le profit entre les actionnaires et les clients de l'entreprise et a conclu :

> We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold. [p. 100]

> [TRADUCTION] Nous croyons que la question de savoir à qui appartient le bien affecté au service public est devenue un faux problème en l'espèce et que la propriété ne permet pas à elle seule de déterminer qui a droit au profit lorsque ce bien cesse d'être inclus dans la base tarifaire et est vendu. [p. 100]

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas*, the regulator disposed of this point as follows:

ATCO soutient dans son mémoire que les clients [TRADUCTION] « n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service, non plus que sur les fonds de l'entreprise » (par. 2). À cet égard, voici ce qu'a conclu l'organisme de réglementation dans *SoCalGas* :

> No one seriously argues that ratepayers acquire title to the physical property assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service. [p. 100]

> [TRADUCTION] Personne ne prétend sérieusement que les clients acquièrent un droit de propriété sur les biens affectés au service public; la DRA [Division of Ratepayer Advocates] soutient que le profit tiré de leur vente doit être retranché des besoins en revenus ultérieurs non pas parce que les clients sont propriétaires de ces biens, mais parce qu'ils en ont payé les coûts et assumé les risques pendant leur affectation au service public et leur inclusion dans la base tarifaire. [p. 100]

This "risk" theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

Cette considération liée aux « risques » vaut également en Alberta. Pendant les 80 dernières années, le marché albertain de l'immobilier a connu des fluctuations considérables, mais durant toute cette période, que la conjoncture ait été favorable ou non, les clients ont garanti à ATCO un rendement juste et équitable pour le terrain et les bâtiments *considérés en l'espèce*.

The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

133 L'approche suivant laquelle le partage des risques emporte le partage du gain net a également été retenue dans *SoCalGas* :

> Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base. [p. 110]

> [TRADUCTION] Même si les actionnaires et les détenteurs d'obligations ont fourni le capital initial, les clients ont payé au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du terrain et des bâtiments et ils ont assuré à l'entreprise un rendement raisonnable selon la valeur non amortie du terrain et des bâtiments pendant la période où leur coût a été inclus dans la base tarifaire. [p. 110]

In other words, even in the United States, where property rights are constitutionally protected, ATCO's "confiscation" point is rejected as an oversimplification.

Autrement dit, même aux États-Unis où le droit de propriété est protégé par la Constitution, la thèse de l'effet « confiscatoire » avancée par ATCO est rejetée au motif qu'elle est simpliste.

My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply is that the Board's response in this case cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

134 Je ne prétends pas que l'attribution du profit en l'espèce convient nécessairement en toute circonstance. D'autres organismes de réglementation ont jugé que l'intérêt public commande une attribution différente. La Commission tranche au cas par cas. Je dis simplement que la mesure retenue ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et qu'elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. La déférence s'impose en l'espèce et, à mon avis, la décision de la Commission n'aurait pas dû être annulée.

2. The Regulatory Compact

2. Le pacte réglementaire

The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly

135 Dans sa décision, la Commission renvoie au « pacte réglementaire », notion aux contours flous selon laquelle, en contrepartie d'un monopole

and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

> The ratemaking process involves fundamentally "a balancing of the investor and the consumer interests". The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation. [p. 806]

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. stated, at p. 691:

> It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) ratemaking exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years :

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so

conféré par la loi et d'un revenu calculé suivant la méthode du coût d'achat majoré, l'entreprise de services publics accepte de voir son rendement limité de même que sa liberté de se départir des biens dont le coût est pris en compte pour établir sa base tarifaire. C'est ce qui ressort de l'arrêt *Washington Metropolitan Area Transit* de la Cour d'appel des États-Unis (circuit du district de Columbia) :

> [TRADUCTION] Le processus de tarification consiste essentiellement à « mettre en balance l'intérêt de l'investisseur et celui du consommateur ». L'intérêt de l'investisseur est de protéger son investissement et d'avoir une possibilité raisonnable de toucher un rendement acceptable. L'intérêt du consommateur réside dans la protection gouvernementale contre la tarification déraisonnable de services fournis dans un contexte monopolistique. Pour ce qui est de l'appréciation d'un bien, l'équilibre optimal est atteint lorsque les intérêts de l'un et de l'autre sont respectés le plus possible. [p. 806]

ATCO estime que la manière dont la Commission a attribué le profit contrevient au pacte réglementaire non seulement en raison de son effet confiscatoire, mais aussi parce qu'il s'agit d'une « tarification rétroactive ». Dans l'arrêt *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684, le juge Estey a dit ce qui suit à la p. 691 :

> Il ressort clairement de plusieurs dispositions de *The Gas Utilities Act* que la Commission n'agit que pour l'avenir et ne peut fixer des tarifs qui permettraient à l'entreprise de recouvrer des dépenses engagées antérieurement et que les tarifs précédents n'avaient pas suffi à compenser.

Je le répète, la Commission était appelée à se prononcer sur une rentrée projetée et elle a décidé que les deux tiers devraient être pris en compte dans la tarification ultérieure (et non antérieure), ce qui est conforme à la pratique réglementaire. Par exemple, dans la décision *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960), l'organisme de réglementation a statué que le profit réalisé lors de la vente d'un terrain devrait servir à réduire les tarifs pour les 17 années suivantes :

> [TRADUCTION] Lorsqu'un terrain est vendu à profit, le gain doit être ajouté à l'amortissement cumulé, c.-à-d.

that there is a corresponding reduction of the rate base and resulting return. [p. 864]

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

More recently, in *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), the regulator commented:

> . . . we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in rate-base. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the utility to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former property. [p. 529]

The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the Board doing what it did in this case.

3. Land as a Non-Depreciable Asset

The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus, in this case, the land was still carried on ATCO's books at its original price of $83,720 whereas the original $596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of $141,525.

« porté à son crédit », de manière à réduire proportionnellement la base tarifaire et, par conséquent, le rendement. [p. 864]

L'ordonnance a été confirmée par la Cour suprême de l'État de New York (section d'appel).

138 Plus récemment, dans la décision *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), l'organisme de réglementation a dit :

> [TRADUCTION] . . . nous avons jugé approprié de déduire la plus grande partie du profit des coûts futurs liés au siège de l'entreprise parce que les clients avaient assumé les risques et les charges pendant l'inclusion du bien dans la base tarifaire. Nous avons également jugé équitable d'attribuer une partie du profit aux actionnaires afin d'inciter raisonnablement l'entreprise à obtenir le meilleur prix de vente possible et d'indemniser les actionnaires des risques inhérents à la possession du bien. [p. 529]

139 Toutes ces décisions mettent l'accent sur la mise en balance des intérêts des actionnaires et des clients, ce qui est tout à fait compatible avec la théorie du « pacte réglementaire » qui sous-tend la décision de la Commission en l'espèce.

3. Le terrain en tant que bien non amortissable

140 La Cour d'appel de l'Alberta a établi une distinction entre le profit tiré de la vente d'un terrain, dont le coût historique n'est pas amorti (et qui n'est donc pas graduellement remboursé par le truchement de la base tarifaire), et le profit tiré de la vente d'un bien amorti, comme un bâtiment, pour lequel la base tarifaire opère un certain remboursement du capital et qui, en ce sens, « a été payé » par les clients. Elle a conclu que la Commission avait eu raison d'inclure dans la base tarifaire l'équivalent de l'amortissement consenti pour les bâtiments (l'objet du pourvoi incident d'ATCO). Ainsi, en l'espèce, alors que la valeur du terrain était encore reportée dans les comptes d'ATCO au coût historique de 83 720 $, les bâtiments, payés initialement 596 591 $, avaient été amortis dans les tarifs exigés des consommateurs et leur valeur comptable nette s'établissait à 141 525 $.

141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Re Boston Gas Co.* for example (cited in *TransAlta (1986)*, at p. 176), the regulator held:

> . . . the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land. [p. 26]

142 In *SoCalGas*, as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating: "We see little reason why land sales should be treated differently" (p. 107). The decision continued:

> In short, whether an asset is depreciated for rate-making purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets. [Emphasis added; p. 107.]

143 In *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), the regulator commented that:

> Our decisions generally find no reason to treat gain on the sale of nondepreciable property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use]. [p. 105]

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the

Il ressort de la pratique réglementaire que de nombreux organismes de réglementation (et non tous) refusent de faire une distinction (à cette fin) entre les biens amortissables et les biens non amortissables. Dans la décision *Re Boston Gas Co.* (citée dans *TransAlta (1986)*, p. 176), par exemple, l'organisme a conclu :

> [TRADUCTION] . . . les clients de l'entreprise ont versé un rendement et payé tous les autres coûts afférents à l'utilisation du terrain. Le fait qu'il s'agit d'un bien non amortissable — son utilisation ne diminuant habituellement pas sa valeur d'usage — n'a rien à voir avec la question de savoir qui a droit au produit de sa vente. [p. 26]

Dans *SoCalGas*, l'organisme de réglementation a également refusé de faire une distinction entre le profit réalisé lors de la vente d'un bien amortissable et celui issu de la vente d'un bien non amortissable, affirmant à la p. 107, qu'[TRADUCTION] « [i]l ne voyait pas pourquoi des ventes de terrains devraient être traitées différemment » et ajoutant :

> [TRADUCTION] En somme, les clients s'engagent à verser un rendement selon la valeur comptable, que le bien soit amorti ou non pour les besoins de la tarification, et ce, tant que le bien est employé et susceptible de l'être. L'amortissement tient simplement compte du fait que certains biens, contrairement à d'autres, se détériorent durant leur affectation au service public. Fondamentalement, la relation entre l'entreprise et ses clients demeure la même qu'il s'agisse de biens amortissables ou non. [Je souligne; p. 107.]

Dans *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), l'organisme de réglementation a fait la remarque suivante :

> [TRADUCTION] Dans nos décisions, nous concluons généralement qu'il n'y a pas lieu de traiter différemment le profit réalisé lors de la vente d'un bien non amortissable, comme un terrain nu, et celui issu de la vente d'un bien amortissable dont le coût a été inclus dans la base tarifaire ou d'un terrain détenu pour usage ultérieur. [p. 105]

Encore une fois, je ne dis pas que l'organisme de réglementation *doit* systématiquement écarter toute distinction entre un bien amortissable et un bien non amortissable. Je dis simplement que la distinction n'est pas aussi déterminante que le

Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. La limitation du pouvoir discrétionnaire de la Commission, alléguée par ATCO sur le fondement de différents points de vue doctrinaux, n'est pas compatible avec les termes généraux employés par le législateur albertain et doit être rejetée.

4. Lack of Reciprocity

4. L'absence de réciprocité

145 ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

ATCO soutient que les clients ne devraient pas tirer avantage d'un marché haussier, car c'est elle, et non eux, qui subirait la perte si la valeur du terrain diminuait. Toutefois, la documentation présentée à notre Cour donne à penser que la Commission tient compte des profits *et* des pertes. Dans les décisions mentionnées ci-après, elle énonce et rappelle, puis rappelle encore, le « principe général » :

the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility. [Emphasis added.]

[TRADUCTION] . . . la Commission estime que les profits ou les pertes (soit la différence entre la valeur comptable nette et le produit de la vente) résultant de la vente de biens affectés à un service public doivent être attribués aux clients de l'entreprise de services publics, et non à son propriétaire. [Je souligne.]

(See *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984, at p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984, at p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23.)

(Voir *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984, p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84115, 12 octobre 1984, p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n^{o} E84113, 12 octobre 1984, p. 23.)

146 In *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984, the Board reviewed a number of regulatory approaches (including *Re Boston Gas Co.*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

Dans *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984, la Commission a examiné un certain nombre de décisions d'organismes de réglementation (y compris *Re Boston Gas Co.*, précitée) portant sur le profit tiré d'une vente et a dit ce qui suit au sujet de ses propres décisions (p. 12) :

The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

[TRADUCTION] La Commission est consciente de n'avoir pas appliqué une formule ou une règle uniforme permettant de déterminer automatiquement la procédure comptable à suivre à l'égard du profit ou de la perte résultant de l'aliénation d'un bien affecté à un service public. Il en est ainsi parce qu'elle décide de ce qui est juste et raisonnable en fonction du fond ou des faits de chaque affaire.

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

> If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property. [p. 107]

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulated in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

III. Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

La prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain *diminue* ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. Comme il a été signalé dans *SoCalGas* :

> [TRADUCTION] Si la valeur du terrain devenait inférieure à son coût historique, on pourrait prétendre que le rendement constant versé au fil des ans [par les clients] pour le terrain a en fait surindemnisé les investisseurs. Le rapport entre les risques et les avantages est tout aussi symétrique pour un terrain que pour un bien amortissable lorsque leur coût est pris en compte pour l'établissement de la base tarifaire. [p. 107]

II. Conclusion

En résumé, le par. 15(3) de l'AEUBA conférait à la Commission le pouvoir d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de la vente du terrain et des bâtiments en cause. Dans l'exercice de ce pouvoir, et vu la [TRADUCTION] « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait (GUA, par. 22(1)), la Commission a attribué le gain comme elle l'a fait pour les considérations d'intérêt public énoncées dans sa décision. Le pouvoir aurait peut-être été exercé différemment par un autre organisme de réglementation ou dans un autre ressort, mais il reste que la Commission était autorisée à répartir le gain tiré de la vente d'un bien qu'ATCO souhaitait soustraire à la base tarifaire. Il ne nous appartient pas de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer notre opinion à celle de la Commission.

III. Dispositif

Je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de l'Alberta et de rétablir la décision de la Commission, avec dépens payables à la ville de Calgary dans toutes les cours. Le pourvoi incident d'ATCO devrait être rejeté avec dépens.

APPENDIX

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

Jurisdiction

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

Powers of the Board

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

(3) Without restricting subsection (1), the Board may do all or any of the following:

(a) make any order that the ERCB or the PUB may make under any enactment;

(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

(e) make an order granting the whole or part only of the relief applied for;

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in

ANNEXE

Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17

[TRADUCTION]

Compétence

13 La Commission connaît de toute question dont peut connaître l'ERCB ou la PUB suivant un texte législatif ou le droit par ailleurs applicable, et sa compétence est exclusive.

Pouvoirs de la Commission

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB et à la PUB.

(2) La Commission peut agir d'office à l'égard de tout renvoi, demande, plainte, directive ou requête auquel l'ERCB, la PUB ou la Commission peut donner suite.

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

a) rendre toute ordonnance que l'ERCB ou la PUB peut rendre suivant un texte législatif;

b) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que l'ERCB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

c) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que la PUB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

e) rendre une ordonnance accordant en tout ou en partie la réparation demandée;

f) lorsqu'elle l'estime juste et convenable, accorder en partie la réparation demandée ou en accorder

addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Appeals

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

. . .

Exclusion of prerogative writs

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

Gas Utilities Act, R.S.A. 2000, c. G-5

Supervision

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

une autre en sus ou en lieu et place comme si tel était l'objet de la demande.

Appel

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

. . .

Immunité de contrôle

27 Sous réserve de l'article 26, toute mesure, ordonnance ou décision de la Commission ou de la personne exerçant ses pouvoirs ou ses fonctions est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire.

Gas Utilities Act, R.S.A. 2000, ch. G-5

[TRADUCTION]

Surveillance

22(1) La Commission assure la surveillance générale des services de gaz et de leurs propriétaires et peut, en ce qui concerne notamment le matériel, les appareils, les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne application d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

(2) La Commission mène toute enquête nécessaire à l'obtention de renseignements complets sur la façon dont le propriétaire d'un service de gaz se conforme à la loi ou sur tout ce qui est par ailleurs de son ressort suivant la présente loi.

Investigation of gas utility

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

. . .

Designated gas utilities

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

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

(a) issue any

(i) of its shares or stock, or

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

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

(b) capitalize

(i) its right to exist as a corporation,

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

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

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

(d) without the approval of the Board,

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

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

Enquêtes

24(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à un service de gaz.

. . .

Services de gaz désignés

26(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires de services de gaz assujettis au présent article et à l'article 27.

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

. . .

Prohibited share transactions

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

. . .

Powers of Board

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

27(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'un service de gaz désigné en application du paragraphe 26(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire du service de gaz.

. . .

Pouvoirs de la Commission

36 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement et d'autres tarifs spéciaux opposables au propriétaire d'un service de gaz et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'un service de gaz, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'un service de gaz, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) exiger que le propriétaire d'un service de gaz construise, entretienne et exploite,

compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs, fixes or imposes.

Rate base

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the

conformément à la présente loi et à toute autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire du service de gaz justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension;

e) exiger que le propriétaire d'un service de gaz approvisionne en gaz certaines personnes, à certaines fins, en contrepartie de certains tarifs, prix et charges, et à certaines conditions, selon ce qu'elle détermine.

Base tarifaire

37(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire d'un service de gaz servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'un service de gaz par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qu'elle estime pertinents.

Recettes excédentaires ou insuffisantes

40 Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de

fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

General powers of Board

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the *Public Utilities Board Act* conferred on the Board in the case of a public utility under that Act.

Public Utilities Board Act, R.S.A. 2000, c. P-45

Jurisdiction and powers

36(1) The Board has all the necessary jurisdiction and power

fixation des tarifs, des taux ou des charges, ou de leurs barèmes,

(ii) un exercice ultérieur,

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa b) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

d) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas b) ou c) et la période, y compris tout exercice ultérieur, au cours de laquelle il convient de le faire.

Pouvoirs généraux

59 Pour l'application de la présente loi, la Commission a, à l'égard des installations, des locaux, du matériel, des services, de l'organisation de la production, de la distribution et de la vente de gaz en Alberta, ainsi que du propriétaire d'un service de gaz et de son entreprise, les pouvoirs que lui confère la *Public Utilities Board Act* à l'égard d'une entreprise de services publics au sens de cette loi.

Public Utilities Board Act, R.S.A. 2000, ch. P-45

[TRADUCTION]

Compétence et pouvoirs

36(1) La Commission a la compétence et les pouvoirs nécessaires

(a) to deal with public utilities and the owners of them as provided in this Act;

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

General power

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

Investigation of utilities and rates

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature

a) pour agir à l'égard des entreprises de services publics et de leurs propriétaires conformément à la présente loi;

b) pour agir à l'égard des entreprises de services publics et connaître de questions connexes touchant une région adjacente à une ville, conformément à la présente loi.

(2) Outre la compétence et les pouvoirs mentionnés au paragraphe (1), la Commission a la compétence et les pouvoirs nécessaires pour exercer les fonctions qui lui sont légalement dévolues.

(3) La Commission a et est réputée avoir toujours eu compétence pour fixer, sur demande, le prix et les conditions d'une acquisition effectuée par un conseil municipal sous le régime de l'article 47 de la *Municipal Government Act*

a) avant que le conseil n'exerce son droit d'acquisition suivant cet article, et sans qu'il soit tenu de procéder à l'acquisition ou

b) lorsque l'acquisition est soumise à son approbation suivant cet article, avant que la Commission n'entende la demande et ne statue sur elle.

Pouvoirs généraux

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

Enquêtes sur les services publics et les tarifs

80 Lorsqu'il lui est démontré à l'audition d'une demande présentée par le propriétaire d'une entreprise de services publics ou par une municipalité ou une personne ayant un intérêt actuel ou éventuel dans l'objet de la demande, qu'il y a lieu de croire que les taux établis par le propriétaire d'une entreprise de services publics excèdent ce qui est juste et raisonnable eu égard à la nature et à la qualité du service ou du produit en cause, la Commission

a) peut enquêter comme elle le juge utile sur toute question liée à la nature et à la qualité du

and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

Supervision by Board

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

. . .

Investigation of public utility

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of its owner, the Board shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect of it required by the Board.

service ou du produit en cause, ou à l'exécution du service et aux taux ou charges y afférents;

b) peut, en ce qui concerne l'amélioration du service ou du produit et les taux et charges y afférents, rendre toute ordonnance qu'elle estime juste et raisonnable;

c) peut écarter ou modifier, comme elle l'estime raisonnable, les taux ou les charges qu'elle juge excessifs, injustes ou déraisonnables, ou indûment discriminatoires envers une personne, y compris une municipalité, sous réserve toutefois des dispositions qu'elle considère justes et raisonnables d'un contrat liant le propriétaire de l'entreprise de services publics et une municipalité au moment de la demande.

Surveillance

85(1) La Commission assure la surveillance générale des entreprises de services publics et de leurs propriétaires et peut, en ce qui concerne notamment les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne exécution d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

. . .

Enquêtes

87(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à une entreprise de services publics.

(2) Lorsqu'elle estime nécessaire d'enquêter sur une entreprise de services publics ou sur les activités de son propriétaire, la Commission a accès aux livres, documents et dossiers relatifs à l'entreprise qui sont en la possession du propriétaire, d'une municipalité, d'un organisme public ou d'un ministère, et elle peut les utiliser.

(3) La personne qui exerce un pouvoir direct ou indirect sur l'entreprise d'un propriétaire de services publics en Alberta et toute société dont cette personne est actionnaire majoritaire est tenue de donner à la Commission ou à son représentant l'accès aux livres, documents et dossiers relatifs à l'entreprise du propriétaire ou de communiquer tout renseignement y afférent exigé par la Commission.

Fixing of rates

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;

(d) repealed;

(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Établissement des tarifs

89 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement, des tarifs au mille ou au kilomètre et d'autres tarifs spéciaux opposables au propriétaire de l'entreprise de services publics et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'une entreprise de services publics, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'une entreprise de services publics, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) abrogé;

e) exiger qu'un propriétaire d'entreprise de services publics construise, entretienne et exploite, conformément à toute autre disposition de la présente loi ou d'une autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire de l'entreprise de services publics justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension.

Determining rate base

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to

Base tarifaire

90(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services public et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire de l'entreprise de services publics servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte :

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur

the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

Revenue and costs considered

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of such a period,

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,

(d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the hearing and determining of the matter, and

d'acquisition pour le propriétaire de l'entreprise de services publics, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'une entreprise de services publics par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qui, selon elle, sont pertinents.

Prise en compte des recettes et des dépenses

91(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services publics et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation des tarifs, des taux ou des charges, ou de leurs barèmes;

(ii) un exercice ultérieur;

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) tient compte de l'incidence de la *Small Power Research and Development Act* sur les recettes et les dépenses du propriétaire relatives à la production, au transport et à la distribution d'électricité;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

d) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa c) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

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

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

(a) issue any

(i) of its shares or stock, or

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

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

(b) capitalize

(i) its right to exist as a corporation,

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

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

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

(d) without the approval of the Board,

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

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

e) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas c) ou d) et la période (y compris tout exercice ultérieur) au cours de laquelle il convient de le faire.

Services de gaz désignés

101(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires d'entreprises de services publics assujettis au présent article et à l'article 102.

(2) Le propriétaire d'une entreprise de services publics désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

. . .

Prohibited share transaction

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

. . .

Interpretation Act, R.S.A. 2000, c. I-8

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Appeal dismissed with costs and cross-appeal allowed with costs, McLachlin C.J. *and* Binnie *and* Fish JJ. *dissenting.*

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

102(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'une entreprise de services publics désignée en application du paragraphe 101(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire de l'entreprise de services publics.

. . .

Interpretation Act, R.S.A. 2000, ch. I-8

[TRADUCTION]

Principe et interprétation

10 Tout texte est réputé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Pourvoi rejeté avec dépens et pourvoi incident accueilli avec dépens, la juge en chef McLachlin *et les juges* Binnie *et* Fish *sont dissidents.*

Procureurs de l'appelante/intimée au pourvoi incident : McLennan Ross, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident : Bennett Jones, Calgary.

Procureur de l'intervenante Alberta Energy and Utilities Board : J. Richard McKee, Calgary.

Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Procureur de l'intervenante la Commission de l'énergie de l'Ontario : Commission de l'énergie de l'Ontario, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Procureurs de l'intervenante Enbridge Gas Distribution Inc. : Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Procureurs de l'intervenante Union Gas Limited : Torys, Toronto.

TAB 2

THE CORPORATION OF THE DISTRICT OF SURREY, THE CORPORATION OF THE TOWNSHIP OF CHILLIWHACK, THE CORPORATION OF THE CITY OF CHILLIWACK ..... APPELLANTS;

1956
*Dec. 10
1957
Jan. 22

AND

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—Jurisdiction of Public Utilities Commission to issue certificate of public convenience and necessity without consent of municipality affected—The Public Utilities Act, R.S.B.C. 1948, c. 277, ss. 12, 14—The Gas Utilities Act, 1954 (B.C.), c. 13, s. 3—The Municipal Act, R.S.B.C., c. 232, as amended.

The Public Utilities Commission of British Columbia has jurisdiction, under the *Public Utilities Act* and the *Gas Utilities Act*, to grant a certificate of public convenience and necessity for the operation of a public utility within the boundaries of a municipality, without the consent of the municipality affected.

Per Rand, Locke and Nolan JJ.: The words "if required" at the conclusion of the first sentence of s. 14 of the *Public Utilities Act*, must be construed as meaning "if required by law", and there is no provision requiring the municipality's consent in such circumstances.

APPEAL by the three municipalities from a judgment of the Court of Appeal for British Columbia (1), affirming the decision of the Public Utilities Commission of British Columbia to grant the respondent company a certificate of convenience and necessity. Appeal dismissed.

T. G. Norris, Q.C., for the municipalities, appellants.

Hon. J. W. deB. Farris, Q.C., A. Bruce Robertson, Q.C., and *R. Dodd*, for the respondent.

THE CHIEF JUSTICE:—This is an appeal by leave of the Court of Appeal for British Columbia from its decision (1) dismissing an appeal from a certificate of public convenience and necessity, dated December 13, 1955, granted by the Public Utilities Commission of that Province to the respondent, British Columbia Electric Company Limited.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Nolan JJ.

(1) 19 W.W.R. 49, 4 D.L.R. (2d) 29.

1957

DISTRICT OF SURREY, *et al.* *v.* B.C. ELECTRIC CO. LTD.

Kerwin C.J.

Although the application by the respondent to the Commission states that it was made under s. 12 of the *Public Utilities Act,* which is R.S.B.C. 1948, c. 277, it is quite apparent from what will be stated shortly and from a perusal of the two clauses of that section that that part of the application with which we are concerned is really under s. 12(*b*).

The respondent, among other things, carries on the business of manufacturing gas and has entered into a contract for the purchase of natural gas, with a view to its distribution. The territory in respect of which the respondent applied was divided into the Greater Vancouver area and the Fraser Valley area. A certificate of public convenience and necessity was granted as to the former on July 29, 1955, but decision was reserved with respect to the Fraser Valley area. Ultimately a certificate was also granted as to that area, subject to certain conditions, and the real dispute is as to the power of the Commission to grant this certificate without the consent of the appellant municipalities.

The only provisions of the *Public Utilities Act* requiring consideration are s. 12 and the first sentence in s. 14, which read as follows:

> 12. Except as hereinafter provided:—
>
> (*a*) No privilege, concession, or franchise hereafter granted to any public utility by any municipality or other public authority shall be valid unless approved by the Commission. The Commission shall not give its approval unless, after a hearing, it determines that the privilege, concession, or franchise proposed to be granted is necessary for the public convenience and properly conserves the public interest. The Commission, in giving its approval, shall grant a certificate of public convenience and necessity, and may impose such conditions as to the duration and termination of the privilege, concession, or franchise, or as to construction, equipment, maintenance, rates, or service, as the public convenience and interest reasonably require:
>
> (*b*) No public utility shall hereafter begin the construction or operation of any public utility plant or system, or of any extension thereof, without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction or operation (in this Act referred to as a "certificate of public convenience and necessity").
>
> 14. Every applicant for a certificate of public convenience and necessity under either of the clauses of section 12 shall, in case the applicant is a corporate body, file with the Commission a certified copy of its memorandum and articles of association, charter, or other document of incorporation, and in all cases shall file with the Commission such evidence

as shall be required by the Commission to show that the applicant has received the consent, franchise, licence, permit, vote, or other authority of the proper municipality or other public authority, if required. . . .

It is clear that the relevant part of respondent's application was not made under clause (*a*) of s. 12, because it had no "privilege, concession, or franchise" from the appellant municipalities. That part of the application being under s. 12(*b*), and the opening words of s. 14 referring to an application for a certificate under either of the clauses of s. 12, it is too clear for argument that the latter part of s. 14 refers only to a "consent, franchise, licence, permit, vote, or other authority" when one of them is required on an application under s. 12(*a*). The matter does not lend itself to extended discussion and it is unnecessary to deal with the judgment of the Court of Appeal for British Columbia in *The Veterans' Sightseeing and Transportation Company Limited v. Public Utilities Commission and British Columbia Electric Railway Company, Limited* (1). Notwithstanding the various provisions of the *Municipal Act* to which counsel for the appellants drew our attention, the matter is left to the Commission to take into account the interests of all parties concerned, public and private, and this is corroborated by the provisions of the *Gas Utilities Act,* 1954 (B.C.), c. 13.

The appeal should be dismissed with costs.

The judgment of Rand, Locke and Nolan JJ. was delivered by

LOCKE J.:—The respondent company is a public utility within the meaning of that term, as defined in s. 2 of the *Public Utilities Act,* R.S.B.C. 1948, c. 277, and by a letter dated May 15, 1955, applied to the Public Utilities Commission, constituted under that statute, for a certificate of public convenience and necessity for a project for the supply of natural gas for a portion of the lower mainland area of British Columbia, which included the District of Surrey and the Township of Chilliwhack and the City of Chilliwack.

The application to the Commission was opposed by the present appellants. Lengthy public hearings were held, at which a similar application by a competing gas distributing company was also considered.

(1) 62 B.C.R. 131, [1946] 2 D.L.R. 188, 59 C.R.T.C. 63.

1957

DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Locke J.

The respondent has for many years sold manufactured gas through various subsidiary companies in a number of municipalities in the greater Vancouver area. The project proposed was for the supply in additional areas in the lower mainland of the Province of natural gas brought by a pipeline company from the Peace River areas of Alberta and British Columbia.

By s. 2 of the *Gas Utilities Act*, 1954 (B.C.), c. 13, a "gas utility" is defined as a corporation which owns or operates in the Province facilities for, *inter alia*, the production, transmission or delivery of gas, a word defined to include natural gas, and the respondent company falls within this definition. By s. 3 of that Act, every such company to which a certificate of public convenience and necessity is thereafter granted under the *Public Utilities Act* shall in the municipality or area mentioned in such certificate be empowered to carry on, subject to the provisions of that Act, its business as a gas utility, including power to transmit, distribute and sell gas and to place its pipes and other equipment and appliances under any public street or lane in a municipality upon such conditions as the gas utility and the municipality may agree upon. If the parties fail to agree upon these terms, the Public Utilities Commission is empowered by s. 40 of the *Public Utilities Act* to settle them.

Section 12 of the *Public Utilities Act* provides for applications to the Commission for a certificate of public convenience and necessity in cases where a franchise has been granted to a public utility by any municipality or other public authority after the coming into force of the Act, and also in cases where no such franchise has been granted, these being dealt with in clauses (*a*) and (*b*) respectively. The respondent had not applied to any of the appellant municipalities for any concession or franchise to supply gas within their boundaries and, while the written application to the Commission merely states that it was being made under the provisions of s. 12 of the Act, it is clear that the application was made under clause (*b*) of that section.

According to s. 14 of the statute, upon an application for such a certificate under either of the clauses of s. 12, the applicant, if a corporate body, shall file a certified copy of its memorandum and articles of association or other docu-

ment of incorporation, and such evidence as shall be required by the Commission to show that the applicant has received the consent or permission of the municipality or other public authority *if required.*

It was the contention of the appellants that their prior consent or permission was a condition precedent to the right of the Commission to grant the certificate applied for and they contend that this construction of the statute is supported by the language of the section. For the company, it is said that the words "if required" should properly be construed as meaning "if required by law" and that, by virtue of the provisions of the *Public Utilities Act* and the *Gas Utilities Act,* no such consent is required.

The contention that the utility cannot carry on its activities in a municipality without its consent is based upon certain provisions of the *Municipal Act,* R.S.B.C. 1948, c. 232, which, standing alone, would indicate that such consent was required. By s. 58 of that statute a municipality is authorized to pass by-laws regulating the operations of a wide variety of businesses and other activities and prohibiting the carrying on of certain of them, other than by leave and licence of the municipality. Thus, by cl. 55 of that section, by-laws may be passed

> For regulating the construction, installation, repair and maintenance of pipes, valves, fittings, appliances, equipment, and works for the supply and use of gas:

and by cl. 109 for licensing and regulating any gas company and authorizing the use of the public highways by such company. Section 328 of the Act, by cl. 29, fixes the payment to be made by gas companies semi-annually for the licences held by them, failure to pay which renders the licence liable to cancellation. The provisions for the licensing and regulation of gas companies by municipalities in British Columbia have been for many years part of the municipal law of the Province: see *Municipal Clauses Act,* R.S.B.C. 1897, c. 144, s. 50(36); *Municipal Act,* R.S.B.C. 1911, c. 170, s. 53(92); *Municipal Act,* R.S.B.C. 1936, c. 199, s. 59(99).

The *Public Utilities Act* was first enacted in 1938 and was designed to place the operations of persons engaged in the production, generation, transmission or sale of gas and electricity and a wide range of other undertakings designed

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to render service to the public, under the control of a commission constituted by the Act. The statute imposes upon every public utility the obligation, *inter alia,* to supply to all persons who apply therefor and are reasonably entitled thereto suitable service without discrimination or delay, to maintain its property and equipment in proper condition to enable it to furnish adequate, safe and reasonable service, to obey all orders of the Commission made pursuant to the Act in respect of its business or service and to refrain from demanding unjust or discriminatory rates for its service. By Part V of the Act the Commission is given general supervision of all public utilities falling within the definition in the Act and is empowered, *inter alia,* to make such regulations or orders regarding equipment, appliances, safety devices and extensions of works as are necessary for the safety, convenience or service of the public. Further wide powers of supervision and control are given over the rates which may be imposed, the manner in which money can be raised by the sale to the public of shares or bonds and over the mortgage, sale or licensing of the utilities' property. No utility to which a certificate of public convenience and necessity has been issued and which has commenced operations may cease operating without the Commission's consent.

The whole tenor of the Act shows clearly that the safeguarding of the interests of the public, both as to the identity of those who should be permitted to operate public utilities and as to the manner in which they should operate, was a duty vested in the Commission. It is quite impossible, in my opinion, to hold that these powers and those which might be asserted by a municipality to regulate the operations of such companies under s. 58, cls. 55 and 109, were intended to co-exist.

It is unnecessary for the determination of this matter to decide whether, apart from the provisions of the *Gas Utilities Act,* the appellant municipalities might insist that a licence under the licensing provisions of the *Municipal Act* was a condition precedent to the granting of a certificate under s. 12(*b*) of the *Public Utilities Act.* The language of s. 3 of the *Gas Utilities Act* is clear and free from ambiguity.

The words "if required" at the conclusion of the first sentence of s. 14 must be construed, in my opinion, as meaning "if required by law". The municipality, of necessity, being a statutory body could only require its licence or consent if authorized by statute to do so and, from the date the *Gas Utilities Act* became the law, no such licence or consent was necessary. The effect of s. 3 of that statute was, in my opinion, to impliedly repeal the licensing provisions of the *Municipal Act* relating to such utilities.

In discharging its important duties under the *Public Utilities Act* the Commission is required to consider the interests not merely of single municipalities but of districts as a whole and areas including many municipalities. The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission, subject, *inter alia,* to the right of municipalities of insuring a supply of gas by municipal enterprise of the nature referred to in the reasons delivered by the Chairman of the Public Utilities Commission. This right the Commission was careful to preserve.

Reliance was placed by the appellants on certain passages from the judgments delivered by the Court of Appeal in *The Veterans' Sightseeing and Transportation Company Limited v. Public Utilities Commission and British Columbia Electric Railway Company, Limited* (1), but I think what was there said does not affect the present matter. The provisions of the *Gas Utilities Act* of 1954 are decisive, in my opinion.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—At the conclusion of the argument I had doubts as to whether the provisions of the *Gas Utilities Act* and the *Public Utilities Act* manifest a clear intention on the part of the Legislature to confer power on the Public Utilities Commission to authorize the respondent to carry on operations in the appellant municipalities without their consents, which consents would otherwise have been necessary under sections of the *Municipal Act* which have not been expressly amended or repealed.

(1) 62 B.C.R. 131, [1946] 2 D.L.R. 188, 59 C.R.T.C. 63.

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I cannot say that these doubts have been entirely dispelled but as the other members of this Court and the unanimous Court of Appeal are satisfied that the relevant statutory provisions should be so construed, I concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitors for the Corporation of the District of Surrey, appellant: Norris & Cumming, Vancouver.

Solicitor for the Corporation of the Township of Chilliwhack and the Corporation of the City of Chilliwack, appellants: F. Wilson, Chilliwack.

Solicitor for the respondent: A. Bruce Robertson, Vancouver.

TAB 3

BRITISH COLUMBIA

COURT OF APPEAL

Before O'Halloran, Davey and Sheppard, JJ.A.

Prince George Gas Company Limited
and **City of Prince George** (Appellants)
v. **Inland Natural Gas Company Limited** (Respondent)
(No. 2)*

* For (No. 1) see (1957) 22 WWR 5.

Alfred Bull, Q.C., G. H. Steer, Q.C., and *D. W. H. Tupper,* for Prince George Gas Company Limited.

A. C. DesBrisay, Q.C., for City of Prince George.

J. L. Farris, Q.C., and *J. D. Taggart,* for Inland Natural Gas Company Limited.

April 8, 1958.

O'HALLORAN, J.A. — It falls to this court to review the decisions of the Public Utilities Commission of British Columbia which authorized respondent Inland Natural Gas Co., and denied appellant Prince George Gas Co., authority to construct and

operate a four and a half mile lateral or feeder line from the main transmission line of Westcoast Transmission Co. Ltd. to the city of Prince George and environs. The Prince George Gas Co. has a franchise from appellant city of Prince George to market and distribute natural gas in that city and had the full support of the city in its application to the Public Utilities Commission to construct and operate the necessary feeder line required to supply natural gas to consumers in the city and environs.

Westcoast Transmission Co. was in the course of constructing a 649-mile natural gas pipeline from the Alberta Peace River area to the United States boundary near Huntington, B.C. at a then estimated cost of $152,000,000 (April, 1956).

Two other decisions of the commission closely connected with the above and made at the same time also require review by this court. The first is the acceptance by the commission without examination of the price of natural gas at the Prince George diversion point from the main Westcoast transmission line. The second is the finding of the commission that the Prince George area in addition to its own economic costs in obtaining natural gas ought to contribute to, compensate or subsidize respondent Inland Gas Co. so that the latter could construct and operate 270 miles south of Prince George a separate and distinct feeder line at Savona on the Westcoast transmission line to run some 332 miles through Savona to Nelson.

Westcoast Transmission Co. had secured contracts for the sale of its natural gas with, (*a*) Pacific Northwest Pipeline Corpn., a United States company for the supply of the United States markets, and (*b*) with B.C. Elec. Co. for the supply of the Lower Mainland and Greater Vancouver markets, and (*c*) with respondent Inland Gas Co. for the supply of the markets of the entire interior of British Columbia including the city of Prince George. The latter contract entailed the construction by the respondent Inland Gas Co. of a 332-mile lateral or feeder line at an estimated cost of $28,000,000 from the Westcoast transmission line at Savona, B.C., some 270 miles south of Prince George.

Separate appeals on fact to the Lieutenant-Governor-in-Council of British Columbia were taken by the Prince George Gas Co. and the city of Prince George. The Lieutenant-Governor-in-Council, without adjudicating upon these appeals, referred them to this court under secs. 108 and 109 of the *Public Utilities Act,* RSBC, 1948, ch. 277. Their separate appeals upon law came direct to this court under secs. 100 *et seq.* of the said Act.

In my judgment, with respect, the Public Utilities Commission fell into fundamental error of fact in holding that the city of Prince George "might never have been in a position to receive gas at all" unless Westcoast Transmission Co. had received the financial and marketing support of respondent Inland Co. to obtain the required governmental authorizations to enable Westcoast to construct the natural gas pipeline from the Alberta Peace River to the United States boundary near Huntington, B.C. As I read the commission's reasons this finding of fact dominated and guided the reasoning which led to the commission's conclusions and decisions. It is also plain from the evidence the Westcoast project became economically feasible only because the United States market was available.

From the evidence it is plain that it was not economically feasible to build a natural gas pipeline 235 miles from the Peace River to supply the city of Prince George alone. But it is equally plain it was not economically feasible to build a natural gas pipeline to Savona some 270 miles further south of Prince George and then from Savona to supply Kamloops 26 miles distant from Savona, and from there to Penticton some 180 miles from Savona, and from there to Nelson some 332 miles distant from Savona. The potential markets were not there. The population in the interior of British Columbia bears no commercial comparison with the large population of the Lower Mainland and Greater Vancouver area, nor with the even greater population across the United States boundary from Huntington, B.C.

Before the federal Board of Transport Commissioners in June, 1955, it was stated on behalf of the Westcoast Co. that the entire interior markets of British Columbia including the Prince George area were estimated at 27,000,000 cubic feet per day, namely, only four per cent of the Westcoast transmission line's capacity of 660,000,000 cubic feet per day, of which the Pacific Northwestern Pipeline Corpn. obtained a contract with Westcoast for 300,000,000 cubic feet per day for the United States market.

Nor is there any evidence in the appeal books that the Lower Mainland and Greater Vancouver markets (for which the B.C. Elec. Co. has a contract with Westcoast) would justify construction of a natural gas pipeline from the Peace River to Huntington, B.C. I am unable to find any evidence in the 883-page appeal books of any factual estimate of the Lower Mainland and Greater Vancouver market although inferences point to that market being very considerably less than the 300,000,000 cubic

feet per day contracted for by the Pacific Northwest Pipeline Corpn. From the statements in the dominion order-in-council of June 23, 1955, it would appear that Westcoast's commitments with B.C. Elec. and Inland contracts combined do not exceed 100,000,000 cubic feet per day, viz., less than one-third of the daily volume of the Pacific Northwest Pipeline Corpn's contract with Westcoast for the United States market.

The evidence compels me to conclude that Westcoast could not economically have built its natural gas pipeline from the Peace River to Huntington, B.C., or for that matter into any portion of British Columbia without the prior assurance of the United States market illustrated by the 300,000,000 cubic feet per day contract with the Pacific Northwest Pipeline Corpn. In Ex. 32 headed, at p. 564, as the "Inland Story," having said that the Westcoast Transmission Co. had received all necessary authorizations to construct a transmission line from the Peace River through British Columbia to the Vancouver area, it continued:

> *"However, the tremendous cost of over $120,000,000 makes the pipeline impractical for British Columbia alone and it must extend to the highly populated areas of Washington and Oregon to be economically feasible."*

Also in the agreement of February, 1955, between the Westcoast Co. as seller and the Inland Co. as buyer, Inland is given the right to terminate that 20-year contract if the customer or customers of Westcoast in the United States failed to procure from the federal Power Commission on or before the first day of December, 1955, a certificate of public convenience and necessity

> "for the construction and operation of its or their pipeline facilities in the United States and a presidential permit authorizing the construction by it or them of facilities to import gas into the western United States, containing terms and conditions satisfactory to such customer or customers."

It is true that by reason of Inland's wholly-owned control of two natural gas producing well companies in Alberta, Inland obtained a volume of natural gas apparently sufficient to supply the Westcoast requirements at the intake of its transmission line in Alberta. In that respect it may be said that the Inland Co. assisted the Westcoast Co. in satisfying the appropriate governmental authorities, that it had a supply of gas to permit export to the United States. But that assistance to the Westcoast Co. necessarily relates to the supply of that volume of gas

at the intake of the Westcoast transmission line in Alberta for delivery outside Alberta, and has no direct or determinative influence upon that part of the Inland Co.'s undertaking which is concerned only with the purchase from the Westcoast Co. of a supply of gas for the consumer markets in the interior only of British Columbia. In short in Alberta Inland was a seller of gas to the Westcoast Co. but in the interior of British Columbia it was a purchaser of gas from Westcoast. In Alberta, the Inland Co. may be an asset to the Westcoast Co. but in British Columbia Inland may be a liability since Westcoast has agreed to pay Inland $500,000 a year for the first three and a half years of the operation of the Savona-Nelson branch line. That interior market, as above stated, could not at its potential best exceed more than four per cent of the Westcoast's transmission line maximum requirements. For above reasons alone I have come to the conclusion stated at the outset that the Public Utilities Commission fell into fundamental error.

Moreover, in its certificate of August 10, 1956, the Public Utilities Commission directed that the volume of gas Inland should supply the Prince George Gas Co. at the Prince George city gate should not exceed 1,000,000 cubic feet per day. If, as represented by counsel in this court, the Prince George market is about 12 per cent of the other interior British Columbia markets, then the whole of the interior market, including Prince George, may be estimated at about eight and a half or nine million cubic feet per day or about three per cent of the Northwest pipeline daily volume for the United States market.

While it might reasonably be found as a fact that without the Pacific North West pipe line contract Prince George "might never have been in a position to receive gas at all," yet it cannot on the evidence be found as a fact by any legitimate inference that without the Inland contract to supply the interior of British Columbia gas could not be available to Prince George. The availability of gas to Prince George did not of necessity depend on the Inland contract when it is apparent that even with the proposed Savona-Nelson branch line in operation the Inland Co. would not take more than four per cent of the maximum of the Westcoast's requirements. The Inland contract could not be a determining factor in the Westcoast project.

Once this conclusion is reached, to my mind it sweeps away entirely any real basis for subsequent conclusions of the Public Utilities Commission put forward as primary conclusions such as:

A. That the Prince George Gas Co. ought to make a contribution to the Inland Co. for the latter's costs to supply other interior communities, such as Kamloops, Kelowna, Penticton, Trail, and Nelson, over the Savona-Nelson 332-mile branch line from Westcoast's main transmission line;

B. That the price of natural gas to be sold at the Westcoast transmission line diversion point four and a half miles from the city of Prince George, should be greater if sold to the Prince George Gas Co. than if sold to the Inland Co., that is to say, higher than in the Inland-Westcoast contract terms of a demand charge of $3.21 per m.c.f. of monthly billing demand, a commodity charge of 20c per m.c.f. of gas actually delivered by the seller to the buyer and a charge for interruptable gas of 22c per m.c.f. These figures are a sufficiently general description of the terms defined in detail in the Inland-Westcoast contract referred to above.

These latter references, A. and B. above, in my judgment at least, contain fallacies plain in themselves and quite apart from their reliance on the original fundamental error (first dealt with above) on which they were based.

In regard to A. above (viz., contribution to the Inland Co.) the conclusion that the whole of the British Columbia interior, comprising such far distant communities as Prince George in the north central part of the province and the other communities in the Okanagan and Kootenay areas comprising an economic unit for the purpose of the marketing and distribution contract Inland had made with Westcoast is, with respect, inherently and plainly fallacious. Not only did the Public Utilities Commission reject the peculiar economic advantages of Prince George as a large and developing distributing point to the north with a four and a half mile branch line from the Westcoast transmission line, in comparison with Inland's proposed branch feeder line some 332 miles long, branching from the Westcoast transmission line at Savona, 270 miles south of Prince George, but the Public Utilities Commission also, with respect, ignored completely the difference in climate, topography, and sources of livelihood of the inhabitants of Prince George when compared with such places on the Savona branch line as Kamloops, Kelowna, Penticton, Trail and Nelson. These geographic, climatic, and economic differences are plain to anyone born in British Columbia or who has lived in British Columbia for any length of time. If these differences are not recognized, Prince George would be required to pay higher prices for gas which could throttle its industrial activity in favour of other areas

to whose competitive costs with other local fuels Prince George would be forced to contribute, e.g., Prince George would be compelled to subsidize the Inland Co. so the latter could sell gas in Penticton at lower prices than Penticton has now to pay for coal, fuel oil, electrical energy and other fuels.

It is true that the communities along the 332-mile Savona branch line to Nelson may have many grounds peculiar to their own situations and areas for accepting the Inland Co. as a marketing and distributing agency. But whatever the reasons those communities may have for acceptance of the Inland agency, they are not reasons which would prompt those communities to do so if they were physically situated in the same position and area as the city of Prince George. The people of the city of Prince George quickly recognized these diifferences when by vote, they authorized the Prince George city council to give a franchise to the Prince George Gas Co. in competition with the Inland Gas Co. I am satisfied, with respect, that the Public Utilities Commission in disregarding the geographic and other economic advantages of Prince George applied wrong and uneconomic rating principles and contrary to the *Public Utilities Act*, when it decided that Prince George should contribute to and compensate Inland for supplying natural gas to the communities along the 332-mile Savona-Nelson branch line.

If, however, it could be said, that the Prince George consumers ought economically "to contribute" to the costs of the supply of natural gas to other communities in British Columbia, that contribution would occur if Prince George were charged at its diversion point on the main Westcoast transmission line the same unit cost and price as other British Columbia communities are required to pay at their individual diversion points along the main Westcoast transmission line. The Westcoast Co. seems to have recognized that principle in effect, by requiring the Inland Co. to pay at the Prince George diversion point the same price that is chargeable at Savona, 270 miles south of Prince George, and also the same price that the B.C. Elec. Co. is charged some 500 miles south of Prince George at Huntington for the Lower Mainland and Vancouver markets.

I have no quarrel with this latter principle of fixing a uniform price along the individual diversion points from the Westcoast mainline in British Columbia subject to what is later said that a competent rating authority first determine that the uniform price so established is an economically fair price when determined in relation to the actual cost of the construction of the pipeline from the Peace River to the United States boundary, and actual

costs of operation along that main Westcoast line when also related to the fair economic return upon the actual capital investment. But the Public Utilities Commission did not examine that phase of the matter. Instead, the Public Utilities Commission, although it conceded that Prince George required only a separate four and a half mile feeder line for its own needs, nevertheless held Prince George ought to contribute as well to the cost of construction and operation of a separate 332 mile feeder line to start 270 miles south of Prince George, for the needs of the communities this latter feeder line would serve.

It follows as well, in regard to B. above, that the Public Utilities Commission fells into error in deciding that the Prince George Gas Co. could not be granted the same price as the Inland Co. at the Prince George diversion point on the Westcoast transmission line some four and a half miles from the city of Prince George. Before the Public Utilities Commission, Inland produced its contract with the Westcoast Co. to buy gas at the Prince George diversion point from the Westcoast main transmission line for figures of $3.21 per monthly billing, 20c per m.c.f. per day on actual volume and 22c per m.c.f. per day for interruptable gas as mentioned above. With this contract in hand, Inland insisted, with the approval of the Public Utilities Commission, that if the Prince George Gas Co. were to buy at that diversion point instead of Inland (or to put it another way, if Inland instead of Prince George Gas Co. were authorized to supply the city of Prince George), then the consumers in Prince George in their individual charges for use of natural gas would have to pay an additional amount, which, if reflected in comparable terms to the Westcoast-Inland contract price, would be $5 per monthly billing, 30c per m.c.f. daily and 30c per m.c.f. for interruptable gas (A.B. p. 454). This discloses, of course, a plain case of the Inland Co. obtaining a large middleman's profit from the Prince George area. This approval by the Public Utilities Commission flowed from its acceptance of the factual assumptions which I have found previously are insupportable in fact.

Moreover, the Public Utilities Commission never did examine the economic fairness of the Westcoast price to Inland of $3.21, 20c and 22c at the Prince George diversion point on the main transmission line in relation to the actual cost of the transmission line itself from the Peace River area to the United States boundary near Huntington, B.C. To my mind such an inquiry is obviously necessary before determining whether the price chargeable the Prince George area is or is not a fair return within the meaning of the *Public Utilities Act* upon the true

capital invested. It seems that when Inland appeared before the Public Utilities Commission it said in effect:

> "We have a 20 year contract with the Westcoast Co. at a price fixed between us of $3.21 for monthly billing demand, 20c per day m.c.f. on demand, and 22c per day m.c.f. for interruptable supply of gas; we must ask you [the Public Utilities Commission] to accept this as a fair economic price without any enquiry into it."

It would seem that that price negotiated between Westcoast and Inland was to be the same under the contract whether the diversion point was at Prince George or whether the diversion point was 270 miles further south at Savona. It seems also that it was practically the same price that was fixed in the agreement between Westcoast and the B.C. Elec. Co. for sale of its gas at Huntington, B.C. In short, it was represented to the Public Utilities Commission that Westcoast was charging the same price for its gas at any diversion point that occurred along its 500-mile distance of pipeline from Prince George to the United States boundary. As already stated, the economic fairness of this price along the Westcoast transmission line was not subjected to any investigation in relation to the actual capital cost of the main transmission line itself or its annual operation from the Peace River to the United States boundary.

At this point it cannot escape an inquiring mind that the contract price to the Pacific Northwest Pipeline Corpn. for the United States market at Huntington, B.C., was not revealed in the evidence before the Public Utilities Commission. But reports in the daily press of the Borden seven-man Energy Commission appearing after judgment in this case was reserved in our court became widely publicized apparently without contradiction at the Borden inquiry itself by the Westcoast Co., that Westcoast was selling gas to the Pacific Northwest Pipelines for the United States market at a price of 10c per m.c.f. per day (viz., 22 cents *vis-à-vis* 32c per day m.c.f.) less than to both the B.C. Elec. and to Inland, although the divorsion point to the B.C. Elec. at Huntington is in the immediate vicinity of the diversion point to the Northwest Pipeline Corpn. The distance from Huntington, B.C., to the Seattle ciy gates is estimated at 130 miles compared to the distance of some 40 miles (about one third the distance) from Huntington to the Vancouver city gate.

This court has no direct evidence that the 22c sale figure to Pacific Northwest Pipelines above mentioned is correct, but the difference between the 22c and the 32c figure seems now to be accepted as a fact in the Vancouver daily press. It does point

up a danger for this court to pass upon the economic fairness of the price to Prince George consumers unless the court is first convinced that there was a sufficient economic reason for Prince George consumers having to pay 28c per m.c.f. per day ($5 per monthly billing demand, 30c m.c.f. per day demand, etc.) at the Prince George diversion point in excess of what seems to be widely accepted in the daily press to be the price charged the Pacific Northwest Pipelines at Huntington, B.C., some 500 miles further south. The reason for further investigation into costs and prices is not confined to this aspect as is shortly explained.

The conclusion I must reach inevitably is that Prince George Gas Co. is entitled to buy natural gas from Westcoast Co. at the Westcoast transmission line diversion point some four and a half miles from Prince George; and that it also is entitled to pay the same price at least as the price Westcoast is willing to sell to Inland under the contract referred to. However, if the Prince George Gas Co. is willing to accept that price of $3.21, etc., at the Westcoast transmission line, without having it investigated whether that price is or is not a fair economic price at the diversion point, then, of course, it is its decision. But if Prince George Gas Co. or the city of Prince George wishes to have it determined whether that price is or is not a fair economic price, then in my judgment it is entitled to have a proper investigation by a competent tribunal, whether that tribunal is federal or provincial.

It seems proper to add here that in my judgment the economic fairness of this price at diversion points on the Westcoast transmission line cannot be decided without consideration of at least three factors: The first arises out of the evidence of C. R. Hetherington, executive vice-president of the Westcoast Transmission Co., that the Pacific Northwest Pipeline Corpn. above mentioned, which has a 300,000,000 cubic feet per day contract with Westcoast is selling or considering to sell to another United States natural gas pipeline company, namely, Colorado Interstate Pipeline Corpn., at Colorado Junction in the state of Wyoming, far to the south of Huntington, B.C., at a price of 18c per m.c.f. per day, apparently four cents less than the 22c m.c.f. per day that Northwest Pipelines is paying the Westcoast Co. at Huntington, B.C. In his cross-examination by Mr. G. H. Steer, Q.C.:

> "Q. Do you say that ordinarily, if you hadn't made these deals in contemplation of certificates of public convenience and necessity being granted, do you say that normally if

Westcoast were selling to a number of distributing companies in the province of British Columbia, it would sell at different rates? A. Well, we never came up against that situation, Mr. Steer. I would say that the answer to that, under these particular circumstances, is definitely yes, that we would sell at different rates, and I would like — now, let me continue to tell you what I mean there. It is not uncommon for pipeline companies to have utility rates for sales to a distributing utility in the vicinity of the main line and at the same time have what you might call a transmission rate or a pipeline rate for sales to a pipeline company that then must haul all the gas hundreds of miles to sell it to other communities. Now, that is standard in the gas business. For example, *on the Pacific Northwest pipeline, they sell gas at an average price of about 35c to the various utility customers* in the vicinity of their pipeline, and yet at a junction down in Colorado or possibly it is Wyoming is where it is, *it is Colorado Junction in Wyoming, they sell at 18c, not 35c, but they sell at 18c to Colorado Interstate who then hauls that gas to Denver.* Now, if they tried to sell at 35c to this pipeline you couldn't sell the gas by the time you got it to Denver and nobody would benefit. We are in exactly the same situation. We are selling — we have what you might call a main line rate and then Inland it just happens that what we would call the pipeline rate turned out to be the same as the rate to the British Columbia Electric. Now, the Inland is buying this gas at Savona and they are going to haul it for 330 some miles and serve a large segment of the British Columbia population. We in Westcoast think that is desirable. Now, then, to try and sell that gas at Savona at some price that would not permit its sale in Penticton and Trail doesn't help anybody. So to answer your question, the situations must stand on their own and yes, we would have different rates, but we would not discriminate."

It is not stated directly that the natural gas Pacific Northwest Pipe Lines is selling to the Colorado Interstate Co. is the Canadian gas that comes from its Westcoast contract, but the inferences are there, unless explained away. It is clear nevertheless that the price at which Westcoast may sell competitively may have no economic relationship to the costs of supplying gas. In this way sales below cost may destroy competition, so that when it is destroyed the price may be raised. In this connection the competitive aspects of natural gas with other local fuels, in order to gain potential markets in Prince George, Penticton,

and other interior areas, are freely discussed throughout the evidence in the appeal books.

It would seem that the Inland Co.'s many estimates and calculations presented in the testimony of the anticipated crystallization of the hoped-for consumer markets in Prince George, Kamloops, Kelowna, Penticton, Trail, Nelson, etc., are dependent upon the gas being sold in those localities at a price less than the prices of competing fuels for gas, light, cooking and heat and heating water in those same localities. But if the competitive price of gas in these localities is based upon the same pricing principles that Westcoast's Mr. Hetherington described in the above Denver, Colorado, illustration, then such prices bear on their face no relationship to economic costs of the gas supply in those localities. The calculations take lightly into consideration, for example, that the other competitive fuels might also reduce their own prices in order to hold their own consumer markets against Inland's gas. This phase is touched on vaguely in respect to Kamloops which now has an oil refinery, and in Penticton where the electric company reduced its prices about the time there was talk of Inland gas becoming a competitive fuel.

In my judgment no price can be accepted as economic which rests solely on competitive prices in a locality. No one will deny that large volumes may reduce economic costs and sale prices (if that is proven so on investigation and the product itself is not degraded) but that does not accept the principle that large volumes may be sold below economic cost of supply in some localities and as a balance so to speak are also sold much above economic cost of supply in other areas. Such practices were condemned in the Macdonald Royal Commission Reports, 1936-1938, relating to coal and petroleum and their economic relationship. In fact, the Denver, Colorado, illustration above carried condemnation on its face. That very subject-matter and the accepted economic practice of the United States Inter-State Commerce Commission are outlined in a letter to *"Life" Magazine* of March 24, 1958, from an official of that commission. I quote in part:

> " * * * * Your solution seems to be that the freight rate structure should be dictated by the unrestrained competitive efforts of the carriers *without any interference by the impartial and authoriitative exercise of federal power as a shield against vicious economic results.*
>
> "History clearly shows that competitive forces generally are effective in reducing prices and improving standards of

service. These very same competitive forces in the transportation field, if unchecked, would result in the *ruthless elimination of carrier competition in particular situations,* and in disrupting reasonable and fair rate relations as between competing producers, localities, and geographical areas."

This competitive aspect forces consideration of another factor, namely, that Westcoast has given an exclusive sales and price contract to the B.C. Elec. Co., an agency which has a near monopoly in the Lower Mainland and Greater Vancouver area of fuel for lighting and cooking, and a large business in heating and hot water hearing. In short, the exclusive sales agent of Westcoast in the Lower Mainland and Greater Vancouver area has a monopoly of the natural gas in that area as well as a near monopoly of some of the fuels for lighting and cooking competing with natural gas in that area. It is obvious that it is not in the interests of the B.C. Elec. Co. to sell Westcoast natural gas at a price that will make competitive inroads into the sale of its own fuels, but the Denver illustration given by Westcoast's Mr. Hetherington points up the results where a competitive situation exists and invites a thorough investigation of what is an economic price of Westcoast natural gas anywhere in British Columbia as well as at any point in British Columbia where it is exported from Canada. If it can escape governmental review of its costs and prices Westcoast could believe it was good business to sell at lower than economic cost to Pacific Northwest Pipelines and at higher than an economic price to the Greater Vancouver area and the B.C. interior areas.

Inherent in the foregoing aspects of the necessity of the determination of what is an economic price of natural gas at the diversion point on the main Westcoast transmission line is also the method of computation of the cost of the construction and operation of the pipeline from Peace River to the United States boundary near Huntington, B.C. In short, if there is to be a fair economic relationship between the price of such natural gas at its diversion points and the overall cost of the Westcoast transmission line, and the consequent economic return upon capital investment, that economic relationship must necessarily be based on the true actual cost of construction and operation and not upon mere acceptance of any system of built-up costs related to volume of sales by any sales-realization method of costing condemned in the Macdonald Royal Commission Report on the Petroleum Industry, published in 1936, to be found in the Vancouver city library and in the U.B.C. reference and other libraries.

In vol. 1 of that report (consisting of vols. 1, 2, and 3) on pp. 13-22, is found an explanation and discussion of the sales realization method of computing costs to confirm the conclusions there reached that the sales realization method is useless for the purpose of arriving at any true actual cost. Among other objections, it seeks to include marketing and distribution costs in the original capital cost of production or construction. This sales-realization cost method (and see also pp. 22 and 25, and pp. 148-50, and pp. 159 and 201 of vol. 1 of that report) was also rejected by the Tariff Board of Canada, and see vol. 3 of that report, pp. 172-3, and 178-9. The chairman of that royal commission, the Honourable M. A. Macdonald (subsequently Chief Justice of British Columbia) said in his preface to vol. 1:

> "It was found that real costs were not presented. The financial statements produced were at first thought to contain actual costs, but it was found on further study that they could not be accepted as such. A bookkeeping system is followed by the oil companies known as the sales realization method, *wherein the selling price of products* is taken as the basic factor in ascertaining the costs of each individual product. It seemed to me—and I so stated at the outset when this method was first advanced—that it appeared to be an illusory system of cost accounting, but I preserved an open mind on the subject. After further consideration, however, that view was adhered to. The Tariff Board of Canada, in an inquiry conducted this year of similar import in so far as the need of obtaining basic costs were concerned, and in which they had for their consideration as part of its record the evidence taken in this Inquiry (Mr. O'Halloran, Chief Counsel, acting on behalf of the Provincial Government before the Board), refused for their purposes to accept this method of ascertaining costs of individual products.
>
> "If we had accepted the sales realization method it would have been better to close the inquiry at that point and to report accordingly, because under such a system high prices could be justified irrespective of the real costs. By this method costs fluctuate with changing realized prices. If, for example, the retail price of gasoline to the consumer should be increased, the cost of its production would also be increased (in the books only), keeping the selling price virtually in the same relation to costs as before the advance. And yet the real costs of production might not be changed at all."

A variety of ancillary or supplementary questions (including direct or indirect tax) were debated in the nine-day appeal argu-

ment, but in my judgment, with deference, they are not directly relevant because of the view I have reached above of the sweeping results of the fundamental error in fact described at the outset. The questions debated of law and mixed law and fact have in this case lost their foundation in fact. However, several observations pertinent to the reasoning in this judgment are added for explanatory purposes:

1. The fair economic price of gas to the consumer in Prince George by reason of its very nature demands separate consideration of three steps, namely: (*a*) The fair economic price at the diversion point on the main Westcoast transmission line; (*b*) The additional fair marketing and distribution economic price demanded by the construction and operation of the four and a half mile branch or feeder line from (*a*) above to the city gate of Prince George; (*c*) The additional fair construction, distribution and marketing economic price to the premises of the consumer in the city of Prince George itself.

The calculation of (*b*) above must necessarily depend on the actual cost and operation of the four and a half mile feeder line and a fair economic return thereon after it has been constructed and in operation for some reasonable period, such as one or more years. The calculation of (*c*) must depend on the number and locality of the actual consumers. To attempt to base this on a count of houses and industrial plants alone as potential consumers only invites confusion. For example, if a householder is approached by a sales agent to instal natural gas instead of the fuel or power he is using, one of his first questions will naturally be, "How much will it cost me?" so that he can decide whether he will substitute natural gas for what he is now using. How can such sales agent answer that question authoritatively unless his answer is made subject to an economic fair price on (*a*), (*b*) and (*c*). Unless (*a*), (*b*) and (*c*) are kept separate, confusion is difficult to avoid in reaching an economic price, as I am satisfied occurred in the evidence before the Public Utilities Commission when attempts were made to estimate the monthly charge to a theoretical consumer in Prince George.

The ascertainment of fair economic cost is of necessity a basic requirement before one can ascertain the just and reasonable or fair economic price within the meaning of the *Public Utilities Act*. The questions of cost and price were considered at pp. 1-4 in vol. 2 (the coal industry) of the Macdonald Royal Commission Report, 1937. Related to cost and price is also the character of the capital structures of the companies affected

and see vol. 2 of the Macdonald Royal Commission Report above at pp. 67-70; 127-145; and p. 263.

2. Another observation relates to the reams of testimony in the evidence of prepared estimates regarding cost, prices, and return upon investment of the proposed Inland feeder line from Savona to Nelson. Such estimates in respect of (*b*) and (*c*) above are on their face conjectural. They were made, it is true, by people who seemingly have high qualifications in their own fields, but they were putting forward a case for the side which had employed them. There was no evidence put forward by independent investigators of similar qualifications as occurred in the coal and fuel oil comparison in the Macdonald Royal Commission of 1938 to which I will refer more fully in a moment. Until fundamental estimates have been proven in fact, that is, in actual practice, subsequent estimates are founded on the shifting sands of hope; cf. the old saying, "What may seem to work out satisfactorily in the laboratory is not necessarily commercially feasible in the field." The problems surrounding a feeder gas line to be laid into a great variety of homes and industrial establishments is far different from that surrounding the construction and operation of a lengthy gas transmission line, or even of a feeder line to a city gate. There are so many intangibles surrounding the costs of (*b*) and (*c*) above, not to mention municipal regulations and individual legal rights touched on in the argument before this court in *B.C. Elec. Co. v. Surrey (Dist.)* (1956) 19 WWR 603. If it is attempted to accept such estimates as basic facts we have then only inferences based on conjecture which, in law, of course, are not legitimate inferences at all and see *Caswell v. Powell Duffryn Associated Collieries Ltd.* [1940] AC 152, 108 LJKB 779, Lord Wright at pp. 169-170.

Most of these estimates concern the hoped-for ability to sell natural gas to potential consumers but that is necessarily dependent upon ability to sell natural gas to those potential consumers in competition with other fuels in the locality, affected, of course, not only by price but also by efficiency and convenience. In vol. 3 of the Macdonald Royal Commission in 1938 concerning the economic relationship of coal and fuel oil, an actual test was carried out at the request of the royal commission by a leading engineering firm between two similar hotels in Chicago, one fired with coal and the other fired with fuel oil, and see vol. 3, *supra,* pp. 63-71 and p. 187 concerning "dollar efficiency" of the competing fuels, and pp. 269-276 where the complete detail of the method employed by the engineering firm in the fuel comparison is fully set out. Loose, or carefully prepared,

theoretical or hypothetical estimates of comparable fuels directed to their salability as competing fuels must, in my opinion, be rejected by the practical or realistic mind.

One would think, of course, that an estimate in respect to (*a*) above, namely, the capital cost of the transmission line from the Peace River to the United States boundary, would be subject to few intangibles that could not be commercially and successfully estimated. But even then, the actual cost of that transmission line seems to have been surrounded by uncertainties. For example, its capital cost was estimated at $120,000,000 before the federal Board of Transport Commissioners. Then before the Public Utilities Commission, when the transmission line was about half constructed, the estimates were raised to $152,000,000. But after it was actually completed and when the appeal was before this court in January last, the cost was stated by counsel for the Inland Company to have surged to a much larger amount. If the estimates of construction vary so greatly from the actual cost when completed, how much more must one expect variations to occur when dealing with estimates of marketing and distribution which depend so largely on the competitive features and prices of other fuels in the same neighbourhood, as well as the selling ability of the agent.

3. Another observation concerns the distinction between "fact" and "opinion" in the submission made in the argument before this court that the Court of Appeal should hesitate to disturb the conclusions and expressed opinions of the Public Utilities Commission. This submission was based on the grounds that such conclusions and opinions are founded on economic policy which it was said is the commission's special duty to define, describe and apply. It was argued such opinions, conclusions and directions were based on opinion as distinct from fact. There are several answers to this submission. The first is the *Public Utilities Act* gives an appeal on fact to the provincial cabinet which is concerned in the interest of the province as a whole that no area of this large province shall be handicapped in its economic development in order to permit at its expense the economic development of other quite distant areas greatly different in their resources and opportunities for economic development. The *Public Utilities Act* empowers the provincial cabinet to refer any such appeal to the Court of Appeal to undertake the cabinet's appellate duties in that respect. Sec. 109 of the *Public Utilities Act* makes provision therefor and provides that the Court of Appeal shall give such judgment therein as to it seems proper.

If the decisions of the Public Utilities Commission based its interpretation of what is fact or what it considers to be inferences from fact were to stand as final, there would be no sense in granting an appeal from the Public Utilities Commission to the cabinet, and even less sense in providing that the cabinet could pass on their appellate responsibilities in that respect to the Court of Appeal. This matter was considered in *Oak Bay (Dist.) v. Victoria (City)* [1941] 2 WWR 425, 56 BCR 345, and in which it was held that at every step the Public Utilities Commission was dealing with questions of fact but not of law, and further that the amendment to the *Public Utilities Act* then under consideration was: (1) To make it clear that injustice or unreasonableness on a rate was a question of fact and not of law. (2) To make it clear that the commission was the sole judge of that fact but as a tribunal of first instance only and thus the right of appeal under the statute to the Court of Appeal was protected. And see also the *Veterans' Sightseeing and Transportation Co. v. Public Utilities Commn.* (1945) 62 BCR 131, 59 CRTC 63, and also the form of the judgment on appeal in that case reported in (1946) 62 BCR 351.

Again, while fact and opinion may be distinguishable metaphysically, economic opinions and conclusions when expressed in a magisterial way are necessarily based on facts or legitimate inferences derived from facts. We are not concerned here with proven hypotheses which acquire the logical status of scientific facts, cf. *Clarke v. B.C. Elec. Ry.* [1949] 2 WWR 832, at 839-40.

If the Public Utilities Commission, as any tribunal of first instance may do, misconceives the evidence, miscalculates its weight or allows itself to draw conjectural or opinionated conclusions, then the Public Utilities Commission must be held by a Court of Appeal to have reached an unsound economic decision in the instant case.

But what is "fact?" Legal writers of great reputation such as *Stephen, Holland, Markby, Best* and *Bentham,* among others, have attempted definitions. It may often be easier to say what a thing is not, than to say what it is. On occasions the best definition appears in a description. What is "fact" lies in the conception that a thing is existing or true. It is not limited to what is tangible or visible or to what is only perceptible directly by the senses; things invisible, mere thoughts, intentions, fancies of the mind, when conceived as existing or true, are conceived as facts. "The state of a man's mind is as much a fact as the state of his digestion" said Lord Justice Bowen. All inquiries into the truth, the reality, the actuality of things, are inquiries

into the facts about them. It is thus that opinion, prejudice, emotions, actual experiences of life, intuitive influences, "hunches" and other mentally formative influences, from which no human being is wholly immune, project themselves unobtrusively into the mental processes by which the facts in issue or legitimate inferences therefrom are interpreted and judged. The border between law and fact is often extremely difficult to cross unless statute defines it in measured words that decades of appeal courts have accepted. See *J. B. Thayer Evidence at the Common Law* (1898) p. 191. It is to be remembered of course that if legitimate inferences are to be regarded as facts, nevertheless the process of inference, viz., whether the inference is legitimate or not is a question of law, and see *Caswell v. Powell Duffryn Associated Collieries Ltd., supra.*

4. Another observation: The question hovers constantly in the background, has the Public Utilities Commission jurisdiction to fix the fair economic price that Westcoast shall charge at the diversion points along its transmission line? That question escaped consideration before the Public Utilities Commission apparently because: (*a*) Counsel for the Inland Co. declined to raise it; (*b*) The Westcoast officials giving evidence did not say that they would refuse to supply gas to the Prince George Gas Co. at a diversion point. D. P. McDonald, vice-president and general manager for Westcoast, said on November 15, 1955, that the Westcoast would sell on non-discriminatory terms to any company to which a certificate of public convenience and necessity might be granted by the Public Utilities Commission. (*c*) Under an order of June 6, 1955, issued by the Board of Transport Commissioners for Canada, the Westcoast Co. is obligated to sell and deliver gas at its main transmission line in British Columbia to any financially responsible company having a municipal franchise to sell and distribute such natural gas. The Prince George Gas Co. has such a franchise. (*d*) In the Westcoast contract with Inland Co. February 2, 1955, it was set out that the agreement and the respective obligations of the parties thereunder were subject "to any valid by-laws, orders, rules and regulations of duly constituted authorities having jurisdiction." (*e*) Moreover, the Westcoast Co. accepted its authorization for export to the United States market on condition it would not refuse to supply any area in the interior of British Columbia. (*f*) The Westcoast Co. was not made a party to the proceedings before the Public Utilities Commission although one would think for reasons already appearing in this judgment, that since Westcoast was the owner of the natural gas brought into British Columbia for sale any sale thereof

to actual consumers in British Columbia would be subject to a fair economic price fixed by the Public Utilities Commission at diversion points along the Westcoast main transmission line.

If Westcoast is to be regarded as an integrated concern there is a strong argument that the fair economic price of natural gas purchased by Westcoast in the Alberta-Peace River area for sale in British Columbia and also the fair economic price of such gas to be sold for export to the United States at Huntington, B.C. would come under federal jurisdiction since, *inter alia,* the producing cost thereof would be established at the intake in the Alberta-Peace River area. But the Public Utilities Commission passed that problem by. In the Macdonald Royal Commission into the petroleum industry in 1936 (vol. 1) *supra,* no difficulty was experienced by that British Columbia Royal Commission in inquiring into the cost of producing petroleum in California that was sold in British Columbia, nor of inquiring into cost of producing gasoline in California that was sold in British Columbia. On the contrary, every assistance was given by the United States companies to facilitate those investigations.

5. Another relevant observation is that sec. 125 of the *Public Utilities Act* recognizes the superior position occupied by a company with a franchise from a municipal corporation. And see *Veterans' Sightseeing and Transportation Co. v. Public Utilities Commn., supra;* and see *B.C. Elec Co. v. Surrey (Dist.), supra.* While it appears no municipal corporation along the proposed Inland Co.'s 332-mile branch line from Savona to Nelson had given a franchise to any local distributing company as against Inland, the position of the Inland Co. *vis-à-vis* the city of Prince George is quite different from that of the B.C. Elec. Co. in *B.C. Elec. Co. v. Surrey (Dist.).* The municipality of Surrey is situated in a cluster of municipalities in the compact lower mainland area which favoured the B.C. Elec. Co. as a distributing agent for it already had the distributing and marketing set-up for light, power and gas in the lower mainland area. The city of Prince George, however, in comparative isolation in the north central part of British Columbia has no common interest, economic or otherwise, with the municipalities along the Savona-Nelson line. Penticton is some 500 miles from Prince George while Nelson is about 630 miles distant from Prince George. The Kootenay areas are predominantly mining; the Okanagan area predominantly apples and tree fruits; the Cariboo, including Quesnel 80 miles south of Prince George, is known largely as ranching. Prince George, however, is the most populous centre in north central British Columbia with a predominant lumber business; with the early completion of the

Pacific Great Eastern Railway into the Peace River area and the improvement of the John Hart highway, it has the advantage of being a substantial distributor for that large wheat-producing area and neighbouring developing areas in the far northern part of the province. As a matter of fact, the city of Prince George is nearer to the Peace River area than it is to Savona, the diversion point to Kamloops, the Okanagan and Kootenay areas.

The reasoning in this judgment drives me to this summary of my conclusions:

(1) Prince George Gas Co. Ltd. has shown unanswerable grounds to be granted a certificate of public convenience and necessity to build and operate a four and one-half mile branch line in accordance with the *Pipelines Act*, RSC, 1952, ch. 211, from the Westcoast main transmission line near Prince George to the city of Prince George itself, and to instal the necessary equipment within that city and adjacent areas so that natural gas may be supplied to the consumers in that area who wish to buy it at a fair economic price.

(2) Prince George Gas Co. is entitled to pay Westcoast a price for gas at that Prince George diversion point from the Westcoast main transmission line no more than the Westcoast company are willing to sell the Inland Co. at that same diversion point.

(3) As to the price that Prince George Gas Co. shall charge the Prince George consumers, application should be made in due course to the Public Utilities Commission within a reasonable time (say, one or more years) after the branch line has been constructed and natural gas made actually available to the Prince George consumers, to review the price the Prince George Gas Co. may then be charging the Prince George consumers.

(4) If Prince George Gas Co. declines to accept the same price at the diversion point aforesaid that the Westcoast have been willing to sell the Inland Co. at that point and Prince George Gas Co. or the city of Prince George wishes now to have an investigation of what ought to be a fair economic price at that diversion point, then it is recommended that both or either of them apply to the provincial cabinet for a reference to this court under the *Constitutional Questions Determination Act*, RSBC, 1948, ch. 66, to determine whether jurisdiction to fix the price at the said diversion point comes within federal or provincial competency; to my mind that question cannot be pushed aside or escaped unless Westcoast and the respondent Inland Co. are prepared to accept the jurisdiction of the Public Utilities Commission.

(5) Even if (alternatively in that respect) Inland may be authorized (in preference to the Prince George Gas Co.) to construct a four and a half mile feeder line to the city of Prince George gate and the Prince George Gas Co. may then be entitled to purchase gas at the city gate from Inland for distribution to the consumers of the city of Prince George and environs, nevertheless, in my judgment, it is economically impossible and directly contrary to the principles underlying the *Public Utilities Act* for the Public Utilities Commission to attempt to fix a fair economic price of gas at the city gate or to fix a fair economic price to the city of Prince George consumers without prior thereto having accepted a fair economic price of the gas at the diversion point on the Westcoast transmission line.

In my judgment no such fair economic price can be accepted without first enquiring into (*a*) The true capital cost of the Westcoast transmission line from the Peace River to the United States boundary; (*b*) The true actual capital cost of the natural gas purchased by Westcoast in Alberta for transmission in its said transmission line; and (*c*) The true actual cost of the transportation of the said gas from the Peace River intake to the Prince George and other diversion points on its main transmission line. In my judgment all these requirements are basically essential in order to determine an economic return to the Westcoast Co. upon such capital cost.

Otherwise, in my judgment with deference, the Public Utilities Commission or other rating tribunal would be acting contrary to economic rating principles and in particular contrary to the principles of cost and price in relation to a fair economic return upon capital invested, as held by the Macdonald Royal Commission into the Petroleum Industry, vol. 1 (1936) and in vol. 3 thereof concerning the economic relationship of coal and fuel oil in British Columbia, and see also *Northwestern Utilities Ltd. v. Edmonton (City)* [1929] SCR 186, at 192, which affirmed [1926] 3 WWR 798; the *Bluefield* case, 262 US at p. 692; and *Federal Power Commn. v. Hope Natural Gas Co.*, 320 US 591, at 603.

The consolidated appeals are allowed accordingly and the whole matter referred back to the Public Utilities Commission to carry out the declarations, findings and opinions in this judgment. This requires a rehearing before the Public Utilities Commission, at which the Westcoast Co. would be a necessary party.

DAVEY, J.A. — The appeals of both appellants on law and on fact from decisions of the Public Utilities Commission have their origin in the construction of the transmission line of the West-

coast Transmission Co. to carry natural gas from the Peace River gas fields to the northwestern United States, a distance of 649 miles.

The scheme of Westcoast included the supply of gas from the main transmission line to the southwest corner of British Columbia, embracing the Fraser Valley and the city of Vancouver and adjacent municipalities; also to that part of the interior of British Columbia stretching from the city of Prince George at the north to the city of Nelson in the south east, a distance of some hundreds of miles.

The B.C. Elec. Co. undertook the distribution of gas in the Fraser Valley and Vancouver; the respondent, Inland Natural Gas Co., distribution in the interior of British Columbia. For that purpose Westcoast and Inland entered into a 20-year contract for the supply of gas. Under it Inland agreed to pay a demand rate of $3.21 and a commodity rate of 20c per m.c.f.—the same rate as that payable by the B.C. Elec. Co.—and to pay for a minimum quantity whether used or not.

The minimum amount Inland will be required to pay Westcoast over the 20-year term of the contract on a "take or pay" basis is $13,000,000; and, according to respondent's factum, if Inland is certified for the whole of the area embraced in the contract, it will pay Westcoast more than $30,000,000 over the same period; some of the evidence would suggest a much greater amount, and no one has suggested less.

The Westcoast transmission line, at least in its international aspects, falls under federal jurisdiction; but Inland, as a purely local concern, is under provincial jurisdiction and so is bound by the *Public Utilities Act,* RSBC, 1948, ch. 277.

In due course, Inland applied to the Public Utilities Commission for a certificate of public convenience and necessity for the whole undertaking envisaged by its contract with Westcoast, including the distribution of gas in the city of Prince George. According to the reasons of the commission that plan contemplated the sale of gas on a uniform schedule of rates over its entire system.

Prince George Gas Co. obtained a franchise from the city of Prince George under the provisions of the *Municipal Act,* RSBC, 1948, ch. 232, for the distribution of gas in that city; it applied under sec. 12 (*a*) of the *Public Utilities Act* for approval of that franchise and for a certificate of public convenience and necessity in respect thereof.

The Public Utilities Commission heard the applications together. On May 23, 1956, it granted to Inland, on certain conditions, a certificate of public convenience and necessity for the whole of the undertaking except distribution in the city of Prince George and adjacent territory, and to Prince George Gas Co. a conditional certificate of public convenience and necessity for distribution in the Prince George area.

Those conditions, in so far as they bear upon these appeals, may be stated as follows:

As to Prince George Gas Co.: That Prince George Gas should make a firm arrangement with Inland, by agreement or direction of the commission, to secure a supply of gas from Inland on terms which should put,

> "the Prince George area on a substantially equal footing with other areas served by Inland Natural Gas Co. Ltd. as to supply * * * and shall provide for a price that, in the initial years at least, will ensure that a contribution will be made by consumers in Prince George to the overall costs of that part of the Inland system but for the creation of which they might never have been in a position to receive gas at all."

That part of the system was not further defined, but in the order of August 10, 1956, later mentioned, it was obviously treated as being the whole system, for the rate prescribed for Prince George Gas was the rate designed and proposed by Inland to give it, if continued, at the expiration of five years the same revenue upon the predicted demand that Inland would have received from the Prince George consumers under the uniform schedule to be applied to the entire system.

As to Inland: That it should file with the commission an undertaking to offer gas to Prince George Gas on terms acceptable to and reviewable by the commission, whereby a supply would be assured to Prince George *pari passu* with the supply of gas to other points on Inland's system.

Negotiations between Prince George Gas and Inland for a contract making the firm arrangement stipulated by the commission proved abortive, because Inland demanded from Prince George Gas the $5 demand charge and 30c commodity charge per m.c.f. just described.

The matter again came before the commission on July 25 and 26, 1956, to fix the terms on which Inland should sell gas to Prince George Gas; on that occasion the city of Prince George

was, for the first time, represented by counsel. It supported the position taken by Prince George Gas.

On August 10, 1956, the commission approved a draft agreement submitted by Inland which fixed the rate of $5 demand and 30c commodity charge per m.c.f. for the gas to be supplied to Prince George Gas; the commission directed that rate should remain in effect until it fixed a new rate after it had the results of one year's operating experience by both parties.

Prince George Gas and the city have appealed against those orders on questions of law and of fact. They contend that Prince George Gas should not be required to buy from Inland, but ought to be allowed a reasonable time to get, by negotiation or legal proceedings, a supply of gas from Westcoast at the $3.21 and 20c rate per m.c.f. payable by Inland; alternatively, that, if required to buy from Inland, it should not be required to subsidize the other consumers on the Inland line, but ought to pay only the wholesale rate payable by Inland; or, in the further alternative, that the price it should pay ought to be no more than a fair and reasonable charge for the service rendered by Inland in supplying gas to it wholesale.

Before examining the reasons given by the commission for these orders and the arguments supporting the appeals, the nature of the Inland undertaking should be explained in more detail.

The Westcoast transmission line on its way from the Peace River gas fields to the United States border passes close to the cities and towns of Prince George, Quesnel, Williams Lake, and Merritt in that order. Inland proposes to serve these communities by constructing short feeder lines ranging from two to seven miles in length from Westcoast's line to the respective communities. In the case of the city of Prince George the feeder line will be five miles long.

Between Williams Lake and Merritt Westcoast's line passes through Savona. At that point Inland proposed to tap the main line and to construct a subsidiary transmission line, some 200 miles long, south easterly through the city of Kamloops, and through the Okanagan Valley to the town of Osoyoos at the international boundary, where that line would end.

It also proposed to build a transmission line some 58 miles long, from the international boundary, near Waneta, to Nelson for the purpose of delivering American gas to Rossland, Trail, Castlegar, Nelson and other communities in the Kootenay district.

That was the project envisaged by the original contract between Westcoast and Inland, for which Inland first applied for a certificate. Later Westcoast and Inland amended their contract to provide for an extension of the Inland transmission line from Osoyoos to Nelson in order to deliver Westcoast's gas to the Kootenays, instead of American gas which Inland had intended to obtain through the proposed connection at Waneta. Inland's application to the commission was amended accordingly, and it is the amended plan for which the commission granted the certificate of public convenience and necessity. The present undertaking involves one transmission line 332 miles long, instead of two lines totalling 200 miles, and a very substantial increase in the diameter of the pipe in the Okanagan Valley.

The increase in cost is, no doubt, substantial; however, Westcoast, under the amended contract, makes a large contribution to it. It is the overall cost of that extended undertaking which the commission has required the Prince George consumers to bear in part through the rate it has initially prescribed; and it is the same overall cost to which those consumers may be required to continue to contribute, depending on how the commission applies the words contained in the condition,

> "that part of the Inland system but for the creation of which they might never have been in a position to receive gas at all."

With that explanation it is possible to examine the first branch of this appeal, namely, the condition requiring Prince George Gas to buy its gas from Inland instead of allowing it an opportunity to get the gas directly from Westcoast at the much lower rate paid by Inland.

The commission rejected appellants' contention on two independent grounds; but it is necessary to examine only one, for that, in my opinion, is decisive.

The commission decided to require Prince George Gas to buy from Inland because, *inter alia,* Inland has a firm and adequate supply of gas for present requirements and is clearly under the jurisdiction of the commission; the Prince George consumers can thereby be assured of a supply of gas *pari passu* with the other customers of Inland.

It is difficult to see how Prince George Gas can expect to get a supply of gas from Westcoast by agreement, for by that company's agreement with Inland, so long as Inland is prepared to supply gas, Westcoast is prohibited from selling to anyone else

in the territory. That agreement is subject to valid orders of any public regulatory body having jurisdiction over Westcoast; but the commission's jurisdiction over Westcoast is, at the best, doubtful. Moreover, as the commission points out, Mr. Hetherington, one of the officers of Westcoast, stated that, if ordered to sell to Prince George Gas, Westcoast would feel bound to ask for a greater price than that payable by Inland, in order to enable it to compensate Inland for the loss of the Prince George market.

Under the *Pipe Lines Act,* RSC, 1952, ch. 211, the Board of Transport Commissioners might order Westcoast to sell to Prince George Gas, but the board is given no express authority to fix the price, and it is doubtful whether it has any implied authority.

The appellants contend that the Public Utilities Commission, although without jurisdiction over the international and the inter-provincial operations of Westcoast, has jurisdiction over its local operations, and by virtue of that it can order Westcoast to supply gas to Prince George Gas and fix the price. That proposition is debatable. The appellants argue also that they can invoke a condition in Westcoast's export licence requiring it to supply gas to Canadian consumers. There is, however, no assurance that the Governor-General in Council would be prepared to act under that condition in the present circumstances.

Putting appellants' submissions on these points at their highest, the possibility of Prince George Gas getting a supply of gas from Westcoast at any price, to say nothing of getting it at the rate payable by Inland, is doubtful.

I respectfully agree with the commission's conclusion:

> "It is not unlikely that protracted litigation would be necessary to determine the underlying question of constitutional law. However, even if it became clear that the Public Utilities Commission does have jurisdiction over Westcoast's price, the commission would not determine a price except in new proceedings involving that company, where its representation would be fully developed and presented."

The legal and factual grounds for those conclusions have not been successfully challenged, and they establish a sound foundation for the application of the following policy enunciated by the commission:

> "Whatever company distributes gas at Prince George must, in view of the commission, be able to count on procuring reasonable quantities of gas *pari passu* with companies distributing gas at other points on the Westcoast system."

With respect, that seems to be sound policy.

That policy can only be implemented by requiring, as the commission has done, Prince George Gas to buy its gas from Inland and Inland to sell to Prince George.

But whether that policy is sound or not, it represents a matter of opinion or judgment on an administrative problem which, in the absence of error in the law or in the facts on which the policy is based or in the circumstances to which it is applied, is a question of neither law nor fact on which an appeal lies under the *Public Utilities Act: Union Gas Co. v. Sydenham Gas & Petroleum Co.* [1957] SCR 185, 75 CRTC 1, per Kerwin, C.J.C. at 189, and Rand, J. at 190.

Counsel for the appellants argue that secs. 12 and 14 of the *Public Utilities Act* give the commission no jurisdiction to attach such a condition to a certificate of public convenience and necessity issued to a holder of a municipal franchise.

It is doubtful whether sec. 12 (*a*) authorizes the commission to impose a condition requiring a utility to obtain its energy from a particular source; but, as such a condition appears to be in harmony with the Act, it is, I think, authorized by the generality of the following language contained in sec. 14:

> " * * * The commission shall have power, after a hearing, to issue a certificate as prayed for or to refuse to issue a certificate * * * and may attach to the exercise of the rights granted by the certificate such terms or conditions, including conditions as to the duration of the rights or privilege, in harmony with this Act as in its judgment the public convenience or necessity may require * * * ."

Different considerations are raised by the condition contained in the order of May 23, 1956, that Prince George Gas shall buy its gas from Inland

> "for a price that, in the initial years at least, will ensure that a contribution will be made by consumers in Prince George to the overall costs of that part of the Inland system but for the creation of which they might never have been in a position to receive gas at all,"

and by the order of August 10, 1956, implementing that condition by approving initially a demand charge of $5 and a commodity charge of 30c per m.c.f.

In my opinion, for reasons which I shall discuss later, those orders, interpreted in the light of the reasons, require the Prince

George Gas to pay a charge which will be passed on to its consumers, and which may subsidize consumers on the remoter parts of the Inland system.

Appellants submit that those directions impose a tax, at least to the extent that they require the Prince George Gas to pay money for the benefit of other Inland customers; because the levy on Prince George Gas will be passed on to its customers, it is said that the tax is indirect and in conflict with secs. 91 (3) and 92 (2) of the *B.N.A. Act, 1867,* and therefore beyond the power of the commission. No attack is made on the Act on that ground, but only on the orders made by the commission.

Counsel support their submissions by *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.* [1932] 3 WWR 639, [1933] AC 168, 102 LJPC 17; and *Lower Mainland Dairy Products Board v. Turner's Dairy Ltd.* [1941] SCR 573, affirming [1941] 3 WWR 342, and other cases to like effect.

In those two cases the marketing boards, being public authorities, by order took the money of one group of people and gave that money to another group. It was held that the levy by which the money of one group was appropriated and paid to another was a process of taxation. In *Turner's* case it was held that the same thing was done under a pretended arrangement of vendor and purchaser.

With deference, I am unable to apply that reasoning to a process of rate fixing in the quite different field of public utility regulation, a process which, in this respect, contains no element of taxation.

Under the scheme approved by the commission, Prince George Gas will buy gas from Inland and sell that gas to its own customers. If it were not for the *Public Utilities Act,* Inland could exact the highest rate the traffic would bear; the fact that it might charge Prince George Gas an utterly unreasonable rate, in order to cheapen the rates payable by customers on remoter parts of its system and thereby broaden its market, would not make that rate any less a price to be paid for a commodity purchased, or convert that price into a tax. The fact that Inland's rates are subject to the approval of the Public Utilities Commission; or perhaps more accurately, in the circumstances of this case, the fact that the Public Utilities Commission has imposed a condition that may require Prince George Gas and its customers to pay rates which are unreasonable for the service supplied, in order to reduce the rates payable by other subscribers,

cannot change the essential character of the rates; they remain rates imposed in the course of a *bona fide* effort to regulate a public utility; the higher rates paid by one class of consumers reduce the rates payable by another, but no property is taken from one and given to another; the rates still remain in substance the price to be paid for a commodity; they are not taxes: *Shannon v. Lower Mainland Dairy Products Board* [1938] 2 WWR 604, [1938] AC 708, at 722, 107 LJPC 115, adopting the reasons of Martin, C.J.B.C. in *In re Constitutional Questions Determination Act; In re Natural Products Marketing Act* [1937] 3 WWR 273, at 282, 52 BCR 179. *Reference re Farm Products Marketing Act* [1957] SCR 198, cited by appellants, is, in my opinion, distinguishable upon the facts.

If the process of regulation under the *Public Utilities Act* has been used as a mere sham to cover up a process of indirect taxation, other considerations would have arisen; but I see no evidence of that.

The condition is attacked also on the ground that the commission has no power under the *Public Utilities Act* to impose conditions requiring one group of consumers to pay rates that are higher than a fair and reasonable charge for the service rendered in order to subsidize other consumers less favourably situated.

The first question raised by that attack is whether that is the effect of the condition.

A requirement that one group of consumers contribute to the overall costs of a public utility system serving them and others does not, *per se,* constitute a subsidy; that depends upon the circumstances. In so far as those costs fairly constitute part of the cost of providing service to the consumers they may be a proper element in the rates those consumers are called upon to pay; the fact that such contribution to those costs may reduce the rates of other consumers does not make it a subsidy. However, in that case the benefit to the other consumers is not the specific purpose of the contribution, but the incidental result flowing from a proper rate based upon the cost of service.

On the other hand that contribution to the overall costs becomes a subsidy if its specific purpose is to benefit other consumers without regard to the extent those costs properly enter into the cost of serving the contributing consumers.

It is significant that the condition does not fix the contribution the Prince George consumers may be required to make by reference to the cost of providing them with service. I do not overlook the words

"overall costs of that part of the Inland system but for the creation of which they might never have been in a position to receive gas at all."

Passing over the problems arising from the use of "might" instead of "would," such a circumstance will not necessarily make those costs part of the cost of providing service to the Prince George consumers. That will depend upon other circumstances not mentioned in the condition.

So, while one result of the condition, depending on the mode of application, may be to require a contribution which can be supported as a proper rate, that will not be a necessary result.

It seems clear from both the language of the condition and the reasons of the commission that the condition may require Prince George consumers to make a contribution to the overall costs by way of subsidy to other consumers. It is on that possibility that the validity of the condition must be determined.

In so far as the contribution may result from rates properly imposed in accordance with the Act no condition is required; in so far as the contribution may be a subsidy it must depend upon the condition, and that condition must, under sec. 14, be in harmony with the Act.

But before examining that question, it should be mentioned that the appellant, Prince George Gas, and the respondent both agree that in imposing the condition as to price, and in fixing that price, the commission was not engaged in the process of rate fixing that falls to it under other sections of the Act. Fixing rates under the Act would raise different issues from those confronting the parties and the commission at that stage. It is to be observed, however, that during the July hearings, the chairman of the commission spoke of the price as a rate, and so does par. 2 directed to be added to art. VII of the agreement by par. 1 (*b*) of the order of August 10, 1956.

Counsel for the respondent submits that the commission did not order the Prince George Gas to pay the $5 and 30c rate, but merely gave it an opportunity of accepting a certificate of public convenience and necessity upon condition of doing so; if Prince George Gas does not agree to the condition, it does not have to take up the certificate. He supports the condition by that part of sec. 14 already quoted.

It is true the commission was not engaged in rate fixing when it prescribed that condition and approved the price; it is likewise true that Prince George Gas is not obliged to take up its

certificate on that condition. But if it does not agree to the condition it gets no certificate, and if it accepts the certificate and enters into the prescribed agreement with Inland, it will have agreed to the principle that it and its consumers shall pay a price that may to a greater or lesser degree subsidize other consumers on the Inland system. The reservation of the right of the commission to vary the price after one year's operation does not affect the principle, but only the degree to which the Prince George consumers may be obliged to subsidize other consumers if, in the judgment of the commission, subsidies continue to be necessary.

If Prince George Gas should accept the certificate on that condition and enter into the agreement, the price approved by the commission would become a rate for the purposes of the Act, since "rate" is defined as including

> "every general, individual, or joint rate, fare, toll, charge, rental, or other compensation of any public utility,"

in this case a rate for the compensation of Inland approved by the commission for the purpose of implementing its order of May 23, 1956.

A rate which is set without regard to what is a fair and reasonable charge for the services rendered by a public utility, for the express purpose of compelling some consumers to subsidize others, is, in my opinion, inconsistent with the statutory provisions governing rates; any condition requiring payment of such rates cannot be in harmony with the Act, as required by sec. 14.

One of the cardinal principles governing rates from the standpoint of the customer is set out in sec. 16 (*b*), which directs the commission, *inter alia,* to have due regard to the protection of the public from rates

> "that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility."

Sec. 8 forbids any public utility to demand or receive any "unjust, unreasonable, unduly discriminatory, or unduly preferential rate" or to subject any person or locality "to any undue prejudice or disadvantage." "Unjust" and "unreasonable," as applied to rates from the point of view of the customer, include by definition, injustice and unreasonableness arising from the fact that the rates are excessive as being more than a fair and

reasonable charge for service of the nature and quality furnished by the public utility.

Those statutory provisions, in my opinion, deny power to the commission except, perhaps, under sec. 16 (*c*) of the Act, which does not arise here, to set rates for the purpose of requiring some consumers to subsidize a service furnished to others.

The prejudicial effect of the condition becomes apparent, when one examines its effect on any attempt by Prince George Gas to have the rates payable to Inland fixed in accordance with the Act.

Sec. 20 directs that upon its own motion or upon complaint that any rates charged by a public utility are "unjust, unreasonable, insufficient, or discriminatory, or in anywise in violation of law," the commission may after a hearing determine the just, reasonable, and sufficient rates, and fix the same by order.

Sec. 21 directs that if the commission after a hearing finds that under a contract entered into by a public utility any person receives service at rates which are unduly preferential or discriminatory, it may declare the contract null and void in whole or in part, or may make such other order as it may think fit. The prescribed contract between Prince George Gas and Inland would, I think, be a contract falling within the ambit of that section.

But if Prince George Gas should attempt to invoke the powers of the commission under either sec. 20 or 21 to enforce its statutory right to rates that are fair and reasonable, it would undoubtedly be met with the contention that by taking its certificate on the condition attached and agreeing to pay the price set by the commission, it had accepted the principle that it and its customers should subsidize other consumers on the Inland system, and that it had thereby precluded itself from moving on that ground under sec. 20 or 21.

In my opinion the condition as to price is not in harmony with the Act, and is beyond the commission's powers. Consequently the price fixed by the order of August 10, 1956, to implement that condition must fall with it.

But apart from its dependence upon the invalid condition, the order fixing the price cannot be supported as an order fixing a valid rate. It was designed to give Inland upon the predicted demand in five years time the same revenue as would have been yielded by the application of the uniform schedule of rates tentatively under consideration for the whole system to distribution

of gas by Inland in Prince George. It is not clear on the evidence whether that revenue was computed by taking the delivered price to the Prince George consumer without deducting the cost of distribution in Prince George, or the revenue at the city gate by deducting that cost of distribution; in any event that distinction is immaterial for present purposes.

It does not follow from what I have said that the commission is prevented from setting, in proper cases, a uniform schedule of rates for all or any part of a system, which may incidentally have the effect of compelling some consumers to contribute to the cost of serving others. But the present order fixing the price cannot be upheld on that ground.

The commission did not enter upon an inquiry to determine the facts which are necessary to support uniform rates. On the contrary, it said it would be premature to enter upon such inquiry at that time. It was content to accept the geographic area that Westcoast and Inland appropriated exclusively to Inland, without examining the grounds for treating the physically separate and independent parts of the system as one unit for rate fixing. In fact, the commission appears to have entertained some doubt about the justification for including the Kootenays as part of the one overall system, instead of treating it as a separate system, as would have been the case if Inland had got its gas for that district from another company at the international border near Waneta as it had originally intended, because in its reasons the commission said:

> "Indeed, there is not now any such geographical advantage, for Prince George is for the purposes of *Westcoast's* enterprise an inseparable part of a larger area which includes the Okanagan and *possibly* the Kootenays as well." [My italics.]

It is to be observed, also, that the commission finds that Prince George is an inseparable part of the larger area for the purposes of Westcoast's enterprise, not for those of Inland's. The latter point is important to fixing a uniform schedule of rates for the whole of the Inland system.

The commission has found as a fact that part of the Inland subsidiary transmission line was essential to its agreement with Westcoast and therefore to Westcoast's transmission line, without which Prince George would have enjoyed no geographical advantage and would have been unable to get gas at all. It has also found that to exclude Prince George and the surrounding area from Inland's project "could be a serious blow to Inland."

Assuming, but without deciding, that those findings can be supported on the evidence, they are no answer to this aspect of the appeal. Inland retains the wholesale supply of gas to the Prince George area and it will be paid a fair and reasonable charge for what it delivers. The sole question remaining is, what rate should Prince George Gas pay for that gas?

That depends on what costs are to enter into Inland's rates, and how the burden of those costs is to fall upon the different parts of the Inland undertaking; and, consequently, how much of the revenue required to meet those costs is to be raised from each part. Those matters can only be determined upon the relevant considerations emerging from an inquiry directed to those issues—an inquiry which the commission has not yet made.

When it is made, that will be time for the commission to give such effect, if any, as it thinks proper, to the argument that Inland is essential to Westcoast, and Prince George is important to Inland.

If the commission had by the condition in question required Prince George Gas to pay rates to be agreed upon with Inland, subject to the provisions of the Act, or failing agreement just and reasonable rates to be fixed by the commission in accordance with the Act, it would have avoided the objection that in my view invalidates the condition. The validity of the order fixing the rates would then stand or fall upon considerations relating to the question of rates. The purpose of the commission in attaching the condition as to contribution, and in fixing at this time the price to be paid by Prince George Gas was no doubt to enable that company to determine the feasibility of its undertaking under those conditions. Whether there will remain any doubt about that feasibility after judgment in this appeal, and, if so, how that doubt can be settled are matters for the commission.

These observations are made only to clarify my reasons and without in any way intending to suggest what order the commission should make as a result of this appeal.

In the result Inland's certificate remains unimpeached except so far as it may complement Prince George's; so does Prince George's except for the condition as to price, which in my opinion is invalid in law. The order of August 10, 1956, approving the price demanded by Inland is wrong in law and in fact and cannot stand.

In my opinion the invalid condition cannot be severed from the Prince George certificate, because the commission might not have granted Prince George Gas any certificate if it had known it could not attach to it that particular condition as to price; or it might have granted Prince George Gas a certificate on quite different terms. The Prince George certificate must be set aside. As they stand, the certificates of Prince George Gas and Inland are to some extent complementary, and if the Prince George certificate is revoked or reissued in substantially different form, that of Inland will have to be modified. Therefore the Inland certificate ought to be set aside also, in order to give the commission complete authority over the subject matter on reconsideration following judgment in this appeal, without having to invoke its power of review and rescission under sec. 99.

I would set aside the order of August 10, 1956, on the appeals on law and fact and remit the matter to the commission to revoke the two certificates and make such other order on the several applications for certificates of public convenience and necessity as it may see fit in accordance with the opinion of this court.

SHEPPARD, J.A. (dissenting) — These two appeals, by the Prince George Gas Co. and by the city of Prince George respectively, are from that part of the certificate of public convenience and necessity of May 23, 1956, granted by the Public Utilities Commission to the Prince George Gas imposing a condition to the effect that the Prince George Gas shall make firm arrangements to secure a supply of gas from the respondent, Inland Natural Gas Co., at a price

> "that, in the initial years at least, will ensure that a contribution will be made by consumers in Prince George to the overall costs of that part of the Inland system but for the creation of which they might never have been in a position to receive gas at all;"

and from an order of the commission of August 10, 1956, implementing the said order of May 23, 1956, by approving the form of offer of such supply of gas by Inland including the offered price of $5 demand rate and 30c commodity rate.

The appeals arise from the following proceedings:

By application of January 30, 1956, the Inland Company applied to the commission for a certificate of public convenience and necessity to permit that company to supply natural gas to the interior of British Columbia, and to do so by installing feeder

lines from the transmission line of the Westcoast Transmission Co. to various communities, including the city of Prince George, and to operate the distribution systems in those communities. By an amendment of April 7, 1956, Inland proposed that the line originally proposed from Savona to Osoyoos be extended over the Cascades to Nelson in the West Kootenays and that the expenditure in construction of its system be increased from $17,347,000 as originally proposed, to $23,860,000 by the fall of 1957, and to $28,660,000 by the fall of 1962. The system of Inland, as extended, was intended to supply the following cities, namely, Prince George, Quesnel, Williams Lake, Savona, and Merritt, and to include a line easterly from Savona through Kamloops, the Okanagan and West Kootenays to Nelson to supply the intervening municipalities.

Prince George Gas obtained from the city of Prince George a franchise to supply that city with natural gas. By application of March 21, 1956, the Prince George Gas applied to the commission for a certificate of public convenience and necessity to construct and operate a distribution system to supply natural gas to the city of Prince George and by amendment of that application to approve of the franchise agreement or, alternatively, for a certificate to construct and operate a distribution system for the supply of natural gas to the residents of the city of Prince George and the vicinity. That proposed system was to consist of a feeder line from the transmission line of Westcoast, a distance of some four and seven-tenths miles, and a distribution system within the city which were estimated to cost $1,500,000.

These two applications (by Inland and Prince George Gas respectively) were heard before the Public Utilities Commission in April, 1956, and after hearing the evidence the commission granted to Prince George Gas a certificate of May 23, 1956, subject to certain conditions, including condition 1, being that under appeal, which reads as follows:

> "1. Prince George Gas Co. Ltd. shall make firm arrangements to secure a supply of gas from Inland Natural Gas Co. Ltd. by agreement subject to approval by the Commission or, failing to reach an agreement within 60 days from the date hereof, by direction of the Commission, which agreement or direction shall put the Prince George area on a substantially equal footing with other areas served by Inland Natural Gas Co. Ltd. as to supply, shall protect the obligation of Inland Natural Gas Co. Ltd. to serve the British Columbia Power Commission at Prince George, and shall

provide for a price that, in the initial years at least, will ensure that a contribution will be made by consumers in Prince George to the overall costs of that part of the Inland system but for the creation of which they might never have been in a position to receive gas at all."

By another certificate of May 23, 1956, the commission approved the construction and operation by Inland of a gas distribution system as requested in its application excepting only therefrom the city of Prince George, but subject to certain conditions including condition 3, which provided:

"3. Inland shall before taking any action hereunder and in any case within 30 days from the date hereof file with this Commission an undertaking, in order to enable Prince George Gas Co. Ltd. to meet the terms of the Certificate granted to it concurrently with this Certificate.

"(*a*) to offer gas to Prince George Gas Co. Ltd. on terms acceptable to and reviewable by the Commission whereby a supply will be secured *pari passu* with the supply of gas to other points on Inland's system and

"(*b*) to apply to the Commission for a further Certificate to authorize the supply of gas by Inland to Prince George Gas Co. Ltd. and to the B.C. Power Commission at Prince George;

"and Inland shall proceed to implement the first part of its undertaking to the satisfaction of the Commission within 60 days from the date of this Certificate and the latter part as soon as possible thereafter."

The officials of Prince George Gas and of Inland discussed the service agreement contemplated in the respective conditions and later Inland submitted to Prince George Gas an agreement providing for the supply of natural gas at a price of $5 demand and 30c commodity rate and for Inland to own the feeder line which would connect the transmission line of the Westcoast company with the Prince George distribution system. Those terms were not acceptable to Prince George Gas and on July 25, 1956, the commission convened a hearing to settle the terms of the Inland offer.

At that hearing the city of Prince George applied for leave to intervene and also to reopen the matter so as to adduce evidence to prove that the commission was in error in directing in the certificate to Prince George Gas that Prince George Gas take from Inland, or that the price in the initial years ensure a

contribution by the consumers in Prince George to the overall cost of the Inland system. The commission permitted the city of Prince George to intervene but refused to reopen the matter as to whether Prince George Gas should take from Inland or whether contribution should be made. The commission did permit evidence on the issue whether the feeder line should be constructed and owned by Prince George Gas and as to the price to be charged by Inland to Prince George Gas.

After evidence and argument the commission, by order of August 10, 1956, directed that the agreement offered by Inland to Prince George Gas with amendments then indicated, was

> "acceptable to the commission as implementation of the undertaking of Inland Natural Gas Company Limited to offer gas to Prince George Gas Company Limited under the terms of the Certificate of Public Convenience and Necessity granted to Inland Natural Gas Company Limited by the commission on May 23, 1956."

Prince George Gas and the city of Prince George have appealed from the certificate of May 23, 1956, and from the order of August 10, 1956, upon a question of law under sec. 100 of the *Public Utilities Act*, RSBC, 1948, ch. 277, and upon questions of fact under secs. 108 and 109.

At the initial hearing of this appeal the appellants asked that further evidence be admitted and after argument that was refused for written reasons then delivered, (1957) 22 WWR 5. The hearing was then adjourned to permit the appellants to apply to the Supreme Court of Canada for leave to appeal to that court. Later, on the resumption of this appeal, the appellants asked that the judgment on this appeal provide that condition 1 in the certificate of Prince George Gas be limited to a condition that Prince George Gas may have a reasonable time within which to negotiate with Westcoast for the supply and price of gas to Prince George Gas but not so as to debar Prince George Gas from the opportunity of applying afresh to the Public Utilities Commission or to the Board of Transport Commissioners or to the minister under the terms of the Westcoast licence or charter.

There was evidence that the commission in imposing the condition to the certificate of May 23, 1956, and in approving the proposed offer by Inland was acting in accordance with the public convenience and necessity. In determining public convenience and necessity the commission is required to consider not only the interests of the city of Prince George and of Prince

George Gas but the interests of the public generally, including the Westcoast and Inland systems and all municipalities dependent thereon. In *Surrey (Dist.) and Chilliwack (Tp. and City) v. B.C. Elec. Co.* [1957] SCR 121, affirming (1956) 19 WWR 49, Locke, J., at p. 127, said:

> "In discharging its important duties under the *Public Utilities Act* the commission is required to consider the interests not merely of single municipalities but of districts as a whole and areas including many municipalities. The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission, subject, *inter alia,* to the right of municipalities of insuring a supply of gas by municipal enterprise of the nature referred to in the reasons delivered by the chairman of the Public Utilities Commission."

The city of Prince George granted a franchise for the supply of natural gas to Prince George Gas but that franchise required the approval of the commission (*Public Utilities Act,* RSBC, 1948, ch. 277, sec. 12 [*a*]). Prince George Gas had no supply of natural gas and it was not financially feasible to build a pipe line from the Peace River where the wells were situate to the city of Prince George. That line would be 235 miles long and would cost approximately $7,308,000. Westcoast by its transmission line brought a supply of gas within four and seven-tenths miles of the city of Prince George with the result that a lateral from the Westcoast line to the city of Prince George and a distribution system in the city could be built for $1,500,000. It follows that the bringing of the supply of gas within that distance of the city of Prince George did confer a benefit upon Prince George Gas and upon the residents of Prince George to which they should contribute. There remains the question whether Prince George Gas should contract with Inland or with Westcoast.

Inland obtained from Westcoast by contract for valuable consideration the exclusive right to purchase natural gas to supply the interior of British Columbia. Therefore as between these two companies Inland would have the right to supply Prince George and to enjoin Westcoast from so doing. The circumstances which gave rise to that contract and the mutual relations of Inland and Westcoast are as follow: In 1954 the Westcoast company applied for permission to construct the transmission line from the Peace River into the United States

of America but that was refused by the federal Power Commission on the ground that it was not shown to have been financially feasible as the Westcoast company had not contracts for the purchase from that company of natural gas. Westcoast then entered into three contracts: (1) A contract with the Pacific Northwest Pipe Line Corpn. which provided for that company purchasing and taking delivery of natural gas at Huntington on the border; (2) A contract with the B.C. Elec. Co. to purchase the supply of gas for the city of Vancouver; and (3) A contract with Inland Co. to purchase gas to supply the interior of British Columbia. Inland had as wholly owned subsidiaries four exploration companies which were exploring for and producing natural gas. The contract between Westcoast and Inland provided that for the term of 20 years Inland would sell to Westcoast the production of its subsidiaries and Westcoast at convenient points on its line would sell to Inland exclusively the quantities of gas required to supply the interior of British Columbia at the price of $3.21 per m.c.f. demand charge, 20c per m.c.f. commodity charge, and 22c interruptable charge. Inland also agreed to purchase from Westcoast on a take-or-pay basis minimum amounts that increased yearly. Westcoast agreed to sell exclusively to Inland for the supply of natural gas to the interior provided Inland delivered to the interior at reasonable rates. Later Inland decided to extend its system from Osoyoos to Nelson and Westcoast agreed to contribute to Inland $1,750,000 to defray the cost of construction of that extension.

Before the commission there was evidence that the estimated revenue to Westcoast from the minimum amount which Inland agreed to purchase on a take-or-pay basis would amount to $13,000,000 and that in the third year there would be probable revenue of $27,000,000 to Westcoast from Inland and, further, that the revenue from Inland was estimated at approximately 10 per cent of the total revenue of Westcoast. With these contracts and their collective effect the Westcoast system became feasible and Westcoast was enabled to obtain the necessary permits and to finance the construction of its pipe line from the Peace River to Huntington at a cost estimated at $152,000,000. Hence Westcoast was organized on the basis of selling to three companies who would resell to consumers. Of those three Inland was to provide the distribution system for the supply of the interior of British Columbia.

There are additional grounds which permit the commission to require Prince George Gas to purchase from Inland. Prince George Gas has no supply of gas and it would appear reasonable and in the interests of the city of Prince George not to approve

the franchise to Prince George Gas unless that company obtained a supply of gas. The commission had a sure method of enabling Prince George Gas to obtain that supply. It had jurisdiction over Inland so to require it to undertake to supply Prince George Gas. On the other hand the commission had not the equivalent jurisdiction over Westcoast for the reason that Westcoast was not a party to the proceedings and for the further reason that if Westcoast had been a party it is debatable whether the commission operating under provincial statute could have jurisdiction over Westcoast to require it to supply Prince George Gas for the reason that Westcoast is a company within the *Pipe Lines Act,* RSC, 1952, ch. 211, and that raises a constitutional issue as to the extent of the jurisdiction of the commission over such company. Apart from the question of jurisdiction it is questionable whether the commission could require Westcoast to contract to sell to Prince George Gas by reason that Westcoast had previously contracted to sell exclusively to Inland. Moreover the commission had to consider the effect generally of granting the application of Prince George Gas and had to determine whether the terms to Prince George Gas would be prejudicial to the other municipalities within the Inland system by permitting consumers of the city of Prince George to escape contribution

> "to the overall cost of that part of the Inland system but for the creation of which they might never have been in a position to receive gas at all."

There would therefore appear grounds for requiring Prince George Gas to obtain its supply from Inland provided always that the price was not excessive. The evidence does not establish any probability of excessive price being charged to the residents of Prince George nor of an excessive rate of return to Inland. We are concerned only with the first year of operations which the commission intended as a trial period. Inland could buy gas at $3.21 demand and 20c commodity rate and offered to resell it to Prince George Gas at $5 demand and 30c commodity rate. Inland proposed charging the consumers on its system a uniform basic rate of $1.30 per m.c.f. but that would be subject to adjustments, according to quantity, or to compete with local fuels and for a variation in prices for particular uses, as industrial uses or interruptable supply. There is evidence for Inland that at the price quoted, namely, $5 demand and 30c commodity, the gas would cost Prince George Gas 71.2c computed on a 40 per cent load factor or 83c computed on a 30 per cent load factor, and that price, according to Sampler, would permit Prince George Gas to sell at $1.10 per m.c.f. and to make a return of 8.9 per

cent in the third year. Prince George Gas contends that at the price quoted it would have to sell at $1.30 per m.c.f. to make a return of six and a half per cent. In any event that evidence indicates that the price quoted by Inland to Prince George Gas would enable Prince George Gas to resell in Prince George at $1.30 per m.c.f.; that is the rate Inland proposed to apply elsewhere.

Further the rate of return to Inland does not appear unreasonably high. Inland expected its prices would result in a revenue to Inland over its whole system of four and seven-tenths per cent on a rate base of $23,860,000 or without Prince George, an estimated net return of four and two hundredths per cent on that rate base. The evidence for Prince George Gas estimated that Inland's probable profits in the first year on an estimated consumption and by including estimated sales at $5 demand and 30c commodity to Prince George Gas, would amount to $122,000 or after income tax to $67,100. That would not permit Inland to receive a reasonable return on a rate base of $23,860,000 and would allow nothing as contribution in that first year.

Moreover Prince George Gas in its brief (or formal presentation) submitted to the commission at the hearing in July, 1957, offered to pay Inland $3.21 and 20c commodity and an additional sum of $20,000 for the first year, $30,000 for the second and $50,000 for subsequent years. That offer appears to be against a contention that there should be no contribution or that a contribution up to $20,000 can be unreasonable. There is no evidence that Inland in the first year will receive in excess of that. There is evidence that the consumers in Prince George are in a comparable position to consumers elsewhere and there is no evidence of an excessive rate of return or of unreasonable contribution to Inland.

At the time of the hearing before the commission neither Inland nor Prince George Gas had been in operation and the statements of revenue, expenditures, and rate of return were estimates of those expected in the future. Such estimates cannot be entirely accurate. The brief or formal presentation of Prince George Gas states: "It is, of course, impossible to calculate consumption and expenses accurately." Sampler for the Inland company said: "Load factor of course is something you can't determine precisely until you get into operation;" and further:

> "Well we have made studies and you can get any answer you want as to the cost of operation per customer by going

through records of natural gas companies because they all differ. There are no two of them alike."

Under those circumstances the chairman of the commission has preferred a trial period of one year to ascertain facts "so that we should not be dealing with conjectural costs but with actual costs." Hence the choice of the commission in this instance was between requiring Prince George Gas to supply gas to the residents of Prince George by obtaining it from Inland or, alternatively, permitting Prince George Gas to commence new proceedings against Inland to which Westcoast might be a party to determine the rights of Prince George Gas to acquire a supply from Westcoast and in the meantime to require the residents of Prince George to forego the supply of natural gas. In these circumstances the public convenience and necessity would appear to be best served by requiring Prince George Gas to proceed to supply gas to the city of Prince George by obtaining it from Inland. As natural gas must compete in price with the other fuels now used the residents will thereby get the benefit of a cheaper fuel or if offered at too high a price then both Prince George Gas and Inland by their obligations will be under some pressure to reduce the price so as to increase their outlet.

There is therefore evidence on which it could be held that the certificates, subject to the conditions, and the order under appeal do properly conserve the public interest (sec. 12 [*a*]) and are such as the public convenience and necessity require (sec. 14). Under such circumstances the certificates should stand unless error in law or in fact be demonstrated so as to require this court to intervene.

Prince George Gas contended that the commission in imposing the condition requiring a contribution by the consumers in Prince George is imposing an indirect tax and therefore the order or at least the condition imposed thereby is *ultra vires* of the commission here acting under provincial statute. To be a tax compulsion is essential: *Halifax (City) v. N.S. Car Works* [1914] AC 992, 84 LJPC 17, per Lord Sumner at 998; and that compulsion imports that it be enforceable by law: *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357, Duff, J. at p. 363; *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.* [1932] 3 WWR 639, [1933] AC 168, 102 LJPC 17, per Lord Thankerton, at p. 642; also the fund realized from the tax becomes public funds or at least the fund collectible is at the disposal of the tax authority, as in *Lower Mainland Dairy Products Sales*

Adjustment Committee v. Crystal Dairy Ltd., supra; Reference re Farm Products Marketing Act [1957] SCR 198.

On this argument for indirect tax Prince George Gas is said to be the alleged taxpayer who is to contribute to Inland and to pass on the levy to the residents of Prince George, the consumers; and the commission is said to be the tax authority. The Commission has imposed no compulsion as in the case of taxation and no remedy for recovery as in the case of a tax. Any obligation to pay depends upon contract. If Prince George Gas be taken as the taxpayer then its obligation to pay and the amount of that obligation must be created by its own contract with Inland; that contract is not imposed against the will of these companies. Nor is there any remedy for recovery of the alleged tax unless Prince George Gas agree to pay. Moreover the commission has placed no compulsion on any resident, to whom the alleged tax is said to be passed on; it is a matter of choice for each resident as to whether he will use gas or other fuel and the price will depend upon negotiation and prices of competitive fuels. Again the moneys received by Prince George Gas from its customers, the resident consumers, and by Inland from Prince George Gas, become the moneys of these respective companies and in no sense become public funds as in the case of a tax, nor held at the disposal of the commission as in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd., supra.* In the result the contracts should be regarded as a sale of services and the payments pursuant thereto as compensation for these services and not as taxes.

It was further contended that the commission in imposing the condition and making the order in question purported to exercise its jurisdiction to fix the rates but failed to observe the restrictions on that jurisdiction contained in sec. 16 (1) (*b*) and (*c*); therefore the condition imposed and order were *ultra vires* and void. The alleged failures to comply were: (1) That the rate was excessive, contrary to sec. 16 (1) (*b*); and (2) That the condition failed to segregate the various kinds of service, contrary to sec. 16 (1) (*c*). On the other hand it was contended that the commission was not acting under its jurisdiction to fix rates and therefore that the restrictions on that jurisdiction did not apply. As to the jurisdiction over rates sec. 20 authorizes the commission to fix "the rates" charged "by any public utility." "Public utility" as defined in part of that statute

> "means a person — who owns or operates in the province equipment or facilities for * * *

"(4) the transmission, sale, delivery or furnishing of gas * * * for compensation."

Neither Prince George Gas nor Inland owned or operated such equipment or facilities. Each application was for permission to construct and operate. While an extended meaning of "public utility" may be intended under a particular section such as sec. 12, no such extended meaning can be intended under sec. 20.

Further a rate fixed by the commission under sec. 20 would be mandatory and exclusive, but the approved price was neither mandatory nor exclusive. In the certificate of May 23, 1956, no rate was fixed at all; the price to be paid was left to the negotiations of the parties, Prince George Gas and Inland, and hence that could not be the fixing of a rate under sec. 20. The order of August 10, 1956, states that an offer of Inland in the form of that agreement as amended would be a compliance with the condition imposed upon Inland under the preceding certificate of May 23, 1956; it remained open to the parties to agree upon another price or for Inland to offer at another price if it wished to take the risk; that price was neither mandatory nor exclusive. It follows that the commission was not exercising its jurisdiction of fixing rates and therefore it is not necessary to consider whether it observed the restrictions which would have applied had it been exercising that jurisdiction.

Prince George Gas further contended that the condition in question in requiring Prince George Gas to purchase from Inland at a price to ensure a contribution to Inland is not one of the conditions which may be imposed under sec. 12 (*a*) or under sec. 14, and therefore the imposition of that condition is *ultra vires* of the commission. Sec. 12 (*a*) enumerates the conditions that the commission may impose; the condition is not among those enumerated and therefore not authorized by sec. 12 (*a*).

Sec. 14 reads in part:

" * * * The commission shall have power, after a hearing, to issue a certificate as prayed for or to refuse to issue a certificate, or to issue a certificate for the construction or operation of a portion only of the contemplated facility, line, plant or system, or extension thereof, or for the partial exercise only of the rights or privilege, and may attach to the exercise of the rights granted by the certificate such terms or conditions, including conditions as to the duration of the rights or privilege, in harmony with this Act as in its judgment the public convenience or necessity may require."

The appellants contended that the power of the commission under sec. 14 to attach conditions is restricted by the words "in harmony with the Act;" and those words impliedly require that any condition imposed under sec. 14 be one of those conditions enumerated in sec. 12 (*a*). On the other hand that construction would make the powers of sec. 14 mere surplusage. Further both secs. 12 (*a*) and 14, authorize in affirmative language the imposing of conditions and because of that affirmative language sec. 14 should be read, where applicable, as supplementary to sec. 12 and not as restricted to those conditions enumerated in sec. 12 (*a*). The words "in harmony with this Act" have reference to sections which are restrictive by express words or necessary intendment, as is sec. 8. In the result the commission would have power to impose a condition when such power is conferred by either section.

The power of the commission to impose the condition in question depends upon sec. 14 and appears to be within the powers conferred by sec. 14 unless excluded by the words "in harmony with this Act as in its judgment the public convenience and necessity may require." The words "in harmony with this Act" in this case would preclude a rate that contravenes sec. 8. Whether a rate contravenes sec. 8 (1) is declared by sec. 8 (2) to be "a question of fact of which the commission shall be the sole judge" and hence cannot be a question of law within sec. 100.

There is the further question under sec. 14 whether the condition and order under appeal are *ultra vires* the commission because not such "as in its judgment, the public convenience or necessity may require." It is not necessary to decide to what extent the words "as in its judgment" have made the commission the exclusive forum to determine "the public convenience or necessity" or to what extent the right of appeal is limited by that specific provision, because even by disregarding any such limitation on the right of appeal, the appellants have not here demonstrated any error in law.

The definition of "public convenience and necessity" is a question of law no doubt: *Surrey (Dist.) and Chilliwack (Tp. and City) v. B.C. Elec. Co., supra.* But beyond that there is no principle of law that will determine what specific "terms and conditions" the public convenience and necessity will require under the circumstances at bar. Those terms and conditions must vary in each case with the evidence and cannot be a matter of law.

There is evidence which affords reasonable grounds for holding that public convenience and necessity did require the condition and order under appeal, during the first year of operations; and it is not necessary to consider that the commission, as an administrative tribunal, may have had and may have acted upon information acquired by experience and extending beyond the evidence tendered.

It cannot be said that the commission refused or omitted to determine the proper issue; it proceeded to consider the public convenience or necessity and matters which should be considered in determining that issue, such as the public interest: Sec. 12 (*a*), *Surrey (Dist.) and Chilliwack (Tp. and City) v. B.C. Elec. Co., supra.*

The commission has made no fundamental error in procedure. The commission has declined to give full credit to the expert evidence and has decided to prefer that information to be acquired by one year's experience. It is for the commission to say what weight should be given to the evidence and what further information is required. It would therefore appear that there has been no error in law and that this branch of the appeal upon questions of law must fail.

The other branch of the appeal is "upon any question of fact" (secs. 108 and 109). The appellants have contended that the condition in question and the order of August, 1956, were not in fact such "as the public convenience or necessity may require" and therefore not within sec. 14, and that the price of $5 demand and 30c commodity quoted by Inland, and approved by the order of August 10, 1956, was an unjust, unreasonable, unduly discriminatory or unduly preferential rate and forbidden by sec. 8 (1). Those were supported by the following specific contentions:

It was contended that the city of Prince George was discriminated against by being included in the Inland system and that discrimination arose because the city of Prince George had a preferred position in being closer to the gas wells than other municipalities and therefore that preferred position should be reflected in a preferred rate over other municipalities. On the evidence the city of Prince George has no preferred position: (1) It is of such distance from the well that it is not economically feasible to build a system to Prince George alone; (2) No supply of gas would have been available to Prince George unless the system had been constructed so as to serve the city of Vancouver and to reach the American market at Huntington. In the result the city of Prince George has no position over that

of any other municipality so situate as to be able to tap the Westcoast transmission line.

It was further contended that the city of Prince George was further discriminated against by being made, as part of the Inland system, to contribute to the uneconomic extension of Inland into the West Kootenays. There is no evidence that that extension will be uneconomic, particularly having regard to the contribution of $1,750,000 contributed by Westcoast to Inland over the three-year period. In any event the original plan as filed with the commission was for Inland to serve the Kootenays by a separate line of 58 miles in length to be constructed east of the Cascades and running from the border near Waneta through Trail and intermediate points to Nelson, and for Inland to purchase gas for the West Kootenays from an American company and not from Westcoast. It would therefore be open to Nelson and the other municipalities in the West Kootenays to argue that they were being discriminated against by the extension to Nelson, including them in the Westcoast system, and thereby requiring them to contribute to the overall cost of the Westcoast system, of which system the Kootenays, including Nelson, were wholly independent; that is to say, that the municipalities in the West Kootenays were being discriminated against in favour of Prince George and the other municipalities along the Westcoast transmission line.

In any event the public convenience and necessity cannot be determined from the viewpoint of one municipality or of one company alone: *Surrey (Dist.) and Chilliwack (Tp. and City) v. B.C. Elec. Co., supra.*

It was also contended by the appellants that the uniform rate of $1.30 per m.c.f. proposed to be charged by Inland was discriminatory and therefore there should be zonal rates with rate differentials for each zone. The appellants cited *Interstate Power Co. v. Federal Power Commn.* (1956) 236 F (2nd) 372. In that case the Federal Power Commission held that the company's practice of charging a uniform rate over its entire system was discriminatory and the Court of Appeal in review held that such finding of discrimination was supported by substantial evidence and refused to intervene. That case was decided upon facts but indicates that whether a rate is discriminatory is a question of fact and must be proven. Under sec. 8 (2) whether there is undue discrimination is a question of fact "of which the Commission shall be the sole judge." Therefore whether or not the uniform rate of $1.30 per m.c.f. on the Inland system will be discriminatory must be proven as a fact. It was not

discriminatory in fact at the time of the hearing because the Inland system was not then in operation and the rate not in effect; and whether or not it will be discriminatory when it comes into effect will depend upon a variety of circumstances not in evidence. If Inland on becoming a public utility shall demand such rate and it be found discriminatory that will raise the further question—against whom does Inland discriminate? It would appear not to be against the residents of Prince George as under the certificate and order under appeal those residents will not buy from Inland; and not against Prince George Gas as it will not be buying at that rate.

As to the whole of this branch of the appeal which is restricted to an appeal upon any question of fact (secs. 108 and 109), it is to be borne in mind that neither Inland nor Prince George Gas had its system constructed or in operation at the time of the hearing before the commission and therefore the essential evidence was directed towards proving the probable future incomes and expenses of these respective companies and the probable effect on such future incomes and expenses of the condition imposed by the commission together with the price under the offer by Inland in contrast with the alternative condition contended for by Prince George Gas. To that extent the evidence was directed to prove not facts which had occurred in the past experience of these companies but rather future possibilities expected to arise out of these future systems bringing a new undertaking, the supply of natural gas, into a new territory. Hence the commission was dealing not with facts but with matters of opinion and in such matters the court pays due regard to the peculiar capacity of the commission and to that discretion conferred on the commission under sec. 14 by the words "as in its judgment the public welfare or convenience may require." In *Union Gas Co. v. Sydenham Gas & Petroleum Co.* [1957] SCR 185, 75 CRTC 1, Kerwin, C.J. at p. 188 said:

> "The Court of Appeal apparently considered that it had power to substitute its opinion for that of the Board, treating the question of public convenience and necessity as a question of fact. I am unable to agree with that view. While the Board had been newly formed and we were told that the respondent's application to it was the first to be heard since its creation, the Board was the successor, in many respects, to the jurisdiction formerly exercised by the referee. Its members would be in a position to exercise their judgment, in view of their general knowledge, and, while provision is made for an appeal from its decision, it is, in the wording

of the relevant statutory enactment, 'upon any question of law or fact'."

Rand, J. at p. 190 said:

"It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree; it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only."

It would therefore appear that the issues raised on this branch of the appeal are not questions of fact but are matters of opinion and essentially matters for the commission. In any event the issues, not being questions of fact, are not within the right of appeal under secs. 108 and 109.

It was further contended that the condition if allowed to apply by requiring Prince George Gas to contract with Inland would have some effect prejudicial to Prince George Gas when the rates are considered at the end of the trial period of one year. There would appear no such prejudice in law. Under sec. 20 the commission has power to fix the rates and under sec. 99 the commission may vary or recind its orders. Therefore in law the commission has the power to rehear and to vary at the end of that trial period or at another time. What the commission may decide on the hearing after the trial period is not now a "question of fact" within secs. 108 and 109 or within the competence of this appeal.

In conclusion there has been no error which would permit this court to intervene and the appeal should be dismissed.

TAB 4

Union Gas Ltd. v. Township of Dawn
Tecumseh Gas Storage Ltd. v. Township of Dawn

15 O.R. (2d) 722

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT
KEITH, MALONEY AND DONOHUE, JJ.
22ND FEBRUARY 1977.

Municipal law -- By-laws -- Township passing comprehensive zoning by-law -- Approved by Ontario Municipal Board -- One section of by-law dealing with location of gas pipelines -- Whether by-law intra vires township -- Whether Ontario Municipal Board had jurisdiction to approve by-law -- Planning Act, R.S.O. 1970, c. 349, s. 35 -- Ontario Energy Board Act, R.S.O. 1970, c. 312.

Planning legislation -- Zoning by-laws -- Township passing comprehensive by-law -- Approved by Ontario Municipal Board -- One section of by-law dealing with location of gas pipelines -- Whether by-law intra vires township -- Whether Ontario Municipal Board had jurisdiction to approve by-law -- Planning Act, R.S.O. 1970, c. 349, s. 35 -- Ontario Energy Board Act, R.S.O. 1970, c. 312.

In accordance with the powers given to municipal councils by s. 35 of the Planning Act, R.S.O. 1970, c. 349, an agricultural township in south-western Ontario passed a comprehensive zoning by-law which was later amended. Both by-laws came before the Ontario Municipal Board for approval and were approved. A particular section of the zoning by-law, as amended, dealt with the locations in which, inter alia, gas pipelines could be

constructed within the municipality. On appeal by two gas companies from the Municipal Board's approval of this section of the by-law, held, the appeal should be allowed. The by-law was ultra vires the municipality and the Municipal Board, therefore, was without jurisdiction to approve it.

The local problems of the township were insignificant when viewed in the perspective of the need for energy to be supplied to millions of residents of Ontario beyond the township borders. A potential not only for chaos but for the total frustration of any plan to serve this need would be created if by reason of powers vested in each municipality by the Planning Act, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. The Ontario Energy Board Act, R.S.O. 1970, c. 312, as amended, makes it clear that all matters relating or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the Planning Act. These are all matters that are to be considered in the light of the general public interest and not local or parochial interests.

Furthermore, the maxim generalia specialibus non derogant applied. The Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest'' and this must be classified as special legislation. The Planning Act, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 of that Act must always be read as being subject to special legislation such as is contained in the Ontario Energy Board Act.

[Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Oil Pipe Line Co., [1954] S.C.R. 207, [1954] 3 D.L.R. 481, 71 C.R.T.C. 291, apld; City of Ottawa v. Town of Eastview et al., [1941] S.C.R. 448, [1941] 4 D.L.R. 65, 53 C.R.T.C. 193,

refd to]

APPEAL from a decision of the Ontario Municipal Board approving two municipal zoning by-laws.

J. J. Robinette, Q.C., and L. G. O'Connor, Q.C., for appellant, Union Gas Limited.

P. Y. Atkinson, for appellant, Tecumseh Gas Storage Limited.

W. B. Williston, Q.C., and J. A. Campion, for respondent, Township of Dawn.

T. H. Wickett, for Ontario Energy Board.

The judgment of the Court was delivered by

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

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

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

The Township of Dawn in the County of Lambton, a rural agricultural township in south western Ontario, passed its first comprehensive zoning by-law on June 18, 1973 (By-law 40), and amending By-law 52 on September 3, 1974.

These two by-laws came before the Ontario Municipal Board on April 16 and 24, 1975, for approval. In addition to the parties appearing in this Court, two other parties interested in the

effect of these by-laws were represented at the Municipal Board hearings, but the Ontario Energy Board, one of the most vitally interested parties, inexplicably was not.

The relevant sections of the by-law, as amended, read as follows:

1.1 Section 1 -- Introduction

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

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

Title

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

Penalty

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

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

Section 4 -- General Use and Zone Regulations

4.1 Uses Permitted.

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

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

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

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

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

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

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

from these reasons are quoted [4 O.M.B.R. 462 at pp. 463-6]:

> The Township consists of flat agricultural land with soil rated in the Canada Land Survey as A2. The Board was advised by the representative of the Ministry of Agriculture and Food that the soil is of the Brookstone clay type which requires particular attention to drainage because the land is so flat and that this was the reason it was rated A2 rather than A1. The soil is very productive if properly drained and worked. As drainage is installed the soil responds to cash crops such as corn and soya beans. Drainage is accomplished generally by a grid system of tile drainage lines approximately 40 ft. apart throughout the whole of the Township. These feed into municipal drains which generally follow lot and concession lines and eventually drain to the south-west into the Sydenham River. An example of this method of drainage in the Township is shown on ex. 9, filed. This also indicates the position of the Union Gas Company pipeline which runs in a diagonal direction across the tile drains referred to above. Because the pipeline runs across the drains, a header line is required to direct the flow of the water into the municipal drain.
>
> The evidence indicates that in respect of the pipeline installation on a right of way that may be 60 ft. wide or more, and the header line parallel to it, the farmer in using his equipment must gear down each time before crossing these installations rather than continuing in the usual sweep of the farm land. This time-consuming and inconvenient operation is necessary every time the farmer crosses the pipeline easement area. In addition, the evidence clearly indicated that upon excavation for the pipeline, the soil composition is disturbed and impacted so that growth is hampered for several years until the soil is returned to its normal state. The company indicated in evidence that a new method for laying lines and conserving the topsoil for future development had been devised. This may alleviate the problems, but only time will tell.

. . . . .

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

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

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

The Board must weigh the possibility of incurring these increased costs against the need for protecting the farm industry against unnecessary and unplanned disturbance in future years. There was ample evidence to indicate that the need for pipeline installations would increase in the future. There was also evidence to indicate that about 50% of the existing lines are already built in a north-south and east-

west direction and that the corridor concept has therefore in fact found practical use in the past (exs. 7 and 27). It was the argument of counsel for the applicant that once the corridors were established the extra cost for looping will not be as significant.

Argument of counsel for the Tecumseh Gas Storage Limited was that the use of land for pipelines was not in fact a use of land as envisaged under s. 35(1)1 of the Planning Act, R.S.O. 1970, c. 349. To bolster this argument counsel referred the Board to the case of Pickering Twp. v. Godfrey, [1958] O.R. 429, 14 D.L.R. (2d) 520, [1958] O.W.N. 230. The Board finds that the instant case can be distinguished from the quoted case which dealt specifically with the making of a quarry or gravel pit as a "land use". In addition, the Board finds that the use of land for installation of a pipeline fits the definition arrived at in the case above quoted [at p. 437] as meaning: "the employment of the property for enjoyment, revenue or profit without in any way otherwise diminishing or impairing the property itself."

The second major argument of counsel was that the municipality has no jurisdiction to deal with pipeline installation because of the existence of the Ontario Energy Board Act, R.S.O. 1970, c. 312, which creates the Ontario Energy Board and gives it jurisdiction to determine the route for a transmission line, production line, distribution line or a station (s. 40(1)). The Board was also referred to s. 57 of the Ontario Energy Board Act which reads as follows:

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

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

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

dealing with those matters referred to in s. 35 of the Planning Act.

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

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

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

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

> 35(1) By-laws may be passed by the councils of municipalities:
>
> 1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.
>
> 2. For prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

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

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

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

The principal source of the supply of natural gas to Union Gas is the Trans-Canada pipeline which enters the southern part

of Ontario in Lambton County just south of Sarnia and connects with a major compressor station of Union Gas in the Township of Dawn. There are four other major compressor stations operated by this appellant, one just west of London, another at Trafalgar between Hamilton and Toronto, one near Simcoe and the fourth south of Chatham. These stations are essential to maintain pressure throughout the pipeline network.

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

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

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

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

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

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

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

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

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

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

been made by the Board under this Act.

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

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

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

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

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

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

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

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

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

38(1) No person shall construct a transmission line without first obtaining from the Board an order granting leave to construct the transmission line.

. . . . .

39. Any person may, before he constructs a production line, distribution line or station, apply to the Board for an order granting leave to construct the production line, distribution line or station.

40(1) An applicant for an order granting leave to construct a transmission line, production line, distribution line or a station shall file with his application a map showing the general location of the proposed line or station and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass.

(2) Notice of the application shall be given by the applicant in such manner as the Board directs and shall be given to the Department of Agriculture and Food, the Department of Municipal Affairs, the Department of Highways and such persons as the Board may direct.

(3) Where an interested person desires to make objection to the application, such objection shall be given in writing to the applicant and filed with the Board within fourteen days after the giving of notice of the application and shall set forth the grounds upon which such objection is based.

. . . . .

(8) Where after the hearing the Board is of the opinion that the construction of the proposed line or station is in the public interest, it may make an order granting leave to construct the line or station.

(9) Leave to construct the line or station shall not be granted until the applicant satisfies the Board that it has

offered or will offer to each landowner an agreement in a form approved by the Board.

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

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

. . . . .

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

. . . . .

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

. . . . .

(3) Without any other leave and notwithstanding any other Act, where after the hearing the Board is of the opinion that the construction of the line upon, under or over a highway,

utility line or ditch, as the case may be, is in the public interest, it may make an order authorizing the applicant so to do upon such terms and conditions as it considers proper.

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

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

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

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

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

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

While the result in the case of Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Oil Pipe Line Co., [1954] S.C.R. 207, [1954] 3 D.L.R. 481, 71 C.R.T.C. 291, might perhaps be different today, having regard to the facts of that case and subsequent federal legislation, the principles enunciated are valid and applicable to the case before this Court.

In the Campbell-Bennett case, the defendant Trans Mountain Pipe Line was incorporated by a special Act of the Parliament of Canada to construct interprovincial pipe lines. During the course of construction of a pipe line from Acheson, Alberta to Burnaby, British Columbia, some work was done in British Columbia by the plaintiff for which it claimed to be entitled to a mechanics' lien on the works in British Columbia, and to enforce that lien under the British Columbia Mechanics' Lien Act by seizing and selling a portion of the pipe line.

At p. 212 S.C.R., p. 486 D.L.R., Kerwin, J. (as he then was), on behalf of himself and Fauteux, J. (as he then was), said:

> The result of an order for the sale of that part of Trans Mountain's oil pipe line in the County of Yale would be to break up and sell the pipe line piecemeal, and a provincial legislature may not legally authorize such a result.

Then at pp. 213-5 S.C.R., pp. 487-9 D.L.R., Rand, J., on behalf of himself and the other three members of the Court, said:

> The respondent, Trans Mountain Oil Pipe Line Company, was incorporated by Dominion statute, 15 Geo. VI, c. 93. It was invested with all the "powers, privileges and immunities conferred by" and, except as to provisions contained in the statute which conflicted with them, was made subject to all the "limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil" enacted by Parliament. Within that framework, it was empowered to construct or otherwise acquire, operate and maintain interprovincial and international pipe lines with

all their appurtenances and accessories for the transportation of oil.

The Pipe Lines Act, R.S.C. 1952, c. 211, enacted originally in 1949, is general legislation regulating oil and gas pipe lines and is applicable to the company. By its provisions the company may take land or other property necessary for the construction, operation or maintenance of its pipe lines, may transport oil and may fix tools therefor. The location of its lines must be approved by the Board of Transport Commissioners and its powers of expropriation are those provided by the Railway Act. By s. 38 the Board may declare a company to be a common carrier of oil and all matters relating to traffic, tools or tariffs become subject to its regulation. S. 10 provides that a company shall not sell or otherwise dispose of any part of its company pipe line, that is, its line held subject to the authority of Parliament, nor purchase any pipe line for oil transportation purposes, nor enter into any agreement for amalgamation, nor abandon the operation of a company line, without leave of the Board; and generally the undertaking is placed under the Board's regulatory control.

Is such a company pipe line so far amenable to provincial law as to subject it to statutory mechanics' liens The line here extends from a point in Alberta to Burnaby in British Columbia. That it is a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy: Winner v. S.M.T. (Eastern) Limited, [1951] S.C.R. 887, affirmed, with a modification not material to this question, by the Judicial Committee but as yet unreported. The lien claimed is confined to that portion of the line within the County of Yale, British Columbia. What is proposed is that a lien attaches to that portion of the right of way on which the work is done, however small it may be, or wherever it may be situated, and that the land may be sold to realize the claim. In other words, an interprovincial or international work of this nature can be disposed of by piecemeal sale to different persons and its undertaking thus effectually dismembered.

In the light of the statutory provisions creating and governing the company and its undertaking, it would seem to be sufficient to state such consequences to answer the proposition. The undertaking is one and entire and only with the approval of the Board can the whole or, I should say, a severable unit, be transferred or the operation abandoned. Apart from any question of Dominion or Provincial powers and in the absence of clear statutory authority, there could be no such destruction by means of any mode of execution or its equivalent. From the earliest appearance of such questions it has been pointed out that the creation of a public service corporation commits a public franchise only to those named and that a sale under execution of property to which the franchise is annexed, since it cannot carry with it the franchise, is incompatible with the purpose of the statute and incompetent under the general law. Statutory provisions, such as s. 152 of the Railway Act, R.S.C. (1952) c. 234, have modified the application of the rule, but the sale contemplated by s. 10 of the Pipe Lines Act is sale by the company, not one arising under the provisions of law and in a proceeding in invitum. The general principle was stated by Sir Hugh M. Cairns, L.J. in Gardner v. London, Chatham and Dover Railway (1867), L.R. 2 Ch. 201 at p. 212:--

"When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred."

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

"The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls

and sums of money ejusdem generis--that is to say, the earnings of the undertaking--must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot; under their mortgages, or as mortgagees--by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking--either prevent its completion, or reduce it into its original elements when it has been completed."

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

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

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

17(1) The Lieutenant Governor in Council may make regulations,

(a) for the conservation of oil or gas;

(b) prescribing areas where drilling for oil or gas is prohibited;

(c) prescribing the terms and conditions of oil and gas production leases and gas storage leases or any part thereof, excluding those relating to Crown lands, and providing for the making of statements or reports thereon;

(d) regulating the location and spacing of wells;

(e) providing for the establishment and designation of spacing units and regulating the location of wells in spacing

units and requiring the joining of the various interests within a spacing unit or pool;

(f) prescribing the methods, equipment and materials to be used in boring, drilling, completing, servicing, plugging or operating wells;

(g) requiring operators to preserve and furnish to the Department drilling and production samples and cores;

(h) requiring operators to furnish to the Department reports, returns and other information;

(i) requiring dry or unplugged wells to be plugged or replugged, and prescribing the methods, equipment and materials to be used in plugging or replugging wells;

(j) regulating the use of wells and the use of the subsurface for the disposal of brine produced in association with oil and gas drilling and production operations.

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

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

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

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

The second of the additional submissions to which reference

should be made is based on a cardinal rule for the interpretation of statutes and expressed in the maxim generalia specialibus non derogant. For a discussion of the effect of this rule I will only refer to the case of City of Ottawa v. Town of Eastview et al., [1941] S.C.R. 448 commencing at p. 461 [1941] 4 D.L.R. 65 at p. 75, 53 C.R.T.C. 193, and to the Dictionary of English Law (Earl Jowitt), at p. 862.

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

The Planning Act, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 of that Act must always be read as being subject to special legislation such as in contained, for example, in the Ontario Energy Board Act, the Energy Act and the Petroleum Resources Act, 1971.

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

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

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

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

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

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

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

Appeal allowed.