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

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

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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. and FortisBC Inc. Multi-Year Rate Plan Application for 2020 to 2024 ~ Project No. 1598996 - Reply Argument

In accordance with the regulatory timetable in the above proceeding, we enclose for filing the Reply Argument of FortisBC Energy Inc. and FortisBC Inc., dated March 2, 2020.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by]

Christopher Bystrom*
*Law Corporation

CRB/NR
Encl.

BRITISH COLUMBIA UTILITIES COMMISSION

FortisBC Energy Inc. and FortisBC Inc.

Multi-Year Rate Plan Application for 2020 to 2024

Project No. 1598996

Reply Argument

of

FortisBC Energy Inc. and FortisBC Inc.

March 2, 2020

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PART ONE: INTRODUCTION AND OVERVIEW

1. FortisBC Energy Inc. ("FEI") and FortisBC Inc. ("FBC") (together, "FortisBC", the "Utilities" or the "Companies") filed their Application for a Multi-Year Rate Plan for 2020 through 2024 ("Application) on March 11, 2019. The evidentiary phase of the proceeding included the filing of additional materials requested by the BCUC, a workshop, FortisBC's Evidentiary Update and errata to its Application, two procedural conferences, the filing of intervener evidence, information requests ("IRs") on intervener evidence, FortisBC's rebuttal evidence, and four rounds of information requests ("IRs") to FortisBC. Following the close of the evidentiary phase, FortisBC filed its Final Argument on January 10, 2020.

2. In this reply submission, FortisBC responds to the six interveners who filed arguments in the proceeding. These interveners are the Movement of United Professionals ("MoveUP"), the BC Sustainable Energy Association and Sierra Club BC ("BCSEA"), the British Columbia Municipal Electric Utilities ("BCMEU"), who intervened only in respect to FBC's Proposed MRP, the Industrial Customers Group [of FBC] ("ICG"), the Commercial Energy Consumers Association of British Columbia ("CEC"), and the British Columbia Old Age Pensioners' Organization et al. ("BCOAPO").

3. The submissions of interveners cover a range of views, and can be generally divided into three groups:

- **Supportive:** Both MoveUP and BCSEA support FortisBC's proposed multi-year ratemaking plans ("Proposed MRPs"). BCSEA takes issue with FEI's connect-to-gas incremental funding and makes several reporting-related requests. Overall, however, these interveners are very supportive of FortisBC's Proposed MRPs.

- **MRP with Modifications:** FortisBC would place BCMEU (regarding FBC only) and BCOAPO in this group, as their submissions indicate that they would support an MRP with modifications to its design. The BCOAPO's submission

focuses on the design of the Proposed MRPs, including the growth and productivity factors, and puts forward changes to the design that it would consider acceptable.[1] BCMEU expresses support for the continuation for the 2014-2019 performance-based ratemaking plans (the "Current PBR Plans" or "2014-2019 PBR Plans"), and argues for a positive X-Factor.

- **Opposed:** The ICG (regarding FBC only) and CEC recommend denial of the Application, largely on the basis that they are opposed to the concept of an MRP and prefer a cost of service ("COS") approach or, in CEC's case, a more idiosyncratic form of regulation.

4. FortisBC has carefully considered the submissions of interveners and their points of view. FortisBC is encouraged by the support of MoveUP, whose members have an interest in the long-term health of the Utilities, and BCSEA, who has a particular interest in FortisBC's response to climate policies. With respect to the CEC's and ICG's opposition to MRPs, FortisBC is somewhat discouraged by the fact that neither CEC nor ICG appear to work with an accurate or realistic account of COS ratemaking, nor fully appreciates the power of MRPs and the benefits that FortisBC has achieved for customers as a result. FortisBC has sought again to bring clarity to this ongoing debate in this reply submission, but does not expect to change what appears to be the ideological views of these two parties.

5. FortisBC has studied the position taken by BCOAPO (and also by CEC and ICG) that its proposal is weighted in favour of the Utilities. FortisBC does not believe this to be the case. FortisBC's operating environment is changing significantly and more than ever FortisBC needs to compete with market forces by keeping rates low, proactively addressing the numerous challenges on the horizon and seizing the opportunities that can mitigate the unavoidable impacts of government policy on other fronts. The Proposed MRPs are carefully designed to address the significant challenges and opportunities facing the Utilities. This is not only in the best interest of the business of the utilities, but in the interest of its customers and the public generally.

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[1] BCOAPO Argument, p. 54.

6. FortisBC considers that this process has been a civil one and has not exhibited the "lack of trust" referenced by the BCUC in its 2014 PBR Decision[2] noted by the CEC.[3] Nonetheless, FortisBC wishes to respond up front to comments to the effect that FortisBC's proposal should not be trusted because FortisBC has an incentive to propose an MRP that is overly favourable to its shareholder.[4] Such comments cannot be given any weight. While FEI and FBC are private companies that have a duty to their shareholder, both the Utilities and their shareholder have a strong interest in protecting their customers (as acknowledged by the CEC[5]) and, more than ever, in keeping rates low and competitive in an increasingly complex market. FortisBC and its shareholder have an interest in maintaining the trust and loyalty of their customers and the health of the utilities over the long term. FortisBC has brought all these interests to bear in its formulation of the Proposed MRPs.

7. Furthermore, the BCUC must make its decision based on the evidence before it, not based on the suspicions of a party's motive. It is a fundamental principle of regulatory law that the utility must be presumed to be acting in good faith. The following passage from the Supreme Court of Canada's decision in ATCO is dispositive in this context: "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."[6] The arguments of interveners based on nothing more than unfounded suspicion must be rejected.

8. Ultimately, FortisBC remains convinced that the Proposed MRPs represent the most appropriate ratemaking approach at this time and are in the public interest. FortisBC submits that the case is compelling that it has appropriately responded to past experience and the

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[2] FEI Multi-Year Performance Based Ratemaking Plan for 2014 Through 2018, Decision and Order G-138-14, dated September 15, 2014 ("2014 PBR Decision"). at p. 13. Online: https://www.bcuc.com/Documents/Proceedings/2014/DOC_42181_09-15-2014-FEI-2014-18-DecisionWEB.pdf.

[3] CEC Argument, p. 1, para. 4.

[4] BCOAPO Argument, p. 3: "The utility has a financial incentive – from the point of its owners, the shareholders – to inflate, by an overly generous escalator, overly high base rates throughout the period of the multi-year plan." Also see CEC Argument at p. 2 para. 11, and p. 19, para. 132 regarding working the system at the expense of ratepayers.

[5] CEC Argument, p. 1, para. 5.

[6] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, at para. 84 (online at: http://www.canlii.org/en/ca/scc/doc/2006/2006scc4/2006scc4.html), at Tab 1 of the Book of Authorities.

significant changes in its operating environment to form an MRP that carefully balances the interest of the Utilities and its customers. FortisBC therefore continues to recommend the Proposed MRPs for approval by the BCUC.

9. FortisBC's reply to interveners' submissions follows the organization of its Final Argument. FortisBC has sought to respond to the thrust of intervener submissions and silence on a particular statement should not be interpreted as agreement.

PART TWO: RATIONALE FOR THE PROPOSED MRPS

10. In this part, FortisBC replies to the submissions of interveners on the evaluation of the 2014-2019 PBR Plans and to the submissions that oppose FortisBC's view that an MRP approach is the most appropriate one for the test period.

A. THE 2014-2019 PBR PLANS HAVE BEEN SUCCESSFUL

1. EVIDENCE OF SUCCESS

11. BCOAPO claims that the only meaningful evidence that exists about the success of the 2014-2019 PBR Plans is FortisBC's achievement of their ROE.[7] This is not accurate[8] and is inconsistent with the BCUC's statements in its Decisions in Annual Reviews during the 2014-2019 PBR Plans. Pursuant to BCUC directives, FortisBC provided information annually on various O&M and capital issues, including (i) information on major productivity initiatives; (ii) annual changes to headcount and FTEs; and (iii) cost breakdowns and explanations for sustainment/other and growth capital spending.[9] The BCUC in its Decision on FEI's 2018 Annual Review for 2019 Delivery Rates reiterated the value of this information, saying:[10]

> …the information collected through the annual reviews is important to gain an overall understanding of the functioning of the PBR Plan, as the information provides some quantifiable data on O&M and capital spending at a more granular level. This information may then be used by parties to assist with the evaluation of the PBR Plan as a whole.

12. FortisBC included the same information in its Application[11] and submits that it is meaningful evidence that can be used to evaluate the success of the 2014-2019 PBR Plans.

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7 BCOAPO Argument, p. 48.
8 Exhibit B-23, Rebuttal Evidence, Q&A 5 and 6.
9 Exhibit B-1-1, Appendix B1 is a table of all BCUC directives.
10 Decision and Order G-237-18 on FEI's 2018 Annual Review for 2019 Delivery Rates Application, Appendix A, pp. 13-14, Appendix A, p. 14. Online: https://www.bcuc.com/Documents/Proceedings/2018/DOC_53039_2018-12-13-G-237-18-FinalOrder.pdf.
11 Exhibit B-1-1, Appendices B6, B7 and B8.

13. In its Decision approving FEI's 2014-2019 PBR Plan, the BCUC described the purpose of PBR as follows: "The Panel notes that the purpose of implementing a PBR mechanism is to provide an environment where efficiencies are created through actions initiated by the utility."[12] The evidence in this proceeding shows that the 2014-2019 PBR Plans successfully created such an environment and that the Utilities responded as expected by creating efficiencies and producing good outcomes for customers.

14. FortisBC set out its evaluation of the 2014-2019 PBR Plans in its Application and responses to IRs, which was reviewed on pages 7 to 14 of FortisBC's Final Argument. Meaningful evidence of the success of the 2014-2019 PBR Plans includes:

(a) FEI and FBC achieved significant O&M savings and reduced its O&M per customer which benefitted customers in the form of earnings sharing and will continue to benefit customers in lower Base O&M going forward.[13]

(b) Although FEI's and FBC's capital needs exceeded the formula amounts, the safeguard mechanisms worked as intended.[14]

(c) The 2014-2019 PBR Plans resulted in significant regulatory cost savings, both external and internal to the Utilities.[15]

(d) Rates trends were at or below inflation, including years with no rate increases for both FEI and FBC, and both Utilities built up a surplus to mitigate future rate pressures.[16]

(e) FEI and FBC maintained a high quality of service during the 2014-2019 PBR Plans.[17]

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[12] 2014 PBR Decision, at p. 124. Online: https://www.bcuc.com/Documents/Proceedings/2014/DOC_42181_09-15-2014-FEI-2014-18-DecisionWEB.pdf.
[13] FortisBC Final Argument, pp. 8-10.
[14] FortisBC Final Argument, pp. 11-12.
[15] FortisBC Final Argument, pp. 10-11.
[16] FortisBC Final Argument, pp. 12-14.
[17] Exhibit B-1-1, Appendices C5-1 and C5-2.

(f) Concentric's Benchmarking Study confirms that FEI and FBC are relatively efficient compared to their peers.[18]

15. FortisBC has also provided its views on the weaknesses of the 2014-2019 PBR Plans.[19] Overall, FortisBC submits that the evidence is that the 2014-2019 PBR Plans were a success. As intended, they created an environment that resulted in the utilities initiating efficiencies, which has resulted in positive benefits for customers.

2. EVIDENCE THAT FEI AND FBC HAVE BECOME MORE EFFICIENT

16. The CEC claims that there "is no persuasive evidence that the Companies' operations have become more efficient from a cost benefit perspective."[20] FortisBC disagrees. The 2014-2019 PBR Plans were designed to create an environment in which the Utilities would initiate efficiencies and the evidence shows that FortisBC responded as expected by becoming more efficient. FortisBC achieved regulatory efficiencies and O&M savings, and its rates trended well compared to inflation, all while maintaining a high level of service.[21] FortisBC reported each year in the Annual Review how it achieved efficiencies, and FEI described each of its major efficiency initiatives during the PBR term[22] and both Utilities have reported on headcount and FTEs.[23] As directed by the BCUC, FortisBC also commissioned the Concentric Benchmarking Study which confirms FEI and FBC are efficient relative to their peers.[24] Even Mr. Bell in his evidence filed for BCOAPO states: "One must assume that FortisBC sought efficiencies and achieved them and the objectives of the MRP were achieved."[25]

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18 FortisBC Final Argument, pp. 68 to 70.
19 FortisBC Final Argument, pp. 12-13.
20 CEC Argument, p. 3.
21 FortisBC Final Argument, pp. 8-14.
22 Exhibit B-1-1, Appendix B6.
23 Exhibit B-1-1, Appendix B7; Exhibit B-30, CEC IR 4.2.1.
24 Exhibit B-1, pp. B-52 to B-58.
25 Exhibit C7-5, p. 6.

17. The detailed review of cost and benefits that CEC appears to desire is contrary to the objectives of PBR to decrease regulatory burden and to mimic the type of incentives that are available in competitive markets. FortisBC explained:[26]

> The purpose of the proposed MRPs, similar to the current PBR Plans, is to provide market-like incentives (under the proposed MRPs, this includes traditional and non-traditional incentives as described in Section 8 of the Application) and leave the utilities' management to make decisions that lead to benefits measured by the level of customer rates, bottom line earnings and progress in addressing some of the challenges and opportunities in the operating environment. It is not the purpose to impose the type of additional regulatory review implied by the need for the utility to demonstrate how the benefits were achieved (i.e., information regarding the cost effectiveness of its programs and responses to opportunities). In fact, using this as a standard would effectively reduce the benefits through added regulatory oversight and thus contradict a fundamental purpose of PBR and FortisBC's proposed MRPs.
>
> Additionally, the regulatory framework in this province, whether under a cost of service or PBR or hybrid, is for the BCUC to set rates based on forecasts, and for a utility to manage its own affairs within its budgets. FortisBC's approach under the proposed MRPs is consistent with that fundamental framework.

18. Further, it is unclear what exactly the CEC means by "more efficient from a cost benefit perspective" and similar phrases. Moreover, CEC has not established how this relates to the requirements of the UCA. Contrary to the CEC's submissions, the evidence is that the 2014-2019 PBR Plans worked as intended and that FortisBC has reduced costs and achieved efficiencies while maintaining a high level of service to its customers.

3. THE 2014-2019 PBR PLANS WERE RIGOROUS AND CHALLENGING

19. Contrary to intervener submissions claiming that FortisBC "under spent" O&M and capital[27] or "over earned" during the 2014-2019 PBR Plan,[28] the 2014-2019 PBR Plans imposed challenging efficiency targets that were difficult to achieve and resulted in lower achieved ROEs for the Utilities compared to years under COS ratemaking.

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[26] Exhibit B-7, CEC IR 1.9.1.

[27] For example, BCOAPO Argument, p. 12 and CEC Argument, p. 3.

[28] For example, BCOAPO Argument, p. 12 or ICG Argument, p. 13.

20. Under the 2014-2019 PBR Plans, it was explicitly contemplated that FortisBC could earn more than the approved ROE by reducing its spending below formula amounts. The BCUC stated:[29]

> The Panel notes that the purpose of implementing a PBR mechanism is to provide an environment where efficiencies are created through actions initiated by the utility. Accordingly, there is an expectation that all things being equal, the Fortis utilities will, over the course of this PBR, generate efficiency savings resulting in earnings which allow them to exceed the approved ROE return.

21. Rather than demonstrating anything unfair to customers, FortisBC's O&M spending below formula and achieved ROEs show that the 2014-2019 PBR Plans were successful in providing an environment where the Utilities were able to create efficiencies. Customers benefited from these efficiencies in the form of lower rates and will continue to benefit as the savings are reflected in FortisBC's Base O&M going forward.

22. FortisBC's actions were reviewed each year in the Annual Review process. In its Decision on FEI's Annual Review for 2019 Rates, the BCUC acknowledged the position of interveners, and confirmed that savings occurred:[30]

> The Panel acknowledges the interveners' views regarding FEI's O&M savings. Although it cannot be known with any level of certainty what efficiencies could have been achieved under a different ratemaking mechanism, the Panel finds that O&M savings have been achieved and have been shared with FEI's customers during the PBR term. The Panel also finds that FEI has either maintained or increased its level of service quality as measured by the SQIs.

23. The CEC's claims that the formulas could have been overly generous[31] ignore the facts, the presumption of good faith and the existence of a regulator. The 2014-2019 PBR Plans were the result of a rigorous and lengthy proceeding before the BCUC. The Base O&M and Capital, as well as all elements of the formulas, were scrutinized in the regulatory process to ensure they

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[29] 2014 PBR Decision, at p. 124. Online: https://www.bcuc.com/Documents/Proceedings/2014/DOC_42181_09-15-2014-FEI-2014-18-DecisionWEB.pdf.

[30] Decision and Order G-237-18 on FEI's 2018 Annual Review for 2019 Delivery Rates Application, Appendix A, pp. 13-14. Online: https://www.bcuc.com/Documents/Proceedings/2018/DOC_53039_2018-12-13-G-237-18-FinalOrder.pdf

[31] For example, CEC Argument, p. 3.

were not overly generous. The productivity factors in the 2014-2019 PBR Plans of 1.03 (FBC) and 1.10 (FEI) were at the top of the range in Canada[32] and remain above average in North America even considering the downward trend in TFP values.[33] The BCUC also imposed a 50% growth multiplier which is not typically included in PBR plans.[34] Finally, while FortisBC found efficiencies in O&M to come below the formula amounts, the capital formula amounts proved to be materially insufficient to meet the Utilities' capital needs.

24. The evidence of BCOAPO's expert, Mr. Bell, provides a much different perspective on FortisBC's achieved ROEs than that offered by BCOAPO itself or ICG and CEC.[35] From Mr. Bell's perspective, whose experience is predominantly in Alberta,[36] the ROEs achieved by FEI and FBC must have appeared modest in comparison to the ROEs achieved by the Alberta utilities under PBR.[37] The investor-owned utilities in Alberta achieved ROEs that were 154 to 432 BPS above their allowed ROEs.[38] The achieved ROEs of the ATCO Utilities were so high that they triggered reopener thresholds set at +/- 300 bps and +/- 500 bps and were reviewed by the Alberta Utilities Commission.[39] In comparison, FEI's and FBC's achieved ROEs did not come close to triggering the off-ramp provisions of the 2014-2019 PBR Plans.[40] It is therefore not surprising that Mr. Bell's opinion was that there was no reason for FortisBC's O&M and capital formulas to change.[41] (As discussed below, however, the formulas clearly cannot continue unchanged.)

25. Contrary to the submissions of CEC, ICG and BCOAPO that COS ratemaking lowers the return of the Utilities and that PBR is overly generous, FEI's and FBC's average ROEs under the 2014-2019 PBR Plans were actually lower compared to allowed ROE than their achieved ROEs

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[32] The CEC compiled the X-factors applicable in Canadian jurisdictions at the time on page 59 of its Final Submission in the 2014 PBR proceeding. Online: https://www.bcuc.com/Documents/Arguments/2014/DOC_41404_05-22-2014_CEC-FinalSubmission-PBR.PDF.

[33] North American X-Factors were compiled by Dr. Lowry, in Exhibit B-12, Attachment 163.3, MRI Design for Hydro-Quebec Distribution, p. 32, Table 4 (PDF p. 1211). The Average for Gas distributors is reported as 1.05% and for Electric Utilities 0.95% (inclusive of stretch factor).

[34] Only Hydro-Quebec Distribution has applied a multiplier to its growth factor (Exhibit B-10, BCUC IR 1.17.6).

[35] Exhibit C7-5.

[36] Exhibit C7-5, Appendix 1.

[37] Exhibit C7-9, BCOAPO's response to FortisBC IR 1.1.1.

[38] Exhibit C7-9, BCOAPO's response to FortisBC IR 1.1.1.

[39] Exhibit C7-9, BCOAPO's response to FortisBC IR 1.1.2 and 1.1.3.

[40] Exhibit B-1, p. B-26.

[41] Exhibit C7-5, pp. 10 and 12.

under their most recent years of being under COS ratemaking. This is shown in the tables below for FEI:

FEI's Return Above Allowed ROE: COS vs. PBR		
	2010-2013 COS Rates	2014-2019 PBR Plans
FEI's Average return above the Approved ROE	39 BPS[42]	34 BPS[43]

26. The same is true for FBC:

FBC's Return Above Allowed ROE: COS vs. PBR		
	2012-2013 COS Rates	2014-2019 PBR Plans
FBC's Average Return above Approved ROE	84 BPS[44]	14 BPS[45]

27. In summary, BCOAPO's, ICG's and CEC's attempts to characterize the 2014-2019 PBR Plans as overly generous for the Utilities run counter to all the evidence. The 2014-2019 PBR Plans were the product of a rigorous proceeding, imposed challenging productivity factors and a growth factor, were only partially achievable by the Utilities, and resulted in achieved ROEs that were modest compared to their counterparts in Alberta and lower compared to allowed ROE when they were under COS regulation. Despite the challenge posed by the 2014-2019 PBR Plans, FEI and FBC were able to find efficiencies and produce positive outcomes for customers in the form of lower rate increases and high levels of service.

4. BCOAPO'S *EX-POST* ANALYSIS IS UNTENABLE

28. BCOAPO argues that the utilities "proposals should have to pass an ex-post analysis that can show conclusively that the cost to ratepayers are more than offset by the benefits to ratepayers before the cost recover of the programs is allowed in rates".[46] FortisBC submits that the BCOAPO's proposal is untenable and must be rejected.

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[42] As FEI's regulator, BCUC may take judicial notice of FEI's achieved ROEs. They were reported publically in FEI's Return on Equity for 2016 proceeding, Exhibit B-7, AMPC IR 1.2.2, PDF p. 14. Online: https://www.bcuc.com/Documents/Proceedings/2015/DOC_45327_B-7_FEI-AMPC-FEI-IR1-Response.pdf.

[43] Exhibit B-9, MoveUp IR 1.4.1.

[44] Exhibit B-17, ICG IR 2.12.1.

[45] Exhibit B-9, MoveUp IR 1.4.1.

[46] BCOAPO Argument, pp. 3-4.

29. First, the BCOAPO's proposal is unclear and unsupported by any authority or evidence in this proceeding. It is not clear what costs BCOAPO is referring to, what benefits are supposed to be compared to these costs, and how any such *ex-post* analysis could show anything "conclusively". BCOAPO cites no authority or practice in any other jurisdiction to support or exemplify its proposal. BCOAPO's expert, Mr. Bell, contradicts BCOAPO's proposal as he relies solely on a comparison of FortisBC's achieved ROE to evaluate the PBR plans, rather than on any *ex-post* analysis.[47]

30. Second, BCOAPO's proposal is also not grounded in any known ratemaking principles or requirements of the UCA. For example, BCOAPO has not grounded its proposal in the accepted concept of prudence or the prohibition against undue discrimination. BCOAPO has not established why any costs should be disallowed based on an *ex-post* cost-benefit analysis of an entire ratemaking plan.

31. Third, any such *ex post* analysis would be inherently problematic. The Alberta Utilities Commission, in its review of the ATCO Utilities earnings above the off-ramp criteria of their PBR plans, found it difficult, if not impossible, to do an *ex-post* analysis and decide if cost changes are due to the incentives or due to the other items.[48] In its Decision, the AUC considered two alleged flaws in ATCO's going-in rates, each time concluding that it was difficult, if not impossible, to make a determination:[49]

> 64. In their submission, the ATCO Utilities noted that they also undertook route optimization activities after the AMR project was complete, which also drove O&M savings related to meter reading. The decrease in unit meter reading costs over 2010-2017 indicates that additional savings were realized independent of the AMR meter implementation. The Commission finds this is indicative of a response to the incentive properties of PBR and underscores the complexity of PBR whereby it would be difficult, if not impossible, to isolate the impact of earnings resulting from changes directly related to the AMR project from other contributing factors.

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[47] Exhibit C7-5, p. 7.

[48] AUC Decision 23604-D01-2019, dated February 27, 2019, AUC-Initiated Review Under the Reopener Provision of the 2013-2017 Performance-Based Regulation Plan for the ATCO Utilities. Online: http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/23604-D01-2019.pdf

[49] Ibid., at p. 15.

> 65. The difficulty in isolating earnings impacts also applies to the Evergreen 2 issue identified by Calgary. The Commission is not convinced by the intervener arguments that the repatriation of the CC&B services are related to a flaw in the going-in rates. The ATCO Utilities submitted that ATCO Gas faced incentives to find ways to reduce these costs after the repatriation. The Commission considers that the ATCO group of utilities, including ATCO Pipelines and ATCO Electric (transmission), were motivated to consider cost reductions for these services as a result of the Evergreen 2 decision; however, it is difficult if not impossible to identify and separate costs reductions that the ATCO Utilities would have undertaken only as a result of the Evergreen 2 decision and additional measures taken as a result of PBR incentives. [Emphasis added.]

32. The findings of the Alberta Utilities Commission is consistent with FortisBC's explanations at Annual Reviews and in this proceeding that is very challenging to separate out the savings related to particular initiatives from savings that are part of a broad-based focus on productivity improvement.[50]

33. Third, while BCOAPO's proposal is unclear, any such *ex-post* analysis resulting in disallowance of costs would violate the prohibition on retroactive ratemaking. It is well established that the BCUC may not engage in retroactive ratemaking.[51] It would be unfair to both utilities and customers to be subject to uncertainty as to the final rates over a five-year period based on the results on an unclear cost/benefit analysis to be conducted at the end of the Proposed MRPs. This would introduce significant uncertainty for the utility as to the recovery of its costs and undermine any incentive powers and regulatory efficiency of the Proposed MRPs.

34. FortisBC submits that BCOAPO's *ex-post* analysis proposal is untenable and must be rejected.

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[50] Exhibit B-5, BCOAPO IR 1.29.1; Exhibit B-10, BCUC IR 1.22.11.2.

[51] E.g. in *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 (at para. 71), the Supreme Court of Canada states: "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)." At Tab 1 of the Book of Authorities.

B. THE CONTINUATION OF AN MRP APPROACH IS WARRANTED

1. MISCONCEPTIONS OF COS AND MRP RATEMAKING

35. Interveners that express favour for COS ratemaking, including ICG, CEC and BCOAPO, invariably also demonstrate a misconception of COS ratemaking and an unbalanced view of MRPs. FortisBC addresses these misconceptions below.

1.1 *Achieved ROE may Exceed Allowed ROE under COS Ratemaking*

36. ICG makes numerous submission reflecting a misconception that under COS regulation "returns would be limited to the Fair Return Standard".[52] Fundamentally, the fair return standard applies equally to both PBR or COS ratemaking. Under either approach, the BCUC has an obligation to set rates that provide the utility with a reasonable opportunity to earn a fair return.[53] As the BCUC has stated, "Whether rates are set under cost of service or a PBR Plan, the Commission remains tasked with setting just and reasonable rates under sections 59 to 61 of the UCA."[54]

37. Furthermore, under either PBR or COS ratemaking, a utility's achieved return may be more or less than the approved return. Under COS regulation, if a company is able to provide service for less than forecast during the test period, or if billing units are greater than forecast, the company is generally permitted to keep the extra revenues or cost savings as extra profit. Conversely, any costs above forecast also go to the bottom line and are borne by the shareholder. As there is no earnings sharing under COS, any favourable or unfavourable variance is 100% to the account of the shareholder.[55] Therefore, a utility's incentive under COS ratemaking is to create efficiencies to spend less than the approved forecast to increase its

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[52] ICG Argument, p. 7.

[53] *Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission)*, 1992 CanLII 5959 (B.C.C.A.) at para. 57, at Tab 4 of the Book of Authorities.

[54] 2014 PBR Decision, at p. 14. Online: https://www.bcuc.com/Documents/Proceedings/2014/DOC_42181_09-15-2014-FEI-2014-18-DecisionWEB.pdf.

[55] Exhibit B-1-1, Appendix C4-3, p. 2.

return.[56] Rather than creating lasting efficiencies, however, the BCUC has commented that the incentive under COS may be to create unsustainable savings.[57]

38. A review of FEI and FBC's achieved ROE and allowed ROE in historical years shows that FortisBC has failed to achieve its allowed ROE in some years while under PBR, and has been able to achieve more than its allowed ROE under both COS and PBR ratemaking approaches.[58] Notably, FEI did not achieve its allowed ROE in 1998[59] and FBC did not achieve is allowed ROE in 2002[60] and 2010,[61] during which years the Utilities were operating under a PBR framework.[62] This demonstrates that PBR ratemaking poses risk to the Utilities, and is not a guarantee that the allowed return will be achieved or exceeded.

1.2 *Frequent Rebasing is a Disadvantage*

39. The CEC claims that one of the benefits of COS ratemaking is frequent rebasing.[63] Frequent rebasing, however, is also a disadvantage since it increases regulatory burden and cost.[64] In addition, with frequent rebasing, there is little incentive for the company to invest in long term cost reduction initiatives because any cost reductions achieved would be passed on to customers automatically in subsequent rate proceedings.[65] The BCUC's 2014 PBR Decision discussed the impact of frequent rebasing as follows:

> The interveners may take comfort in the fact that one of its advantages is that it requires more frequent rebasing and hence there is a limit on the time before

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[56] Exhibit B-1-1, Appendix C4-3, p. 2.
[57] BCUC Order G-138-14, p. 14.
[58] Exhibit B-9, MoveUP IR 1.4.1; Exhibit B-17, ICG IR 2.12.1. As FEI's regulator, BCUC may take judicial notice of FEI's achieved ROEs. They were reported publically in FEI's Return on Equity for 2016 proceeding, Exhibit B-7, AMPC IR 1.2.2, PDF p. 14. Online: https://www.bcuc.com/Documents/Proceedings/2015/DOC_45327_B-7_FEI-AMPC-FEI-IR1-Response.pdf.
[59] Ibid.
[60] As FBC's regulator, the BCUC may take judicial notice of FBC's achieved ROEs. They were reported publicly in 2013 Generic Cost of Capital Proceeding (Stage 1) in FortisBC's response to BC Utilities Customers IR 1.2.1, Exhibit B-11, PDF p. 12. Online: https://www.bcuc.com/Documents/Proceedings/2012/DOC_31886_B1-11_FBCU-BCUtilCust-IR1-FBCU-Response.pdf.
[61] Exhibit B-17, ICG IR 2.12.1.
[62] Exhibit B-1-1, Appendix C-1.
[63] CEC Argument, p. 6.
[64] FortisBC Argument, pp. 10-11. See also, Exhibit B-1-1, Appendix C4-3, pp. 2-3.
[65] Exhibit B-1-1, Appendix C4-3, p. 2.

> any sustainable savings directly impact customer rates. However, with COS regulation, there is little incentive to make sustainable efficiency gains and even less so when an investment is required. In fact, perversely, the utility may be incented to make unsustainable savings.

40. The CEC's submission does not acknowledge these dynamics.

1.3 *Cost is Not the only Proxy for Competitive Markets*

41. BCOAPO suggestion that COS regulation is a proxy for competitive market, whereas PBR is a "comparatively lighted handed form of regulation" is incorrect.[66] Contrary to BCOAPO, the BCUC's regulation of the Utilities' rates is the proxy for a competitive market, regardless of the type of ratemaking approach used.[67] Furthermore, one of the features of PBR approaches is that they are a more effective proxy for a competitive market. As Weisman D. and Pfeifenberger J. state: "A voluminous amount of the theoretical and empirical research concludes that incentive regulation is generally superior to cost-of-service regulation in emulating such a competitive market outcome."[68] FortisBC has also explained how its Proposed MRPs adhere to the AUC's principle that: "A PBR plan should, to the greatest extent possible, create the same efficiency incentives as those experienced in a competitive market while maintaining service quality."[69] Dr. Kaufmann also provided a clear explanation of how MRPs are superior at creating incentives in his workshop materials.[70] BCOAPO references no evidence or makes any submissions to counter FortisBC's evidence and submissions on this topic.

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[66] BCOAPO Argument, p. 46.

[67] Weisman D., Pfeifenberger J. (2003) "Efficiency as a discovery process: Why enhanced incentives outperform regulatory mandates.", *The Electricity Journal* 16(1) ("Weisman and Pfeifenberger"), at p. 57: 'It is generally accepted that a primary objective of economic regulation is to emulate a competitive market outcome. Professor Alfred Kahn, for example, observes that "the single most widely accepted rule for the governance of the regulated industries is regulate them in such a way as would be produced by effective competition, if it were feasible."' At Tab 6 of the Book of Authorities.

[68] Weisman and Pfeifenberger, at p. 57, at Tab 6 of the Book of Authorities.

[69] Exhibit B-10, BCUC IR 1.19.1 and Exhibit B-12, BCUC IR 2.167.1.

[70] Exhibit B-1-1, Appendix C3-2, Review of Multi-year Rate Plans and Cost of Service Regulation, pp. 25-31.

1.4 *COS Regulation is not a "Regulatory Norm"*

42. BCOAPO's claim that PBR is a "major departure [from] the regulatory norm"[71] is not based in any authority or evidence. The UCA sets no "regulatory norm" as to the form of ratemaking adopted by the BCUC. If by "norm", BCOAPO is referring to what is more often used, PBR is more prevalent world-wide,[72] has been more common for both FEI and FBC since the 1990s,[73] and is pervasively used for utilities in Canada.[74] In any case, instead of relying on perceived "norms", FortisBC has filed detailed evidence and submissions in this proceeding demonstrating the merits of its Proposed MRPs.

1.5 *COS Regulation Also Subject to Risk*

43. The CEC's conception of COS vs. MRP approaches suffers from fundamental errors. This is exhibited on pages 10-11 of the CEC's submission where it lists conditions under which the MRP could result in the Utilities earning "rewards without necessarily achieving any sustainable cost reductions." Almost all of these risks apply equally to COS regulation, as illustrated in the table below. However, whether under COS or PBR, all of these potential risks are mitigated by the regulatory process and decision making of the regulator who balances the interest of customers and the utilities and determines just and reasonable rates.

CEC Reference	PBR	COS	Comment
The initial Unit Cost O&M $ per customer value is too high.	√	√	This risk can hypothetically apply to either COS or PBR. Under COS, the starting O&M for the year prior to the test year can be too high as it is not known.
The inflation factor is forecast too high overall to reflect the actual cost experience.	√	√	This risk can hypothetically apply to either COS or PBR. COS embeds an assumed inflation factor in the forecasts.
The AWE forecast is too high.	√	√	This risk can hypothetically apply to either COS or PBR. COS embeds an assumed inflation factor in the forecasts.

[71] BCOAPO Argument, p. 46.
[72] Exhibit B-1-1, Appendix C3, p. 21, PDF p. 358.
[73] Exhibit B-1-1, Appendix C1; Exhibit B-7, CEC IR 1.3.2.
[74] Exhibit B-1-1, Appendix C4-2.

CEC Reference	PBR	COS	Comment
The proportion of AWE inflated expenses is too high relative to CPI inflated expenses	√	√	This risk can hypothetically apply to either COS or PBR. Labour vs. non-labour forecasts may be out of line under COS.
Capital or other costs tracked outside the MRP creates O&M savings with the MRP formula	√	√	This risk can hypothetically apply to either COS or PBR. CPCNs have been applied for separately under COS and PBR and forecast to enter rate base similarly
The Utilities do not undertake all maintenance and operations to the standards that are presumed embedded in the base.	√	√	This risk can hypothetically apply to either COS or PBR
There are unaccounted for O&M savings carried forward from previous year projects.	√	√	This risk can hypothetically apply to either COS or PBR
O&M cost reductions are carried into the ECM but do not last the full carry over period	√		No ECM in COS.
O&M is not directly and linearly tied to customer growth on a one-to-one-basis.	√	√	This risk can hypothetically apply to either COS or PBR. Under COS, 100% of forecast customer growth is reflected in the forecast costs.
There is ongoing productivity in the industry that is not reflected in the Zero productivity factor.	√	√	This risk can hypothetically apply to either COS or PBR. Forecasts of costs will reflect utility specific information under COS.
O&M requirements are periodic and are temporarily reduced at times	√	√	This risk can hypothetically apply to either COS or PBR. O&M requirements will fluctuate under both COS and PBR.
O&M improvement opportunities are taken as a result of regular management and rewards to the shareholder instead of being passed on to the ratepayer.	√	√	This risk can hypothetically apply to either COS or PBR, but under COS there is no sharing of benefits.

1.6 *MRPs also Pose Risk to Utilities and Benefits to Customers*

44. BCOAPO's repeated references to the "risk" that PBR plans pose to ratepayers[75] does not present an accurate or balanced view of PBR-type plans. First, BCOAPO does not acknowledge the risk to the Utilities. If the base is not properly set to provide the appropriate starting point or the elements of the formula not properly calibrated, then the MRP will not provide the utility with a reasonable opportunity to achieve it fair return. The BCUC is obligated

[75] BCOAPO Argument, p. 46.

to approve rates that provide a reasonable opportunity for the utility to earn a fair return. However, this is not a guarantee. As noted above, both FEI and FBC have achieved higher returns under COS ratemaking and have had years under PBR where they failed to achieve their allowed return.

45. Second, BCOAPO does not acknowledge the benefits to customers from PBR plans. The performance of FEI and FBC show that the ratepayers have received high quality service[76] and reduced cost per customer over the term of the 2014-2019 PBR Plans.[77] In recent years, rate increases have been below inflation or non-existent, and both utilities have accumulated a surplus to mitigate future rate increases.[78] As FEI and FBC have been under PBR-type ratemaking plans for more years than not since the 1990s,[79] the fact that they are both relatively efficient compared to their peers can be attributed to the success of the PBR approach to ratemaking.[80]

2. MRPs ARE SUPERIOR AT EMULATING A COMPETITIVE MARKET

46. The CEC argues that MRPs reward the Utilities for "normal management responsibilities,"[81] claiming that the "concept of 'sharing' the benefits is akin to acquiring a dollar from someone, returning 50 cents and naming it a sharing of benefits."[82] On a related note, the ICG claims that there is no evidence that there will be efficiency gains over the Proposed MRPs, because FBC has not identified any efficiency initiatives.[83] The CEC's and ICG's position fails to recognize that seeking new ways to be more productive is not an identifiable normal management action, but a discovery process that is more effectively brought about by incentives. Weisman D. and Pfeifenberger J. (2003) persuasively address this topic in their 2003 article, "Efficiency as a discovery process: Why enhanced incentives outperform regulatory

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76 Exhibit B-1-1, Appendices C5-1 and C5-2.
77 FortisBC Final Argument, pp. 8-10.
78 FortisBC Final Argument, pp. 12-14.
79 Exhibit B-1-1, Appendix C1; Exhibit B-7, CEC IR 1.3.2.
80 FortisBC Final Argument, pp. 68 to 70.
81 CEC Argument, pp. 2-3, paras. 11, 12 and 15.
82 CEC Argument, pp. 2-3, paras. 11, 12 and 15.
83 ICG Argument, para. 8.

mandates."[84] The article discusses how motivating increased performance through incentives is generally superior to mandating desired performance levels and the realization of efficiency as a "discovery process" necessarily implies that a regulated firm cannot knowingly disavow and strategically withhold what it has yet to discover.[85] As quoted below, Weisman D. and Pfeifenberger J. articulate the type of objection voiced by the CEC and ICG, and explain why it is incorrect:[86]

> The important role of incentives in eliciting performance gains performance gains has been validated in numerous venues covering many aspects of human interactions not only in how firms and consumers interact in a market economy or how firms compensate their employees, but also how government can exact performance gains from its individual agencies and employees, or even how sporting events motivate participating athletes. This broad experience confirms that it is not the mandates or obligations, but the incentives created by the prospect of meaningful rewards and recognition, that are most effective in eliciting enhanced performance.
>
> The opposition to incentive regulation is not typically based on a lack of recognition that incentives can elicit superior performance and dynamic efficiency gains. Rather, opposition to incentive regulation often focusses on whether such incentives are needed. Not surprisingly, this opposition is a seemingly strongest when the earnings that the regulated firm reports under incentive regulation exceed the level of earnings that would normally be expected cost-of-service regulation. The frequent voice concern is that these higher profits necessarily, the cost of higher prices to consumers. And yet, the broad appeal of incentive regulation is precisely that the realized efficiency gains can benefit regulated firms and consumers alike. In other words, because incentive regulation is not zero-sum Game, higher profits and lower prices need not be mutually exclusive.
>
> In spite of the fact that incentive Regulation can be a "win-win" proposition, some parties view incentive regulation as a little more than a "scheme" used by utilities to increase their profits and earn wind fall gains. These added profits may even be viewed as "bribes" to get utilities to do what they should be doing already. A common refrain is that because utilities have us "statutory obligation" to be efficient, any additional rewards for achieving efficient behaviour through incentive regulation are unnecessary — and serve only to

[84] Weisman and Pfeifenberger, at pp. 55–62, at Tab 6 of the Book of Authorities.
[85] Weisman and Pfeifenberger, at p. 56, at Tab 6 of the Book of Authorities.
[86] Weisman and Pfeifenberger, at pp. 58-59, at Tab 6 of the Book of Authorities.

> foster and in equitable distribution of efficiency gains between regulated firms and customers. This line of argument would seem to suggest that any efficiencies realized by the regulated firm following adoption of incentive regulation must imply that, under cost-of-service regulation, regulated entities either deliberately engaged in inefficient behaviour or were able to "conceal" more efficient operating practises from regulators through their superior knowledge of operating conditions.
>
> While the possibility of such behaviour cannot be ruled out a priori, this claim is incorrect as a general proposition. This is because the achievement of performance gains is first and foremost a "discovery process" in which more efficient operating practises in superior use of technology are learned over time. It is the recognition of this discovery process that leads to the conclusion that the efficiency gains realized after incentive regulation need not imply that the firm was knowingly and efficient under cost-of-service regulation. To the contrary, it is quite possible that the firm under cost-of-service regulation was as efficient as it knew how to be.

47. Weisman D. and Pfeifenberger J. go on to discuss how innovation comes about, concluding (at p. 60): "Clearly, innovation does not happen because market forces "bribe" companies or individual to "reveal" what they know already. Rather, it is strong incentives that motivate innovators to exert significant efforts, question the status quo, and assume the risks it takes to discover and implement more efficient procedures, applications and technologies." As stated by Weisman D. and Pfeifenberger J. (at p. 60): 'It is the recognition of efficiencies as a "discovery process" that largely explains the long-term benefits that incentive regulation offers over traditional cost-of-service regulation.'

48. In support of its view, the CEC reference BC Hydro's ability to constrain costs without PBR.[87] Utilities are of course able to achieve efficiencies under COS regulation and one example of this occurring is not persuasive evidence that COS is superior to PBR.[88] FortisBC's view, which is supported by regulators, including the BCUC,[89] and the academic literature, is that

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[87] CEC Argument, p. 3.

[88] Whether BC Hydro could achieve more efficiencies under PBR is a live issue currently before the BCUC. BCUC Order G-245-19 established a proceeding for the review of BC Hydro's Performance Based Regulation Report. Online: https://www.bcuc.com/Documents/Proceedings/2019/DOC_55889_A-1-G-245-19-PBR-Proceeding-Panel-Appt.pdf.

[89] FortisBC Final Argument, pp. 15-16.

MRPs are more effective at emulating a competitive market, by creating an environment where utilities are more likely to generate efficiencies.

49. In FortisBC's submission, Weisman D. and Pfeifenberger J.'s article provides a clear and convincing response to the CEC's view of incentive ratemaking frameworks. FortisBC's success in generating savings under PBR[90] and the BCUC decisions referenced on page 16 of FortisBC's Final Argument, support the view that incentive regulation is superior to the mandates-based approach the CEC prefers.

3. CEC'S COST-EFFECTIVENESS APPROACH TO RATEMAKING IS NOT SUPPORTED

50. In its submission, the CEC puts forward a sketch of an alternative form of formulaic ratemaking based on holding the Utilities to "a high 'bar' in the establishment of a cost-effectiveness presumption of prudence."[91] Just as the burden is on FortisBC to justify its Proposed MRPs, the evidentiary burden is on the CEC to demonstrate its proposals. In this case, the CEC did not file any evidence in this proceeding and the sketch of its new approach to ratemaking is unclear and lacking support by any evidence, authority or cogent argument. While FortisBC has responded at a high level below, the CEC has not met its evidentiary burden and the CEC's proposal must be rejected.

51. First, the CEC's concept of the "cost-effectiveness presumption of prudence" is a mash-up of multiple concepts and the CEC has not offered any explanation of how they belong together. It is well understood that the BCUC may retrospectively review the past spending of a utility for prudence. Cost-effectiveness, on the other hand, is usually employed in a forward looking analysis. For instance, one alternative may be considered more cost effective than another or a project with a positive net present value may be considered cost effective. While it is well established that a utility is held to a standard of prudence, it is not accepted that a utility is held to the standard of "cost-effectiveness". It appears that the CEC may be using a

[90] FortisBC Final Argument, pp. 8-12.
[91] CEC Argument, pp. 3-4.

concept of prudence or cost-effectiveness or a conflated version of them that is not shared by the industry and therefore difficult to understand and interpret.

52. Second, perhaps due to the fact that the CEC's conceptual framework is confusing, it is unclear how exactly the CEC's proposal to establish a "bar" of cost-effective, prudent spending on a prospective basis is different from a COS or PBR approach. If the CEC believes there is a better way to forecast costs or set formulas over a test period, the CEC has not explained its approach. However, what inklings are provided suggest that the CEC is idealistically assuming access to perfect information on what may be considered prudent or cost effective spending in future years.

53. Third, in Order G-313-19, the BCUC recently rejected a proposal by the CEC based on the concept of cost effectiveness.[92] The BCUC's Decision (at p. 40) records that "the CEC considers that cost-effectiveness is the defining principle for improving the BCUC's oversight." In refusing to accept the proposal, the BCUC stated (at p. 47):

> Further, as pointed out by BCSEA, CEC's proposals do not directly address the role of the BCUC and the tests it applies under the UCA to consider the public interest and to set rates that are not unjust, unreasonable or unduly discriminatory. While the CPCN and section 44.2 processes do test prospective capital expenditures for cost-effectiveness, Mr. Craig's submission that the BCUC has a role in overseeing capital expenditures "to ensure that they are cost-effectively deployed and provide full value for ratepayers" goes beyond the BCUC's mandate. Similarly, the Panel agrees with BC Hydro that CEC's position that the BCUC should evaluate if BC Hydro optimizes its IT strategies is not grounded in the BCUC's role as set out in the UCA. [Emphasis added.]

54. In FortisBC's submission, the CEC's proposal in this proceeding shares the same fundamental flaw as the approach rejected by the BCUC in Order G-313-19. The CEC's proposal to set a prospective bar of cost-effective spending does not fit within the role of the BCUC and tests applied under the UCA and goes beyond the BCUC's mandate.

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[92] BC Hydro Review of Regulatory Oversight of Capital Expenditures and Projects, Decision and Order G-313-19, dated December 2, 2019, pp. 40-47. Online: https://www.bcuc.com/Documents/Proceedings/2019/DOC_56448_2019-12-02-BCH-Review-of-BCH-Capital-Expenditures-Decision.pdf.

4. EVIDENCE SUPPORTS CONTINUATION OF AN MRP APPROACH

55. In FortisBC's submission, the evidence and submissions in this proceeding overwhelmingly support the determination that the continuation of an MRP is warranted for the test period. Interveners did not file any evidence supporting COS ratemaking. The intervener submissions did not make a cogent case for COS ratemaking or any other alternative, generally did not rely on evidence or authorities to support their views, and demonstrated a flawed understanding of COS ratemaking and an unbalanced view of the risks and rewards of an MRP approach. Therefore, FortisBC submits that its Proposed MRPs for the next five years should be accepted.

C. SIMPLE CONTINUANCE OF 2014-2019 PBR PLANS WOULD NOT BE JUST AND REASONABLE

56. In their submission, no intervener sought to defend with any vigour Mr. Bell's opinion that the 2014-2019 PBR Plans should continue unchanged. BCOAPO, who retained Mr. Bell, does not adopt Mr. Bell's view and appears to accept many (if not most) of FortisBC's proposals. The BCMEU offers its agreement with Mr. Bell, but does substantially defend the position.[93]

57. In FortisBC submission, the mere continuation of the 2014-2019 PBR Plans for another five years would not be just and reasonable as it would not provide FEI and FBC with a reasonable opportunity to earn a fair return. The Courts are clear that the BCUC has an obligation to set rates which provide a reasonable opportunity to earn a fair return.[94] The simple continuation of the 2014-2019 PBR Plans, which were designed over six years ago, would not accomplish this.

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[93] BCMEU Argument, p. 2.

[94] *British Columbia Electric Railway Co. v. Public Utilities Commission*, [1960] S.C.R. 837 at 848 and 856-857, at Tab 2 of the Book of Authorities. *Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission)*, 1992 CanLII 5959 (B.C.C.A.) at para. 57, at Tab 4 of the Book of Authorities.

58. Mr. Bell's opinion is based on the flawed analysis that because the Utilities earned their allowed return from 2014-2019, then there is no need for the plan to change. As FortisBC stated in its Rebuttal Evidence:[95]

> Achieved ROE is a backward looking indicator and does not reflect the Utilities' evolving business conditions and operating environment, stakeholders' feedback, recent industry trends or potential changes in regulatory objectives and priorities. The Proposed MRPs, on the other hand, are forward looking in nature and should reflect the Utilities' future needs…

59. The Rebuttal Evidence goes on to describe how the Utilities' operating environment and needs have significantly changed since the 2014-2019 PBR Plans were designed and approved. The significant changes affecting FortisBC have been canvassed in detail in this proceeding as discussed in FortisBC's Final Argument, pp. 17-22. These changes in FortisBC's operating environment must be addressed.

60. Some examples illustrating why continuance of the 2014-2019 PBR Plans cannot be simply continued are as follows:

- The productivity factor set by the BCUC in 2014 was at the top of the range in Canada at the time.[96] Since that time, there has been a continuing decline in productivity in the industry.[97] Therefore, continuing with the same productivity factor in 2020 (that was already high in 2014) would be radically out of step with productivity in the industry generally and productivity factors approved for utilities across Canada.

- It is universally acknowledged and well documented in the Annual Review process and in this proceeding that the capital formula was materially inadequate to covering FortisBC's capital needs. For example, in its Decision on FEI's Annual Review for 2019 Delivery Rates, the BCUC stated: "With

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[95] Exhibit B-23, Rebuttal Evidence, Q&A 7.

[96] The CEC compiled the X-factors applicable in Canadian jurisdictions at the time on page 59 of its Final Submission in the 2014 proceeding. Online: https://www.bcuc.com/Documents/Arguments/2014/DOC_41404_05-22-2014_CEC-FinalSubmission-PBR.PDF.

[97] FortisBC Final Argument, pp. 55-61.

respect to FEI's capital spending, the Panel shares the same concerns as were raised by the BCUC in the FEI Annual Review for 2017 Delivery Rates Reasons for Decision. These concerns include: (i) the continuing trend of capital expenditures exceeding the dead-band; (ii) the magnitude of the capital over-spending; and (iii) the impact on the incentive properties of the PBR Plan under FEI's approach of adding the capital expenditures in excess of the dead-band to the next year's opening plant in service."[98]

- The lagging, 50 percent growth factor systematically and materially under-funded FEI's Growth capital requirements.[99]

- It has become increasing clear that FortisBC, particularly FEI, is facing significant challenges related to carbon reduction policies at all levels of government.[100] The 2014-2019 PBR Plans were not designed with these challenges in mind.

61. FortisBC submits that there is no reasonable case for simply continuing the 2014-2019 PBR Plans for another five years. Given the significant changes that have occurred, the mere continuance of a past plan would not provide FortisBC with a reasonable opportunity to earn a fair return and therefore would not be just and reasonable.

[98] Decision and Order G-237-18, dated December 13, 2018, Appendix A, p. 14.
[99] FortisBC Final Argument, pp. 73-74.
[100] FortisBC Final Argument, pp. 17-22.

PART THREE: PROPOSED MRP DESIGN IS BALANCED AND REASONABLE

62. In this part, FortisBC replies to the specific arguments of the BCMEU, ICG, CEC, and BCOAPO on the design of the Proposed MRPs, including addressing why a zero-percent X-factor is just and reasonable.

A. A FIVE-YEAR TERM IS NECESSARY TO REALIZE BENEFITS OF AN MRP

63. The CEC is the only intervener that specifically opposes FortisBC's proposed five-year term. The CEC advances a number of arguments that generally reflect its opposition to incentive ratemaking, rather than arguments specifically relevant to a five-year term.[101] Part Two of this Reply Submission therefore addresses the substance of most of CEC's arguments. FortisBC adds:

(a) The fact that most plans in other jurisdictions have a five-year term is persuasive.[102] This reflects the fact that a key purpose of MRPs is to create opportunities to find efficiencies and a sufficiently long term is required for those opportunities to be realized.[103] In the 2014 PBR Decision, the BCUC stated: "The Panel is not persuaded by the assertions of CEC and ICG that a longer time period for the PBR plan is of little or no value to Fortis' pursuit and implementation of efficiencies."[104]

(b) FortisBC's position that reducing the frequency of rate cases frees up the management of the Utility to focus on long-term objectives and innovations which benefit customers is supported by the success of the 2014-2019 PBR Plans and empirical studies.[105] The CEC has not shown any flaw in the evidence or filed or pointed to any evidence contradicting that evidence.

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[101] CEC Argument, pp. 52-53.
[102] Exhibit B-1, p. C-5.
[103] Exhibit B-1, p. C-5.
[104] 2014 PBR Decision, at p. 27. Online: https://www.bcuc.com/Documents/Proceedings/2014/DOC_42181_09-15-2014-FEI-2014-18-DecisionWEB.pdf.
[105] See evidence cited on pages 39 to 40 of FortisBC's Final Argument.

(c) In reply to the CEC's comments on the reduction in BCUC oversight,[106] the Annual Reviews provide an opportunity for ongoing BCUC oversight during the term of the Proposed MRPs.

(d) The CEC's statement that "the data supports the fact that ratepayers have been significantly disadvantaged by the PBR process when considering regulatory costs and the consequences of the regulation" is not relevant to the five-year term of the Proposed MRPs in particular, and is without merit.[107] The CEC refers to no data to back up this claim. To the contrary, as discussed in Part Two, Section A, of this Reply Submission, the evaluation of the 2014-2019 PBR Plans shows that customers have benefited. For example, FortisBC's analysis shows that there have been regulatory costs savings[108] and the BCUC has accepted that the 2014-2019 PBR Plans generated O&M savings for customers.[109] Further, the BCUC has stated that "Performance Based Rate (PBR) setting mechanisms are implemented successfully in many jurisdictions, particularly in Canada, including BC".[110] In reply to the CEC's claim of "increased ROE realized by the Utilities",[111] as shown in Part Two, Section A 3, of this Reply Submission, the Utilities ROE was lower on average during the 2014-2019 PBR Plans than during their most recent COS ratemaking periods.

(e) The CEC's submission that "preparing for proper regulation is a small task compared to existing in a competitive environment" is again not focused on the five-year term of the Proposed MRPs, and is without merit.[112] COS and PBR/MRPs are all "proper regulation" and both serve as a substitute for

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[106] CEC Argument, p. 52.
[107] CEC Argument, p. 52, para. 357.
[108] FortisBC Final Argument, pp. 10-11.
[109] Decision and Order G-237-18 on FEI's 2018 Annual Review for 2019 Delivery Rates Application, Appendix A, pp. 13-14.
[110] BC Hydro F2017 to F2019 Revenue Requirements Application, BCUC Decision and Order G-47-18, dated March 1, 2018, p. 110. Online: https://www.bcuc.com/Documents/Proceedings/2018/DOC_50971_03-01-2018_BCH_F17-19_RRA_Decision_WEB.pdf.
[111] CEC Argument, p. 52.
[112] CEC Argument, p. 52.

competition, although MRPs are superior at emulating the effects of a competitive market and are more efficient from a regulatory perspective.[113]

(f) The risk of MRPs is not a "one way risk".[114] Decoupling revenues from costs poses a risk to the utilities, as demonstrated by years under PBR where FEI and FBC did not earn their allowed return.[115] Further, the off-ramps are designed to be symmetrical and so both the Utilities and customers are equally protected.

B. CONTINUATION OF A FORMULAIC APPROACH TO FEI GROWTH CAPITAL WARRANTED

64. The CEC appears to argue that variation in FEI's Growth capital make it unsuitable for a formulaic approach.[116] FEI's Growth capital is suitable for an indexed-based or formulaic approach because it has a clear and direct connection to a cost driver. FEI's has identified Gross Customer Additions as an improved cost driver (compared to Service Line Addition used in the 2014-2019 PBR Plans).[117] This strong link to an identifiable cost driver make its suitable to an indexed-based or formula approach, even though there is variation in the costs caused by each addition. Despite the variation over the 2014-2018 period noted by CEC, there is still a strong correlation of 0.95 percent between FEI's Growth capital and gross customer additions over that period.[118] Finally, as is discussed in Part Four of this submission, FEI's approach to Growth capital, which is rebased using 2016-2018 actuals (with adjustments) is prepared in fundamentally the same way as FEI forecasts its Growth capital unit costs under COS regulation. FEI submits that the continuation of its formulaic approach to Growth capital is reasonable and should be approved.

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[113] See Part Two of this Reply Argument, Section B, 2.
[114] CEC Argument, p. 53.
[115] See Part Two of this Reply Argument, Section A, 3.
[116] CEC Argument, p. 44.
[117] Exhibit B-1, pp. C-59 to C-60; Exhibit B-10, BCUC IR 1.20.1.
[118] Exhibit B-1, p. B-35

C. INFLATION FACTOR CONTINUES TO REFLECT SHARE OF LABOUR AND NON-LABOUR COSTS

65. FortisBC is proposing to use the same inflation factor (or "I-Factor") that the BCUC approved under the 2014-2019 PBR Plans, as the inflation factor continues to reflect FortisBC's share of labour and non-labour costs.[119] The only intervener to question FortisBC's proposed I-Factor is the CEC.

66. The CEC agrees that the AWE:BC and CPI:BC indices continue to be the appropriate indices to use for the Inflation Factor calculation.[120] However, the CEC disagrees with FortisBC's proposed weighting of the indices AWE-BC (at 55 percent) and CPI-BC (at 45 percent) based on 2018 results. Instead, the CEC suggests "that in general an average is a superior methodology, and the previous PBR period likely represents a more appropriate baseline."[121] FortisBC continues to recommend using the 2018 actual results as it leads to a more representative baseline than an average of prior years' results.

67. The 2018 labour/non-labour weightings results are reflective of recent years' conditions, which include the steady increase in headcount additions observed for the reasons described in the 2019 FEI Annual Review.[122] These labour requirements are expected to carry into the MRP period.[123] Due to these changing circumstances leading to an increase in the labour weighting, using data from years prior to 2018 would underrepresent the percentage of labour now and over the term of the Proposed MRPs.[124] Using 2018 labour/non-labour weightings is also consistent with the approach of using 2018 O&M Actuals as the starting point to establish the 2019 Base O&M.

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[119] FortisBC Final Argument, pp. 47-49.
[120] CEC Argument, p. 37, para. 256.
[121] CEC Argument, p. 39, para. 270.
[122] The increase in headcount is shown in Exhibit B-1-1, Appendix B-7, FEI Report on Headcount/FTE, Table A: B7-2: Headcount and Table A: B7-2: FTE. The increase in headcount was also reported in FEI's Annual Review for 2019 Delivery Rates proceeding, Exhibit B-2, Section 1.4.2, Staffing Levels, p. 6. Online: https://www.bcuc.com/Documents/Proceedings/2018/DOC_52169_B-2-FEI-Annual-Review-2019-Rates-Appl.pdf
[123] Exhibit B-12, BCUC IR 2.162.5.
[124] Exhibit B-10, BCUC IR 1.16.2.5.

68. Using historical years would also lead to an inaccurate baseline because they do not reflect the improvements to FortisBC's intercompany charging made in 2018 to properly reflect charges as labour instead of non-labour.[125] The CEC submits that "it would be valuable to verify that the intercompany charging was altered for a specific and defensible reason".[126] FortisBC's change in intercompany charging in 2018 was the result of the SAP Integration Project, which was a major efficiency initiative undertaken by FortisBC as listed in Appendix B6 of the Application[127] and reviewed in detail at the Annual Reviews for 2019 rates.[128] Pursuant to this project, the Utilities adopted a common SAP platform, enabling the alignment and streamlining of processes like intercompany charging. Instead of using an invoicing process from one company to another for intercompany labour charging, the new process enabled by the SAP Integration Project allows direct charging and common coding of labour from one company to another.[129]

69. The CEC suggests using company specific labour/non-labour weightings for the Inflation factor calculation, instead of the combined rate approach that was approved for the 2014-2019 PBR Plans.[130] This change is not needed as it is only necessary for the Inflation factor to be reasonable, not exact. For example, in the Alberta PBR plans, the 55 percent weighting for labour is applied to all utilities even though there is bound to be variation amongst the Alberta utilities.[131] Moreover, the difference between a combined rate approach and one that is specific to each Utility would be relatively small for FEI and FBC.[132] The rate impact further reduced by the 50/50 ESM where half of any O&M savings or cost increases are shared with

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[125] Exhibit B-12, BCUC IR 2.162.5.

[126] CEC Argument, p. 38.

[127] Exhibit B-1-1, Appendix B6, Table A:B6-6.

[128] FEI 2018 Annual Review for 2019 Delivery Rates proceeding, Exhibit B-2, Application, Section 1.4.3, Major Initiatives Undertaken, page 8. The project was the subject of IRs and testimony at the workshop. Online: https://www.bcuc.com/Documents/Proceedings/2018/DOC_52169_B-2-FEI-Annual-Review-2019-Rates-Appl.pdf

[129] Exhibit B-11, in FEI's Annual Review for 2019 Delivery Rates proceeding, Response to Undertaking No. 5. Online: https://www.bcuc.com/Documents/Proceedings/2017/DOC_50235_B-11_FEI%20-Workshop-Undertakings.pdf.

[130] CEC Argument, p. 39.

[131] AUC Decision 2012-237, Rate Regulation Initiative, Distribution Performance Based Regulation, September 12, 2012, para. 229. Online: http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2012/2012-237.pdf.

[132] Exhibit B-7, CEC IR 1.10.5.

customers. Due to the immateriality of the amounts involved, FortisBC recommends continuing with the existing Inflation Factor for the term of the Proposed MRPs.[133]

70. Finally, in reply to the CEC's comment about there being no true-up to "real" inflation",[134] the inflation indices already reflect actual inflation so there is nothing to true-up. In contrast, the growth in number of customers is set first on a forecast basis and it is a simple calculation to true up to the actual number of customers.

D. A ZERO PRODUCTIVITY FACTOR IS CONSISTENT WITH DECLINING INDUSTRY PRODUCTIVITY TRENDS AND FEI AND FBC'S RELATIVE EFFICIENCY TO THEIR PEERS

71. As set out in FortisBC's Final Argument, the evidence in this proceeding shows that FortisBC's implied zero percent X-Factor is reasonable, although it will be challenging to achieve. In this section, FortisBC responds to the arguments of the BCMEU, CEC, ICG and BCOAPO on the X-Factor.

1. THERE HAVE BEEN SIGNIFICANT CHANGES SINCE 2014

72. BCMEU opposes FortisBC's proposed zero percent productivity factor on the basis that the circumstances are not different than when the productivity factor was approved for the 2014-2019 PBR Plans.[135] The proposition that the circumstances are the same as in 2014 is plainly false and is thoroughly refuted by the evidence FortisBC has filed in this proceeding, as reviewed in FortisBC's Final Argument, pages 17 to 29.

2. DECLINING PRODUCTIVITY TREND MEANS PRODUCTIVITY FACTOR MUST BE REDUCED FROM 2014-2019 PBR PLANS

73. The BCMEU submits that productivity growth has been declining industry-wide for the last 10-15 years, so that this is not a new trend with increased relevance specific to the

[133] CEC Argument, p. 39, para. 271.
[134] CEC Argument, p. 36.
[135] BCMEU Argument, pp. 4-9.

Proposed MRPs.[136] The BCMEU's submission is misleading and should be given no weight. First, the fact that the declining trend in productivity has continued for 10 to 15 years means that productivity factors have continued to fall from the time when the BCUC last considered the issue in 2014. Clearly, the declining trend, which the BCMEU accepts and no intervener contests, means that productivity values are much lower today than they were 6 years ago. Therefore, the productivity factor must be reduced from the productivity factor in the 2014-2019 PBR Plans to reflect this significant decline.

74. Second, the fact that the trend has continued for 10 to 15 years is evidence of the unprecedented transition in the industry and that this trend is likely to continue.[137] This means that productivity factors are likely to continue to decline over the course of the Proposed MRPs,[138] which is why FortisBC's sensitivity analysis of the latest TFP study results is so important for the BCUC to consider.[139] The declining trend makes it essential that the productivity factor be set with an eye to the next five years, not the past five years.

75. Third, productivity studies often have a lag in the historical data on which they are based. For instance, the productivity studies conducted in 2013 for FortisBC's 2014-2018 Performance Based Multi-Year Ratemaking Plans were based on a data up to 2011. Although the negative productivity numbers were present at that time, the trend is now undeniable. This can be shown by looking at the results of the studies by NERA and PEG in three periods. As shown in the table below, the more recent years produce more negative productivity values.[140]

	NERA Study	PEG Study
1999-2016	-0.88%	-0.23%
2005-2016	-1.59%	-0.65%
2010-2016	-1.65%	-0.78%

[136] BCMEU Argument, p. 6.
[137] FortisBC Final Argument, pp. 55-57.
[138] FortisBC Final Argument, pp. 57-61.
[139] FortisBC Final Argument, pp. 65-66.
[140] Exhibit B-12, BCUC IR 2.163.4.

76. Based on this analysis, FortisBC submits that a reasonable range for the expected industry productivity trend is between -0.23 percent and -1.65 percent with more weight given to the lower (more negative) bound of this range.[141] Regulators are now unanimous in their acceptance of the declining productivity trend.[142] The consensus amongst regulators, and the likely continuance of the downward trend,[143] makes it extremely relevant to FortisBC's Proposed MRPs.

3. RELIANCE ON INDUSTRY PRODUCTIVITY VALUES IS CUSTOMARY

77. The BCMEU "cautions the Commission against relying too heavily on generalized data not specifically relating to FortisBC".[144] However, the industry productivity factor in MRPs are customarily based on the expected industry productivity rather than individual company information. This is because the main purpose of the productivity factor is to ensure that the economy-wide inflation factor reflects the inflation experienced by an average firm in the utility industry.[145] As noted by the Alberta Utilities Commission in Decision 2012-237:[146] "NERA explained that because in competitive markets prices move according to the productivity of the industry in question rather than the particular costs of one company, it has become customary for regulators in the design of objective PBR formulas to set the X factor based on the underlying trend in industry productivity growth". Customer-specific information is more appropriately considered in considering a stretch factor, which FortisBC has addressed on pages 67 to 71 of its Final Argument.

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[141] Exhibit B-12, BCUC IR 2.163.4.
[142] Exhibit B-10, BCUC IR 1.13.2.
[143] Exhibit B-12, BCUC IR 2.163.11.
[144] BCMEU Argument, p 6; CEC Argument, pp. 41-42.
[145] Exhibit B-10, BCUC IR 1.13.2; Exhibit B-14, BCUC IR 2.169.1.
[146] AUC Decision 2012-237, Rate Regulation Initiative, Distribution Performanced Based Regulation, September 12, 2012, pp. 55-56. Online: http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2012/2012-237.pdf.

4. HISTORICAL ROES AND SAVINGS SUPPORT A ZERO-PERCENT PRODUCTIVITY FACTOR

78. BCMEU, CEC and BCOAPO argue that because FortisBC has achieved savings in the 2014-2019 PBR Plan, it will continue to do so and therefore the X-Factor should be positive.[147] For instance, BCMEU argues that just as FortisBC used historical performance when setting its SQI benchmarks and thresholds, the productivity factor should be based on the Utilities' efficiency trends.[148] This argument is without merit. In fact, FortisBC's achieved savings and ROE values support a zero percent productivity factor.

- **Productivity Factor Based on Industry Information:** First, as discussed above, the productivity value is customarily based on the expected industry productivity information, not utility-specific information, such as efficiencies achieved in the past.[149]

- **Utility-Specific Information Does Not Support a Stretch Factor:** A stretch factor can be added to the base industry productivity factor to account for information specific to the utility. However, FortisBC's experience under PBR plans and the Benchmarking Study indicate that a stretch factor is not warranted.[150]

- **High Relative Efficiency is a Reason for <u>No</u> Stretch Factor:** Utilities with high efficiency are often excluded from stretch factor determinations. One example is in Ontario, were the Ontario Energy Board relies on benchmarking studies to set the stretch factor. According to the Ontario Energy Board's approach, the most efficient cohort of utilities have a stretch factor of zero and the least efficient have a stretch factor of 0.6.[151]

- **Base O&M will Capture Existing Efficiencies:** The Base O&M is proposed to be rebased starting with 2018 actual O&M to capture all of the savings that FortisBC

[147] BCMEU Argument, pp. 4-9.
[148] BCMEU Argument, pp. 7-8; BCOAPO Argument, p. 49.
[149] Exhibit B-10, BCUC IR 1.13.2; Exhibit B-14, BCUC IR 2.169.1.
[150] FortisBC Final Argument, pp. 67 to 71.
[151] Exhibit B-5, BCOAPO IR 1.20.1.

achieved during the 2014-2019 PBR Plans. Therefore, the ICG's argument[152] that the X-Factor should be at least the same as the savings achieved under the 2014-2019 PBR Plans is baseless, as the permanent savings achieved are already reflected in the proposed base O&M.

- **Unreasonable to Expect the Same Downward Trend in O&M per Customer to Continue Indefinitely:** Going forward, FortisBC will need to find new efficiencies above and beyond those already achieved. Any new savings will be difficult to achieve.[153] FortisBC's increasing challenge in finding efficiencies during the 2014-2019 PBR Plans was well documented in the Annual Review processes and is acknowledged by BCMEU.[154] In addition to the increasing challenge in finding efficiencies, FortisBC's evidence shows that there are significant challenges in its operating environment that will require O&M increases.[155] It is therefore unreasonable to expect that FEI's and FBC's O&M will continue to trend downwards at the same level indefinitely. The difficulty in finding new efficiencies and the cost pressures that FortisBC is experiencing support FortisBC's zero percent productivity factor.

- **Achieved ROE Was Well Below the Off-ramp:** FortisBC's ability to achieve the allowed ROE within the off-ramp threshold in the past is not a reason to approve a stretch factor. If the achieved ROE was higher than the off-ramp threshold, it may indicate that the utility has a higher efficiency potential, but does not itself indicate that there is more efficiency potential in the next test period. For instance, the high ROEs achieved in Alberta explain the stretch factor approved by the Alberta Utilities Commission in its second generation PBR plans.[156] FortisBC's achieved ROEs, however, are significantly lower than the off-ramp

[152] ICG Argument, p. 10.
[153] Exhibit B-10, BCUC IR 1.22.11.2.
[154] E.g. BCMEU Argument, p. 8.; MoveUP Argument, p. 8.
[155] Exhibit B-1, p. B-54 and B-57; Exhibit B-1-1, Appendices C2-1 and C2-2; FortisBC Final Argument, p. 107.
[156] Exhibit B-12, BCUC IR 2.164.1; FortisBC Final Argument, pp. 63-64, para. 133.

threshold. FortisBC's achieved ROEs combined with the Benchmarking Study are in fact convincing evidence that a stretch factor is not warranted.

5. FortisBC Have Already Harvested the "Low Hanging Fruit"

79. The CEC state: "the Utilities appear to consider they are entitled to receive extra ROE for addressing 'low hanging fruit'."[157] The Utilities have never stated this. As discussed on pages 67 to 68 of FortisBCs Final Argument, the existence of "low hanging fruit" due to a transition out of COS ratemaking is one factor that has been used to justify a stretch factor. As FortisBC has been under PBR for 6 years, there is no "low hanging fruit".

6. FortisBC will be Challenged and will need to do "More with the Same"

80. BCOAPO argues that "a Zero Productivity Factor, if put into action, will create significant incremental funding for their use, an increase of O&M of approximately $54 million for FEI and $15 million for FBC."[158] The productivity factor does not provide any funding to the Utilities. As discussed above, and in FortisBC's Application and responses to IRs, finding new productivity opportunities is increasingly difficult and FortisBC will need to manage cost pressure challenges during the Proposed MRPs. FortisBC approach to this challenge will be to rely on a productivity focus of "doing more with the same".[159]

81. BCOAPO's comment that a zero percent X-factor would make "the O&M linear" is also misguided.[160] Mathematically, the X-Factor is an adjustment to the I-Factor, so the elimination or inclusion of an X-factor does not change the "linearity" of the O&M formulas in any way.

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[157] CEC Argument, p. 42.
[158] BCOAPO Argument, p. 46.
[159] Exhibit B-1, pp. C-16 to C-17; Exhibit B-10, BCUC IR 1.13.3, 1.19.6, 1.29.1.1 and 1.22.3; FortisBC Final Argument, pp. 108-109.
[160] BCOAPO Argument, p. 50.

7. Analysis of Recently Proposed and Approved X-Factors Shows That Rationales for Positive X-Factors or Stretch Factors do not Apply to FortisBC

82. BCOAPO refers to the 0.3 percent X-Factors or stretch factors approved in other jurisdictions, suggesting that the move by regulators was a decline but not a move to zero.[161] FortisBC provided a detailed analysis of these decisions at pages 61 to 66 of FortisBC's Final Argument and the referenced evidence.[162] BCOAPO has not provided any argument or referenced any evidence or authority that rebuts FortisBC's analysis or argument. BCOAPO has not shown, for instance, why the stretch factors applied in other jurisdictions should apply to FortisBC, given the results of the Concentric Benchmarking Study and FortisBC's past 6 years of PBR. As such, BCOAPO's submissions should be rejected.

8. FortisBC's Approach to Justifying the Productivity Factor is Reasonable and Efficient

83. ICG claims that due to a lack of cost of service analysis a TFP study is required to justify an X-Factor, and therefore the Application is incomplete.[163] ICG is incorrect. First, as will be discussed in detail in Part Four of this Reply Submission, FortisBC's Base unit costs are in fact established using a cost of service approach. Second, the Base O&M should not be considered when assessing the appropriateness of X-Factor. The productivity factor is customarily determined based on the average industry expected productivity growth and is not related to the Base O&M or capital expenditures.[164] Third, there is a significant amount of evidence, including the evidence of experts and associated decisions of regulators in other jurisdictions, Concentric's Benchmarking Study, and FortisBC detailed analysis provided in IRs,[165] to enable the BCUC to make an informed judgement regarding the X-Factor.[166] The BCUC approved FEI's and FBC's PBR plans prior to the 2014-2019 PBR Plans without a TFP study, demonstrating that

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[161] BCOAPO Argument, pp. 49-50.
[162] Exhibit B-10, BCUC IR 1.17.4; Exhibit B-12, BCUC IR 2.163.5.1 and 2.163.6; and Exhibit B-5, BCOAPO IR 1.20.1.
[163] ICG Argument, pp. 8-9.
[164] Exhibit B-10, BCUC IR 163.10.1.
[165] Exhibit B-12, BCUC IR 2.163 series.
[166] FortisBC Final Argument, pp. 52-54.

the BCUC has previously found sufficient evidence in the absence of a TFP study to set an X-Factor.

84. The ICG incorrectly suggests that the quote on page 10 of its submission is the Commission "reminding" FBC of its Decision in 2014 that the reasonableness of the X-Factor can be assessed relative to forecast rate changes under a forecast COS model. In fact, the quote is from page 53 of FEI's 2014 PBR Application. Moreover, the BCUC gave FortisBC's forecast COS model no weight in its Decision.[167]

85. Using TFP studies produced in other jurisdictions is an approach that has been accepted in other jurisdictions that can reduce regulatory burden and costs. In the Régie de l'énergie Decision D-2017-043, page 38, on Hydro Quebec's PBR plan, the Régie noted that intervener expert Dr. Lowry of Pacific Economics Group indicated that productivity studies in other jurisdictions can be used to determine the X-Factor:[168]

> PEG indicates that TFP studies produced for other jurisdictions could be used to determine X-Factor. The use of existing TFP studies would promote regulatory streamlining, especially since some of them, in particular those used by the Alberta Utilities Commission (AUC) and the Ontario Energy Commission (OEB), have clearly identified the issues related to calculating the productivity of an electricity distributor.

86. Given that the negative productivity trend has continued, updating the productivity studies produced in other jurisdictions with the most recent data would very likely make the average productivity more negative. This further supports FortisBC's proposed zero percent productivity factor.

87. FortisBC therefore submits that ICG's arguments should be rejected and that the BCUC should find that it has sufficient evidence to make an informed decision on an X-Factor for the

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[167] Exhibit B-10, BCUC IR 1.161.3.

[168] Exhibit B-12, BCUC IR 2.163.1. The French version is as follows: "PEG indique que des études PMF produites pour le compte d'autres juridictions pourraient servir à déterminer le Facteur X. L'utilisation d'études PMF existantes favoriserait l'allégement réglementaire, d'autant plus que certaines d'entre elles, notamment celles utilisées par l'Alberta Utilities Commission (AUC) et la Commission de l'énergie de l'Ontario (CÉO), ont clairement identifié les enjeux relatifs au calcul de la productivité d'un distributeur d'électricité."

Proposed MRPs. Further, FortisBC submits that the evidence shows that the zero percent X-Factor is reasonable and will be in fact challenging for FortisBC to achieve.

E. A 100 PERCENT GROWTH FACTOR IS ALIGNED WITH THE DATA, OTHER JURISDICTIONS AND THE PRODUCTIVITY FACTOR

88. Only CEC and BCOAPO oppose FortisBC's proposed 100 percent growth factor. FortisBC responds to their submissions below.

1. ECONOMIES OF SCALE ARE FACTORED INTO BASE O&M AND PRODUCTIVITY FACTOR: WHY THE GROWTH COEFFICIENT WOULD DUPLICATE THE PRODUCTIVITY FACTOR

89. The use of a multiplier on the growth factor should not be imposed as it will duplicate the role of the productivity factor, which explains why all other jurisdictions, except one, use a 100 percent growth factor.[169] BCOAPO claims that this position is "baffling" and "totally illogical" because the productivity factor is zero.[170] In fact, FortisBC's position is quite simple, and logical, and is supported by other regulators and experts in the field. The fact is that economies of scale are one of the factors that impact industry productivity values and, indeed, one of the functions of the X-Factor is to account for economies of scale. But it is just one of the factors impacting productivity values. As shown in the studies produced in other jurisdictions, productivity values can be negative, zero or positive. FortisBC's value of zero means that economies of scale are being offset by other factors that are driving down productivity. Therefore, if it is the intent of the Growth factor to account for economies of scale, then it is an inescapable fact that it would double count the productivity factor.

90. As explained in FortisBC's Final Argument, this is widely accepted to be the case. Dr. Lowry's Total Factor Productivity evidence often refers to the economies of scale as a source of productivity growth for the utilities:[171]

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[169] Exhibit B-10, BCUC IR 1.17.7; FortisBC Final Argument, pp. 79-81.
[170] BCOAPO Argument, p. 52.
[171] Exhibit B-12, BCUC IR 2.165.1.1.

> Economies of scale are a second source of productivity growth. These economies are available in the longer run if cost tends to grow more slowly than output. A company's potential to achieve incremental scale economies depends on the pace of its output growth. Incremental scale economies (and thus productivity growth) will typically be reduced when output growth slows.

91. The Alberta Utilities Commission also agrees, as do other experts:[172]

> Furthermore, as Dr. Weisman, Dr. Makholm and Fortis pointed out, any economies of scale and resulting gains are already reflected in the PBR plans on a prospective basis through the X factor. These gains are guaranteed to customers regardless of the actual performance of the company. Incorporating these productivity gains above the Commission-approved X factor in the calculation of capital tracker amounts will effectively result in revisiting the "fixed-price contract" that is a PBR plan.

92. It is therefore a mathematically inescapable fact that applying a growth factor coefficient of less than one acts as an additional or duplicative productivity factor, which double counts the impact of economies of scale. This is why every other jurisdiction, except one, does not include a growth factor coefficient.

93. BCOAPO seems to imply that a zero productivity factor means there is no economies of scale impact on the productivity.[173] This is false. The impact of economies of scale is present in the X-Factor even if the X-Factor is zero. In other words, if the impact of economies of scale on productivity were removed, the industry productivity would be even lower (i.e. negative). Far from "baffling" and "illogical", this is simple math.

94. As stated in FortisBC's Final Argument, the fact that the X-Factor determination includes impacts from economies of scale explains why other jurisdictions use a 100 percent growth factor. Regulatory decisions in other jurisdictions indicate that the topic of adjusting the growth factor for economies of scale is only discussed in two jurisdictions: BC and Quebec. Hydro Quebec Distribution applies a multiplier of 0.75 to its growth factor. Other utilities in

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[172] AUC Decision 2013-435, Distribution Performance-Based Regulation 2013 Capital Tracker Application, date December 6, 2013, para. 229. Online: http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2013/2013-435.pdf.

[173] BCOAPO Argument, p. 52.

other jurisdictions, including Alberta, have growth factors that are either embedded in or implicit in their formulas and reflect 100 percent of changes to their growth factor.[174] FortisBC submits that these other jurisdictions reflect the correct approach, where productivity is considered in relation to the productivity factor only, rather than being double counted in two different aspects of the PBR formula.

2. INFLATION AND GROWTH FACTORS ARE NECESSARY TO REASONABLY REFLECT COST DRIVERS

95. BCOAPO also asserts that inflation and growth are not both needed.[175] FortisBC submits that this is intuitively wrong and that any analysis suggesting such a result is flawed. Inflation and growth account for two separate and distinct drivers of costs: economy-wide inflation and growth in the number of customers. Both need to be accounted for in the formula.

96. BCOAPO assert that a growth factor is not needed because the (inflation-adjusted) real dollar comparison shows unit cost O&M declining.[176] However, the negative correlation in BCOAPO IR 2.132.2 does not indicate that there is an opposite relation between the cost and number of customers. Rather, the negative correlation is due to the small dataset (6 years only).[177] In the longer term, the relation would be positive with a strong correlation.[178] Moreover, the unit cost O&M is declining because of FortisBC's efficiencies found during the term of the 2014-2019 PBR Plans. Removing the growth factor due to FortisBC's success in finding efficiencies would be a perverse result. The Growth factor should reflect driver of FortisBC's costs, not its past success in finding efficiencies.

3. REGRESSIONS ANALYSIS HAS LIMITED VALUE

97. BCOAPO argues that the slope of the regression analysis is meaningful and supports a 30% growth factor.[179] This argument is without merit for the reasons set out below.

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[174] Exhibit B-10, BCUC IR 1.17.6.
[175] BCOAPO Argument, p. 42.
[176] BCOAPO Argument, p. 42.
[177] Exhibit B-14, BCOAPO IR 2.132.2
[178] Exhibit B-10, BCUC IR 1.17.7.
[179] BCOAPO Argument, pp. 54-55.

3.1 Slope Theoretically Represents Incremental Costs but There is Insufficient Data

98. BCOAPO misconstrues the meaning of slope in a regression analysis when it suggests that the slope can represent the multiplier to the growth factor. That is, BCOAPO incorrectly suggests that if the slope is one, then the relationship between the cost and gross customer additions is 1:1 and, if it is 0.33, then that implies a multiplier to growth factor of 0.33. BCOAPO's contention is incorrect. First, as discussed in FortisBC's Rebuttal Evidence, the application of regression analysis with only six data points is limited. Second, the regression lines provided in response to BCOAPO IR 1.23.1 also include an intercept. Mathematically, the existence of an intercept means that one cannot simply relate the relation of independent and dependent variable to only slope and therefore use the slope as the multiplier. Third, to demonstrate the invalidity of BCOAPO's argument, the response to BCOAPO 1.23.1 also included the regression analysis of FEI's growth capital and its growth factor. The slope of FEI's growth capital regression line is 5.87[180], but this does not mean that in FEI's growth capital formula the growth factor should be multiplied by 5.87 (1:5.87).

99. Theoretically, the slope represents incremental costs (MC) and the unit cost represent the average cost (AC). If MC is less than the AC, then there is economies of scale as each customer added will reduce the AC. In this scenario an adjustment less than 1:1 may be appropriate. If the AC is less than the MC, then there is no economies of scale. In this scenario, an adjustment more than 1:1 is appropriate.[181]

100. However, this is only in theory and overly simplified. FortisBC explained that in utility industry, incremental costs would need to be determined through detailed engineering analysis, not through a regression analysis with only 6 data points and without appropriate adjustment to isolate costs of incremental resources necessary to expand service. FortisBC

[180] Exhibit B-5, BCOAPO IR 1.23.1.
[181] Exhibit B-5, BCOAPO IR 1.23.1.

explained this in its Rebuttal Evidence where it was responding to Mr. Bell's invalid "incremental cost per incremental customer" analysis, as follows:[182]

> Incremental cost measures reflect the costs of additional resources that are necessary to provide additional services, such as the costs of serving new customers or increasing energy delivery capacity. They are developed using a detailed, bottom-up analysis of what additional capital and operational resources must be put in place to provide expanded service. This bottom-up analysis, in turn, draws on engineering and operational knowledge, as well as an in-depth understanding of the service territory and customer characteristics over which the new services will be provided. Utility incremental cost measures are often project or activity-based.
>
> One important element in developing incremental cost measures is identifying only the incremental costs that are associated with a change in utility output. Indeed, isolating and including only the costs of additional resources necessary to expand service is the essence of the cost calculation.

101. In summary, a detailed bottom-up engineering and operational analysis would be required to demonstrate what BCOAPO claims can be determined from a regression analysis.

3.2 Other Jurisdictions Do Not Rely on a Regression Analysis

102. FortisBC is aware of no other jurisdiction that uses a regression analysis approach to define a coefficient to a growth factor. In fact, as noted above, other jurisdictions (except one) use TFP studies to reflect economies of scale, such that there is no need for applying a second adjustment to the growth factor.

3.3 Regression Analysis is Mathematically Limited in its Usefulness

103. BCOAPO argues that FortisBC has been inconsistent: "The Utilities seem to want it both ways, claiming that the regression demonstrates the 50% adjustment to the growth factor is not needed, yet the regression is not good enough to use to forecasting the relationship between customers and costs." In reply, FortisBC has not relied on the regression analysis to

[182] Exhibit B-23, Rebuttal Evidence, Q&A 12.

justify its Base costs (i.e. average costs) or its incremental costs, and the regression analysis is limited by only six data points.

104. FortisBC clarified the matter in its Rebuttal Evidence, as follows:[183]

> FortisBC's Application included a correlation analysis to rebut the non-linearity argument in the 2014 PBR Decision, but that is different from a regression analysis. In BCOAPO IR 1.23.1, BCOAPO asked FortisBC to conduct a regression analysis on the same data used in the correlation analysis. FortisBC provided the requested information and explained the meaning of the slope and intercept in the regression equation. However, FortisBC's proposed Base O&M is not based on the results of the regression analysis, but rather on adjusted actual 2018 O&M. As explained in response to BCUC IR 2.165.1.1, the regression analysis provided in response to BCOAPO IR 1.23.1 has limitations and, although it can be used as an input in BCUC's analysis, it is not appropriate to rely on the slope of a regression line constructed with only six data points to forecast FortisBC's incremental costs.

105. As noted in the quote above, FortisBC conducted the regression analysis at the request of BCOAPO,[184] and, having conducted the analysis, sought to explain the results and how it applied to FortisBC's proposal. FortisBC stated: "As shown in the analysis, the regression line slopes of $331.90 per customer added for FEI and $376.60 per customer added for FBC are similar in magnitude to the MRP formula O&M per customer of $250 per customer for FEI and $416 per customer for FBC."[185] However, FortisBC was also always clear about the limitations of the analysis that BCOAPO asked it to conduct:

> While the intercepts can be construed as representing fixed costs at the point where the number of customers equals zero, the negative amounts for both Growth capital and O&M for FEI and the small intercept for FBC are irrelevant in this case. First, it is not possible to have negative costs at zero customers, and second, a regression analysis is most useful over the range that the regression was performed. This means that the regression results will become less useful for extrapolations far outside the range of the original data.

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[183] Exhibit B-23, Rebuttal Evidence, Q&A 11.
[184] Exhibit B-5, BCOAPO IR 1.23.1.
[185] Exhibit B-10, BCUC IR 1.17.7.

106. BCOAPO's attempts to use the regressions analysis with six points of data is not valid. The negative intercept amounts demonstrate that such extrapolation of the data leads to meaningless results. Furthermore, a detailed bottom-up engineering and operational analysis would be required to calculate incremental costs. Therefore, the BCUC should give no weight to the BCOAPO's contentions on this matter.

4. IT IS INCREASINGLY DIFFICULT TO FIND EFFICIENCIES AND FORTISBC IS EXPECTING COST PRESSURES

107. BCOAPO submits that Mr. Bell has demonstrated that there is a declining cost per customer that shows the relationship is not linear.[186] In fact, it was FortisBC in its Rebuttal Evidence (Q&A 11) that indicated that O&M per customer on an inflation-adjusted basis is declining. The trend is declining over 2014 to 2018 because of FortisBC's success in finding efficiencies. Basing a growth factor on FortisBC's success in finding efficiencies would be a perverse result, and essentially the same as the fallacious argument by the ICG that the productivity factor should equal FortisBC's achieved savings over the 2014-2019 PBR Plans. It would not be reasonable to set a growth coefficient on the assumption that FortisBC will be able to continue to achieve the same level of efficiencies compared to formula over the next five years. As demonstrated in the Annual Reviews and this proceeding, FortisBC has harvested all of the "low hanging fruit", is finding it increasingly difficult to find efficiencies and is facing numerous cost increases.

5. MR. BELL'S INCREMENTAL COST PER INCREMENTAL CUSTOMER ANALYSIS HAS NO MERIT

108. Although BCOAPO appears to have given up on the analysis, the CEC claims that Mr. Bell's incremental cost per incremental customer analysis shows that there is no evidence for justifying a 1:1 analysis.[187] FortisBC thoroughly refuted this analysis in its Rebuttal Evidence,

[186] BCOAPO Argument, p. 51.
[187] CEC Argument, pp. 25-26.

explaining that an incremental cost per incremental customer analysis is irrelevant, novel in the industry, and has no clear meaning.[188]

6. RELATIONSHIP OF COSTS AND CUSTOMERS IS LINEAR IN THE LONG RUN

109. The CEC questions the value of the correlation analysis for determining a 1:1 relationship between costs and customers.[189] FortisBC agreed that the correlation analysis does not imply a 1:1 relationship as explained in response to CEC IR 1.14.5:[190]

> In order to respond more fully to the question FortisBC must first explain its understanding of what is meant by a 1:1 relationship. In FortisBC's view, a 1:1 relationship is best characterized by the expectation that the per customer O&M cost increase arising from adding new customers is the same as the average O&M per customer embedded in the Base O&M. With that understanding FortisBC agrees that, although a 0.90 or 0.95 correlation coefficient strongly support a linear relationship, they do not necessarily imply a 1:1 relationship.

110. However, FortisBC cannot agree with the various arguments by the CEC that a Growth factor coefficient is needed because some costs in the Base may not increase linearly with growth in customers.[191]

111. First, the CEC's argument fails to consider that, while some costs may increase less the formula drivers, other costs may increase more than what the index formula can provide. The anecdotal evidence goes both ways.[192] FortisBC noted in response to CEC IR 1.14.6, for example:

> During the MRP term, some of the cost pressures may go above the average cost (sometimes additional cost are incurred without adding a single customer), some are at the average cost rate and some may be lower than the average cost. The correlation results, however, indicate that most of the variations in the O&M costs can be explained by the variations in the number of customers and that there is no particular need to adjust the unit cost index formulas.

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[188] Exhibit B-23, Rebuttal Evidence, Q&A 12.
[189] CEC Argument, p. 165.
[190] Exhibit B-7, CEC IR 1.14.5.
[191] CEC Argument, pp. 22-23.
[192] Exhibit B-1, Application, p. C-9; Exhibit B-12, BCUC IR 2.165.1.1.

112. Second, the CEC's argument is in contrast to the opinion of the CEC's expert in the 2014 proceeding, where Dr. Lowy states:[193]

> In gas and electric power distribution, the number of customers served is an especially important output variable driving cost in the short and medium term.
>
> …
>
> In the energy distribution business, however, we have noted that the number of customers served is the dominant output variable driving cost in the short and medium term. *Outputs*^{C} can then be reasonably approximated sometimes by growth in the number of customers served and there is no need to have a multidimensional output index with elasticity weights.

113. Mr. Lowry's view expressed above is consistent with FortisBC's evidence.[194]

114. Third, the relationship between costs and number of customers is, of course, varied over the short term. Thus, FortisBC states: "In the short term, some of FortisBC's O&M costs are fixed (i.e., leases, rent), some are semi variable (i.e., vehicle costs – insurance portion fixed while fuel costs variable based on vehicle usage) and some variable (i.e., customer billing and postage)."[195] The purpose of any formula, however, is not to find an exact cost driver for every individual cost item, but to find a proxy that represents the cost/price trends at an aggregate level. The number of customers accomplishes this.

115. FortisBC recognizes that, in the short term, there is no way to know what the exact future relationship between costs and number of customers is in individual years (less than 1:1, exactly 1:1 or more than 1:1). However, the key fact is that in the long run there is strong linear relationship. FortisBC may add customers and may not need to add to costs in year one and two, but then at year three FortisBC may need to add costs that are significantly higher that what the growth factor provides. This is because the costs in the individual years occur in steps,

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[193] FEI Application for Approval of a Multi-Year Performance Based Ratemaking Plan for 2014 through 2018 ~ Project No. 3698715, Exhibit C1-9, pp. 9-10. Online: https://www.bcuc.com/Documents/Proceedings/2013/DOC_39088_C1-9_CEC_Intervener-Evidence.pdf.

[194] Exhibit B-1, Application, p. C-9; Exhibit B-12, BCUC IR 2.165.1.1; Exhibit B-5, CEC IR 1.14.6.

[195] Exhibit B-10, BCUC IR 1.17.7.

but in the long run they are almost linear (1:1).[196] The function of indexing formulas is not to replicate the ups and downs of the costs year by year, but to fit these step changes into a linear line. This is what FortisBC's proposed indexed-based approach accomplishes.

116. Finally, FortisBC recognizes that there are economies of scale in its costs. All existing economies are already reflected in the Base, whereas economies realized with the addition of new customers is accounted for in the productivity factor, consistent with approach in all other jurisdictions except one. The evidence is that economies of scale are offset by the many other factors driving down productivity in the industry generally. FortisBC is impacted by these factors and is anticipating cost pressures on a number of fronts. Looking ahead over the next five years, FortisBC expects that it will be challenging to keep costs within the proposed indexed-based amounts and that it will need to find efficiencies in order to manage new costs and rising costs. As such, FortisBC recommends its proposed indexed-based approach to O&M and FEI's growth capital for BCUC approval.

F. OFF-RAMP PROVISION IS SYMMETRICAL

117. The CEC submission that the off-ramp should be lowered to 100 to 150 basis points[197] should be rejected. The CEC submits that the off ramp provision does not provide adequate protection to ratepayers in the event that earnings are less than the approved ROE.[198] The CEC provides no reason why the protection is not "adequate". The off-ramp provision is symmetrical and therefore provides the same protection to customers and the Utilities.

118. The CEC submits that the Utilities would likely seek redress prior to reaching the off-ramp, but ratepayers wouldn't be afforded the same opportunity.[199] The CEC's submission is without merit. Any application to "seek redress" prior to reaching the off-ramp would face the same challenge of having to demonstrate why the BCUC should agree to a change given that the off-ramp was not reached.

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[196] Exhibit B-10, BCUC IR 1.17.7.
[197] CEC Argument, p. 55.
[198] CEC Argument, p. 55.
[199] CEC Argument, p. 55.

119. The BCUC previously determined the off-ramp provision in the 2014 PBR Decision and no party in this proceeding has provided any evidence or argument as to why it should change. Therefore, the off-ramp should continue unchanged.

G. EARNINGS SHARING MECHANISM

120. The CEC refers to the arguments it filed in 2014 in opposition to an ESM that the BCUC rejected when it approved the 2014-2019 PBR Plans.[200] To the extent that the BCUC Panel refers to the CEC's submissions in 2014, FortisBC requests that the BCUC also refer to FortisBC's reply submission in 2014. In its 2014 PBR Decision, the BCUC agreed with FortisBC that the CEC's arguments were out of context, stating:[201]

> The Commission Panel has considered the submissions of CEC with respect to the inclusion of an ESM. The points raised by CEC seem to be more concerned with the approval of a PBR and how it is designed than with the ESM itself. These include matters such as the elimination of the no surprise clause, the potential for earnings by simply not spending and the proposed term of the PBR relative to a more traditional cost of service agreement with a shorter time frame. While the Panel acknowledges that these matters are important, we agree with Fortis that with respect to having an ESM or not, CEC's arguments are out of context. To the extent possible, matters such as these will be dealt with in other parts of this Decision.

121. The CEC's submission that earnings sharing is not a "good deal" for ratepayers is based on an inaccurate understanding of MRPs and is addressed in Part Two of this Reply Submission.

122. Lowering the ESM to "lower than 50%" as CEC suggests would significantly weaken the incentive properties of the Proposed MRPs. Under most MRPs, including Alberta, utilities typically retain 100 percent of savings.[202] This is similar to COS regulation, where 100 percent of the variance from forecast is accountable to the shareholder. No other party has taken issue with the ESM. FortisBC submits the BCUC should continue with the 50/50 ESM as previously approved.

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[200] CEC Argument, pp. 58-59.

[201] 2014 PBR Decision, at p. 125. Online: https://www.bcuc.com/Documents/Proceedings/2014/DOC_42181_09-15-2014-FEI-2014-18-DecisionWEB.pdf.

[202] Exhibit B-1-1, Appendix C4-2.

H. EFFICIENCY CARRY-OVER MECHANISM

123. The CEC reiterates its arguments from 2014 against an Efficiency Carry-Over Mechanism ("ECM"), with which FortisBC continues to disagree. As set out on pages 85 to 86 of FortisBC's Final Argument, the theory of an ECM is clear and compelling. ECMs correct for the well-understood dynamic in MRPs that the incentive to find efficiencies decreases in the later years of the MRP. ECMs have been adopted in other jurisdictions and have been proven to be effective at generating increased savings for customers.[203] The evidence of Mr. Bell - the only evidence filed by an intervener in this proceeding - supports the use of an ECM,[204] although FortisBC disagrees with his approach.[205]

124. FortisBC has amended its ECM proposal compared to the ECM it previously proposed for the 2014-2019 PBR Plans, including by focusing on the last two years of the plan. FortisBC explained:[206]

> Under multi-year rate plans the utility's incentives to pursue efficiency gains declines over the plan's term. This is because the reward for a utility is greatest when the efficiency savings are made in the first year of the plan…In other words, the incentive properties of multi-year rate plans are time-dependent and there is an incentive imbalance between earlier and later plan years…
>
> …the evaluation of the Companies' performance in the Current PBR Plans indicate that annual savings above the formula level peaked in the third year of the plans. The proposed approach to consider the performance in the last two years of the Proposed MRPs is based on this observation.

125. The CEC does not appear to understand either approach. The CEC says that FortisBC has proposed an ECM that is "slightly modified" from the ECM in the 2014-2019 PBR Plans, which the CEC says includes a "five-year rolling carry-over".[207] This is not accurate. The 2014-2019 PBR Plans did not include a pre-defined ECM, but gave FortisBC the option to request an

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[203] Exhibit B-12, BCUC IR 2.164.5.
[204] Exhibit C7-5, BCOAPO Evidence, p. 13.
[205] Exhibit B-23, Rebuttal Evidence, p. 27.
[206] Exhibit B-1, Application, pp. C-11 to C-12.
[207] CEC Argument, p. 59.

efficiency carry-over treatment on a case-by-case basis.[208] FortisBC found the case-by-case approach unworkable.

126. The CEC's opposition to the ECM is summed up by its statement that "the Commission should not become involved with providing incentives and rewards".[209] This reveals that, at root, the CEC's opposition to the ECM is not based on anything more than its ideological opposition to incentive-based ratemaking. However, the CEC's position is misguided because the BCUC provides incentives and rewards no matter which ratemaking approach it chooses. The fact is that all ratemaking structures provide incentives and rewards in one form or the other. The critique of COS regulation, however, is that it doesn't provide the right incentives or strong enough incentives.[210] The incentives of the Proposed MRPs are superior to the incentives under COS regulation and will produce better outcomes for customers, as demonstrated repeatedly by FEI's and FBC's past performance under PBR plans. The inclusion of the ECM will create more balanced incentive properties over the term of the Proposed MRPs and is likely to create more benefits to customers.

I. EXOGENOUS FACTOR CRITERIA

127. The CEC submits that it is not appropriate to remove the materiality threshold, which the CEC says "serves to ensure that the company addresses normal operating costs within its formulaic spending".[211] Exogenous factors are defined to exclude "normal operating costs" because they are limited to unforeseeable events beyond the control of the Utilities. FortisBC addressed this topic at length in pages 98 to 102 of its Final Argument. In summary, the materiality threshold is not necessary or helpful because:

- As exogenous events are outside of the control of the Utilities, FortisBC should be given the opportunity to recover its prudent costs of this nature, even if relatively minor.

[208] Exhibit B-1, Application, p. B-26; Exhibit B-12, BCUC IR 2.164.5.
[209] CEC Argument, p. 60.
[210] Exhibit B-1-1, Appendix C4-3, Fundamentals of Rate Setting, pp. 2-3, PDF pp. 464-465.
[211] CEC Argument, pp. 57-58.

- Removing the materiality threshold will make the Annual Review process administratively simpler and more efficient. The materiality threshold contributed to confusion and complexity during the 2014-2019 PBR Plans.

- FortisBC will bring forward in Annual Reviews cost pressures or savings that FortisBC believes should be treated as exogenous factors, allowing a transparent and objective review of proposed exogenous costs.

- A threshold under which FortisBC is barred from recovery of its prudently incurred costs, which may together add up to a material amount, is unfair to FortisBC and contrary to the regulatory compact. In this case, reliance on FortisBC's judgment is reasonable and appropriate.

J. FLOW-THROUGH TREATMENTS ARE CONSISTENT WITH PRINCIPLES REFLECTED IN 2014-2019 PBR PLANS (Y-FACTOR)

128. The CEC does not oppose FortisBC's proposed flow-through treatment of costs.[212] However, the CEC submits "the Commission and ratepayers lose review of these costs without any corresponding incentive for them to be kept to a minimum. To the extent that these are significant, there is a large loss of oversight for the Commission relative to cost of service ratemaking."[213] This is misleading.

129. FortisBC's flow through items are the same type of items that are flowed through under COS ratemaking. Consistent with the factors listed in the BCUC's deferral account checklist,[214] the general principle is that material and uncontrollable costs that are difficult to forecast are treated as a flow-through. As the costs are largely outside of management's control, there is no material purpose in including them in Base O&M.

[212] CEC Argument, pp. 55-57. At page 57, the CEC does oppose the inclusion of some LNG costs in Base O&M, which is addressed in Part Four of this Reply Argument.
[213] CEC Argument, p. 55, para. 386.
[214] Exhibit B-1, Application, pp. C-122 to C-126.

130. The review and approval process of the flow-through treatment is the same under the Proposed MRPs as it is under COS ratemaking. However, under the Proposed MRPs, the flow-through costs will be reviewed each year in the Annual Review process, which is more regulatory oversight than under COS regulation, which typically has a 2 year test period.

K. DEFERRAL ACCOUNTS TO IMPLEMENT PROPOSED MRPS

131. In reply to ICG's argument on the use of deferral accounts,[215] FBC's Proposed MRP follows the approach of the BCUC Decision approving the 2014-2019 PBR Plans, which created the Flow-through deferral account. FBC proposes to reduce the scope of the Flow-through deferral account to increase the incentive power of the Proposed MRPs as discussed on pages 92-94 of FortisBC's Final Argument.

132. ICG's opposition to the use of deferral accounts is inconsistent with the thrust of its position that FBC should be strictly limited to its allowed ROE. Variances from forecast can be either positive and negative. Without the use of a deferral account, any variance will go to the bottom line. The use of deferral accounts for material, uncontrollable costs that are difficult to forecast ensures that customers pay only actual costs so that there are not windfall gains to either the shareholder or the customer.

133. The fair return standard does not, as ICG submits, "assume that the Company will assume the risk of costs beyond its control".[216] ICG cites no law or evidence for this proposition. The fair return standard is a higher-order principle that does not speak to this issue. In *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] S.C.R. 186, at pages 192-193, the Supreme Court of Canada states: "By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise, (which will be net to the company,) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise." The BCUC's discussions of the fair return standard in its May 10, 2013 Decision on the Generic Cost of

[215] ICG Argument, pp. 14-18.
[216] ICG Argument, para. 45.

Capital (Stage 1)[217] and in its August 10, 2016 Decision on FortisBC Energy Inc.'s Application for its Common Equity Component and Return on Equity for 2016[218] do not support the ICG's submissions.

134. ICG's submissions on regulatory costs at paragraph 45 to 47 of its submission should not be considered, as FBC is not seeking approval of any deferral accounts for regulatory costs in this proceeding. FortisBC notes that it is the BCUC's long-standing practice to approve deferral accounts for regulatory costs and there is a compelling rationale for doing so. It is difficult to forecast regulatory costs because they are driven by factors either partially or fully outside of FBC's control, such as how many regulatory proceedings there are, the length and nature of the regulatory process determined by the BCUC, how many interveners decide to participate and how actively they chose to participate, how many IRs are asked, whether intervener evidence is filed, and so on. The potential for material variances from forecast is therefore high, which gives rise to the risk of windfall gains or losses to the shareholder or customers. Using deferral accounts for these costs saves the time and costs of disputing uncertain forecasts and eliminates concerns regarding windfall gains or losses.

135. ICG's proposed criteria for deferral accounts[219] are unclear and incomplete:

(a) It is unclear what the first criteria, "arise from PBR mechanisms such as the O&M Base formula and the Base Capital formula",[220] is meant to refer to. FBC does not require deferral accounts to implement its O&M formula.

(b) The second criteria "arise from Targeted Incentives"[221] is consistent with FortisBC's proposal for a deferral account to implement the Targeted Incentives, but it is not helpful as a general criteria.

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[217] At pp. 7-12. Online: https://www.bcuc.com/Documents/Decisions/2013/DOC_34706_05-10-2013-BCUC-GCOC-Stage1DecisionWEB.pdf.
[218] At pp. 3-5. Online: https://www.bcuc.com/Documents/Proceedings/2016/DOC_46971_08-10-2016_FEI_CEC-ROE-2016_Decision.pdf.
[219] ICG Argument, pp. 17-18.
[220] ICG Argument, p. 17.
[221] ICG Argument, p. 17.

(c) The third criteria, "are highly volatile and unpredictable",[222] is similar to, but less helpful than the criteria in section IV of the BCUC's Regulatory Account Filing Checklist, which include the degree of controllability, uncertainty, and materiality. These factors interrelate. If a cost is uncontrollable and uncertain, it is likely to be unpredictable and volatile.

136. ICG has not supported the need for a review of deferral accounts. First, this proceeding does not raise the issue directly and need not be considered by the BCUC. Second, ICG has asked very few IRs on this topic and therefore has not developed the evidentiary record to aid the BCUC. Third, ICG has not filed any evidence on the topic. Fourth, the BCUC has relatively recently conducted such a review and issued its Regulatory Accounts Filing Checklist, and FBC provided the information required by the checklist for each requested deferral account.[223] Fifth, ICG's arguments are incorrect in law and fact as discussed above. In FBC's submission, the BCUC should dismiss the ICG's requests.

L. ANNUAL REVIEWS

137. The CEC submits that the Annual Review "has not been sufficient to replace the transparency that is afforded by regular comprehensive Commission review" and requests a mid-term review to determine whether the MRP is working as intended.[224] One of the benefits of an MRP is regulatory efficiency, which saves not only external regulatory costs but frees up management to focus on the needs of the business and finding efficiencies. The Annual Review process should not be designed to create regulatory inefficiency and effectively replicate a COS review as the CEC proposes. The Annual Review process was significantly increased in scope and detail for the 2014-2019 PBR Plans, and now includes a fulsome application, IRs, an "SRP-like" hearing, and written argument. The evaluation of the 2014-2019 PBR Plans was ongoing each year in the Annual Review processes. This makes any mid-term or end of term review unnecessary, and indeed was the reason why the BCUC did not approve a mid-term review for

[222] ICG Argument, p. 18.
[223] Exhibit B-1, Application, Table C5-1, pp. C-122 to C-126.
[224] CEC Argument, p. 88.

the 2014-2019 PBR Plans. Given the scope and content of the Annual Review process, there is no reason to believe that a separate mid-term review would be any more effective at evaluating the MRP. ForitsBC therefore submits that the CEC's proposals are without merit and should be rejected.

138. In reply to the BCSEA's request that FortisBC's Sustainability Report and GHG reduction reporting be included in its Annual Review materials,[225] this information is all publically available on FortisBC's website so there is no need for FortisBC to file it in its Annual Review materials. FortisBC expects that the BCSEA will still be free to ask questions on the material if it feels necessary at the Annual Review proceeding.

[225] BCSEA Argument, pp. 27-30 and 30-32.

PART FOUR: BASE O&M INCORPORATES SAVINGS FROM 2014-2019 PBR PLANS AND WILL REQUIRE FORTISBC TO DO MORE WITH THE SAME

139. In this part, FortisBC replies to the submissions of BCSEA, ICG, CEC and BCOAPO on its Base O&M.

A. PROPOSED BASE O&M RE-ESTABLISHES THE LINK BETWEEN REVENUES AND COSTS

140. ICG and CEC argue that a Commission-approved cost of service review for 2020 is required to set the Base O&M.[226] Contrary to the CEC and ICG, there is no rule that a COS application is required for rebasing. The only rule is that, pursuant to the sections 59-61 of the UCA, the base O&M must provide the Utilities with a reasonable opportunity to recover their prudently incurred costs, including a fair rate of return, while ensuring customers pay only just and reasonable rates. Meeting this requirement does not require a full forward test year COS application.

141. There are in fact various ways that the linkage between revenues and costs can be re-established. FortisBC explained:[227]

> "Rebasing", which refers to the exercise of re-establishing the linkage between revenues and costs, can be performed in various ways. One approach is to perform a full forward-test year cost of service rebasing. Another more regulatory efficient and less costly approach, involves the use of actual or projected costs (adjusted for inflation, anomalies and any other known changes). FortisBC's proposed rebasing approach for O&M expenditures and capital expenditures is based on the latter approach to rebasing and is intended to reduce the regulatory burden while establishing the appropriate Base O&M and Growth capital (for FEI only). FortisBC's approach of using its 2018 Actual amounts is reasonable as FEI and FBC have an incentive under the Current PBR Plans to reduce their O&M, and the benchmarking studies for both FEI and FBC provide further confidence that both FEI's and FBC's O&M are operating efficiently. Other capital costs for both FEI and FBC are based on cost of service forecasts and not based on formulas.

[226] ICG Argument, pp. 6-7; CEC Argument, p. 54.
[227] Exhibit B-8, ICG IR 1.1.1.

142. FortisBC also explained why it was not necessary for there to be a period of cost of service before the Proposed MRPs:[228]

> 1. Mechanically, forecasts for many of the elements of the revenue requirement items are prepared and approved in the same fashion under either approach, including revenue and demand forecasts, gas and electricity commodity costs, other revenues, forecasted O&M and capital, deferral accounts, property taxes, income taxes, and earned return;
>
> 2. Rate base is being re-based using 2018 actuals and 2019 projection, which allows for the re-basing to current costs, the same way that re-basing would occur under a Cost of Service application but with greater regulatory efficiency;
>
> 3. The vast majority of capital is covered under a forecast (all except FEI Growth capital) which is prepared in the same way under Cost of Service;
>
> 4. FEI's unit cost approach to Growth capital, which is rebased using 2016-2018 actuals (with adjustments), is fundamentally the same as the way FEI forecasts its Growth capital unit cost under Cost of Service; and
>
> 5. Index-based O&M which is rebased using 2018 actuals (with adjustments) is the only major element that would otherwise be prepared differently under Cost of Service. Using 2018 Actuals (with adjustments) is reasonable given that it reflects multiple years of cost efficiencies achieved under the Current PBR Plans. FortisBC has also identified cost pressures that it has not incorporated into its proposed Base O&M, but instead proposes to manage within the indexed-based amount. If FortisBC were to prepare a cost of service forecast of O&M for 2020, FortisBC would incorporate those cost pressures into its forecast, in addition to the incremental spending it has proposed in the Application.

143. As noted in the first two points in the quote above, FortisBC's approach is in fact reflective of its COS and allows for rebasing in the same way as a COS application would, but with more regulatory efficiency. FortisBC started with the 2018 Actual O&M to reflect FortisBC's actual cost to serve its customers, which includes all of the savings achieved from 2014 to 2018 under the 2014-2019 PBR Plans. FortisBC then explained on a COS basis each of the adjustments it proposed to move from 2018 actual O&M to its 2019 Base O&M. These

[228] Exhibit B-7, CEC IR 1.2.1.

adjustments were made to be representative of FortisBC's anticipated spending.[229] The result is that FortisBC's indexed-based O&M for 2020 is the same as FortisBC COS forecast O&M for 2020.[230]

144. FEI's and FBC's costs to serve its customers were available for examination and scrutiny in this proceeding. For example, FortisBC's 2018 actual O&M, each proposed adjustment, and its forecast 2020 costs were available for examination and questioning. Amongst other things, FortisBC provided a breakdown of its 2020 O&M on a departmental basis, as would typically be provided for a COS application,[231] and a three year indicative revenue requirements.[232]

145. As FortisBC's actual O&M and all adjustments were available for review and scrutiny, there is no material difference between what FortisBC has proposed and having a 2020 forecast of O&M. The BCUC can be satisfied through this proceeding that the 2018 Actual O&M reflects the cost to serve customers in 2018, that each adjustment to that amount is reasonable and reflects FortisBC's COS, and the end result is a reasonable starting point for the Proposed MRPs because it will result in 2020 O&M that represents FortisBC's O&M costs to serve customers in 2020. This ensures that the Utilities will have a reasonable opportunity to recover their prudently incurred costs, including a fair rate of return, while ensuring customers pay only just and reasonable rates.

B. REDUCTION FOR PBR SAVINGS WOULD BE RETROACTIVE RATEMAKING

146. ICG argues that 2018 actual O&M should be reduced by FBC's "excess" returns in that year.[233] As set out in Part Two, Section A 3, of this Reply Submission, FBC did not make any "excess returns". FBC's rates were approved by the BCUC based on the 2014-219 PBR Plan and are therefore just and reasonable. Reducing Base O&M by FBC's achieved return above its

[229] Exhibit B-10, BCUC IR 1.39.4.
[230] Exhibit B-12, BCUC IR 2.161.3; Exhibit B-17, ICG IR 2.8.1.
[231] Exhibit B-12, BCUC IR 2.162.1.
[232] Exhibit B-12, BCUC IR 2.161.3.
[233] ICG Argument, at pp. 7-8.

allowed ROE would be impermissible retroactive ratemaking[234] as it would be unwinding the approved rates for 2018. ICG's argument has no merit, would be an error of law and must be rejected.

C. INCREMENTAL FUNDING REQUIRED

1. O&M WAS NOT DEFERRED OR UNDERSPENT DURING 2014-2019 PBR PLANS

147. CEC and BCOAPO argue that incremental funding would not be required if FEI had not deferred or "underspent" O&M during the 2014-2019 PBR Plans.[235] As set out in Part Two, Section A 3, of this Reply Submission, it is incorrect to describe FortisBC's O&M savings as "underspending". Fortis did not underspend or defer O&M spending, but achieved O&M savings through its broad based approach to productivity and major productivity initiatives as was expected by the BCUC when it approved the 2014-2019 PBR Plans. Customers received the benefit of those savings in lower rates and they have been incorporated into the proposed Base O&M by using 2018 actual O&M as the starting point.

148. Contrary to the assertions of CEC and BCOAPO, FortisBC's incremental funding requests are required to address the challenges and issues of the changing operating environment that have surfaced only in recent years. FortisBC provided extensive evidence on the significant changes in its operating environment and explained how these changes are driving its incremental funding requests.[236] FortisBC justified the need for each incremental funding at this time, and each must be assessed on its merits.

149. The CEC and BCOAPO's assertions that the Utilities inappropriately deferred or underspent O&M disregards the presumption of good faith, are in conflict with the extensive evidence on the record, and should be rejected.

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[234] E.g. in *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 (at para. 71), the Supreme Court of Canada states: "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)." At Tab 1 of the Book of Authorities.

[235] CEC Argument, p. 17; BCOAPO Argument, pp. 13-14.

[236] Exhibit B-1, Application, pp. B-3 to B-23 and C-17 to C-50.

2. INCREMENTAL FUNDING IS NECESSARY FOR BASE O&M TO REFLECT COSTS TO SERVE CUSTOMERS

150. In reference to FEI's incremental funding, the CEC submits "that FEI should not be seeking funding for individual projects which in the CEC's view has been part of the rationale for moving away from cost of service ratemaking in the first place."[237] This submission to the effect that COS adjustments should not be made to the Base O&M is in direct contradiction to the CEC's own view that Base O&M should be set on a COS approach.[238] FortisBC's incremental funding requests are based on a COS approach, as FortisBC is seeking to set a reasonable starting point for the Proposed MRPs that reflects its cost to serve customers. Without making such adjustments, the Utilities would not have a reasonable opportunity to recover their prudently incurred costs, including a fair rate of return.

3. COST-EFFECTIVE METRICS FOR INCREMENTAL FUNDING NOT NEEDED

151. CEC opposes incremental funding because it "does not find metrics that will be reported and can be utilized to determine the cost/benefit of the spending.[239] The CEC's view that all spending needs to be proven to be cost effective based on pre-determined metrics is not a requirement of the UCA or reflected in either COS or PBR type ratemaking approaches. Nor is it practical. The requirements under sections 59-61 of the UCA for setting the Base O&M can be summed up as ensuring that the Utilities will have a reasonable opportunity to recover their prudently incurred costs, including a fair rate of return, while ensuring customers pay only just and reasonable rates. FortisBC's proposed incremental funding is designed to accomplish this.

4. FLOW THROUGH TREATMENT OF CONTROLLABLE COSTS UNDERMINES INCENTIVES OF PLAN

152. The CEC argues for flow-through treatment of adjustments (bad debt, FAES overhead recoveries, NGIF Funding for FEI; and manual meter reading, FHI management fee and FI corporate services for FBC) and all incremental funding, based on its view that costs may not

[237] CEC Argument, p. 19, para. 130.
[238] CEC Argument, p. 54.
[239] CEC Argument, p. 18, para. 127.

increase with inflation and growth.[240] CEC argues that costs that increase greater than the average may also be removed from the Base.[241] The implication is that only costs that increase at the "average" rate of inflation and growth should be included in the Base. FortisBC does not agree with the CEC's assessment of these costs, all of which will increase due to inflation and customer growth. For example, the drivers of the FHI management fee and FI corporate services for FBC are reflected in the Massachusetts formula, which includes revenues, payroll and capital assets.[242] These drivers will increase with inflation and customer growth.

153. More fundamentally, however, the CEC's position does not reflect a principled approach to incentive ratemaking. Principle 1 is that the "MRP should, to the greatest extent possible, align the interest of customers and the Utility; customers and the utility should share in the benefits."[243] Consistent with this principle, it is a basic tenant of incentive ratemaking that controllable O&M should be included in the Base so that the utility has an incentive to find efficiencies. This aligns the interests of customers and the utility and emulates competitive market forces.

154. The CEC's line-by-line approach to determine if each incremental cost is forecast to increase greater than or less than the inflation factors in the formula is without merit. If the formula were designed to mimic the forecast of every cost item, it would not be a formula. It is obvious that not all costs will increase at the "average" rate. There will be costs that increase at a rate greater than inflation and growth, and costs that increase at a rate lower than inflation and growth. Regardless, all controllable costs should be included in the Base. Removing costs from the formula and instead treating them as flow through reduces the incentive of the Utilities to manage controllable O&M costs and ultimately undermines the intent of the MRP to create an environment where the utilities are encouraged to initiate efficiencies. To maintain the integrity and incentive powers of the Proposed MRPs, as a general rule, controllable O&M should be included in the Base O&M.

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[240] CEC Argument, pp. 13-16 and p. 18, para. 119-121 and pp. 20-21.
[241] CEC Argument, p. 13, para. 93.
[242] Exhibit B-1-1, Appendix D5, p. 22, pdf p. 1281.
[243] Exhibit B-1, Application, p. C-1.

155. Finally, under neither PBR nor COS ratemaking has the BCUC previously approved deferral accounts for the costs covered by FortisBC's incremental funding requests. FortisBC submits that the CEC's submissions are not principled, but inappropriately seek to use flow through treatment to reduce the scope of the formulas in the Proposed MRPs.

5. EXOGENOUS FACTOR CRITERIA NOT RELEVANT TO SETTING BASE

156. The CEC argues that the incremental funding does not warrant "Z-Factor exceptional treatment".[244] The exogenous factor criteria are a mechanism to addresses unforeseeable and uncontrollable events that occur during the course of the MRPs. The exogenous factor criteria are not relevant to setting the Base O&M for a new MRP, because the Base is set using identified costs at the time of entering into a new MRP.

6. ADJUSTMENTS SHOULD BE REVIEWED INDIVIDUALLY ON THEIR MERITS

157. BCOAPO asserts that the 2019 Base O&M is "excessive"[245] and CEC also suggests that the BCUC can "find concerns" based on a high level view of the increase.[246] The CEC's suggestion that the BCUC can make a judgement based on the amount alone is inconsistent with its view that a COS approach is required to set the Base. FortisBC proposed each adjustment based on the changes in its operating environment and its costs to serve customers. With the proposed adjustments, the 2019 Base O&M provides a foundation for FortisBC's indexed-based O&M for the five-year test period based on the cost to serve customers. It is not reasonable to make a judgement about Base O&M on the amount alone, without considering the rationale for each adjustment to get that amount.

158. Despite its high-level comment, BCOAPO takes no issue with FEI's proposed starting point for Base O&M or most of FEI's adjustments to that starting point.[247] For example, BCOAPO supports FEI's proposals for incremental funding for Climate Action Partners and

[244] CEC Argument, p. 18, para. 123.
[245] BCOAPO Argument, pp. 12-13.
[246] CEC Argument, p. 30.
[247] BCOAPO Argument, pp. 12-16.

indigenous relations.[248] This underscores that each adjustment to the 2018 actual O&M should be reviewed individually on its merits.

D. FEI'S BASE O&M ADJUSTMENTS ADDRESS KNOWN CHANGES AND EVOLVING OPERATING ENVIRONMENT

159. The sections below address intervener submissions on particular proposed adjustments to FEI's 2018 actual O&M to arrive at the 2019 Base O&M.

1. UPDATE TO ALLOCATION OF LNG O&M COSTS

160. The CEC argues that LNG customers should be increasingly funding LNG O&M as sales increase.[249] FEI's LNG rates (Rate Schedule 46) are not the subject of this proceeding and are the subject of regulation.[250] However, FEI does have an incentive to increase LNG sales and all of the revenues from RS 46 are to the benefit of customers.[251]

2. CUSTOMER EXPECTATIONS - GENERAL

161. BCOAPO's view is that "given the size of the increase requested, previous plan O&M under-spending, and previous plan FEI over-earning, $2.80M is an appropriate base for this spending component as a base in 2019." FEI fundamentally disagrees with BCOAPO's characterization of this issue. FEI's reply to each of BCOAPO's supporting points is as follows:

(a) The mere size of the incremental funding, without reference to what the funding is for and why it is needed, is not a reason to deny the request. A request - either large or small - may be warranted on the evidence. This is borne out by the fact the BCOAPO actually supports some of FEI's requests, such as incremental funding for Climate Action Partners.

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[248] BCOAPO Argument, p. 15.
[249] CEC Argument, p. 16, para. 109.
[250] Order in Council 557, B.C. Regulation 245/2013, deposited November 28, 2013, issuing Direction No. 5 to the BCUC, and effective December 12, 2013, as amended.
[251] Exhibit B-1, Application, p. C-114.

(b) As addressed in Part Two, Section A 3, of this Reply Submission, there was no "O&M under-spending". Further, BCOAPO has not identified anything that FEI should have spent more money on in earlier years or countered FEI's evidence for why it should not be increasing its focus in the area of Customer Expectations as it has proposed. FEI has been increasing its spending in this area since 2014[252] and, with this Application, has requested incremental funding based on its needs for the 2020-2024 test period.

(c) As addressed in Part Two, Section A 3, of this Reply Submission, it is incorrect to claim that there was "over-earnings". FEI's achieved ROE was earned in accordance with a BCUC-approved ratemaking plan, the design of which was to provide FEI an incentive to become more efficient and achieve savings, which FEI did and customers received the benefit of the savings in the form of lower rates. Furthermore, FEI's achieved ROE is irrelevant to the incremental funding requests that FEI has proposed.

162. BCOAPO's factually and legally incorrect assertions about under-spending and over-earning are distractions from the real issue before the BCUC, which is whether the incremental funding is justified. FEI addressed the need for this incremental funding on pages 119 to 123 of its Final Argument, with the evidence cited in the footnotes. FEI specifically explained why BCOAPO's proposed $2.80 million is not sufficient, as follows:[253]

> As outlined in Section B1 of the Application, FEI's operating environment continues to evolve with a number of federal, provincial and local government policies that will constrain and restrict the use of natural gas as they are implemented. Although FEI has had recent success in customer retention and attachments during the Current PBR Plan period and customer desire for natural gas, climate policy from all levels of government is expected to have a negative impact on FEI's ability to continue to attach and retain customers during the MRP period.

[252] Exhibit B-1, p. 119.
[253] Exhibit B-10, BCUC IR 1.30.5.

> In addition, policy makers at the municipal level are turning to even more ambitious low carbon strategies that are intended to accelerate the transition ahead of CleanBC's target for all new buildings to be "net zero energy ready" by 2032. For example, at the spring 2019 Lower Mainland Local Government Association Conference, members passed a resolution asking the province to incorporate GHG intensity targets directly into the BC Building Code. This is coupled with municipalities exercising authority via re-zoning applications to accelerate the move away from natural gas. Additionally, a growing number of municipalities are now vigorously investigating existing building retrofit strategies at the community scale that align with their low or zero carbon strategies for new buildings, which poses further challenges for FEI to retain existing customer base.
>
> Accordingly, the 2019 Base O&M funds will not be sufficient for FEI to address the challenges it faces over the MRP term. FEI has therefore requested an additional $1.2 million to enable it to compete in the BC energy market space and address the challenges FEI faces in retaining and growing its customer base.
>
> Increasing FEI's investment in programs, incentives and initiatives under the Connect to Gas umbrella that allows FEI to educate, inform and influence customers and stakeholders to continue to use natural gas will better position FEI to continue to provide affordable energy to British Columbians.

163. BCOAPO acknowledges the urgency of the threat posed by Climate Change[254] and does not contradict any of FEI's rationale and evidence to support its incremental funding request in this area. FEI submits that BCOAPO's incorrect assertions should be given no weight and that its incremental funding for Customer Expectations should be approved.

3. CUSTOMER EXPECTATIONS - CONNECT TO GAS

164. FEI cannot agree with BCSEA's submission that FEI's incremental funding for Connect to Gas activities should not be approved because they are counter to carbon reduction policies.[255] FEI has a key role to play in moving to a low-carbon, renewable energy future,[256] and this role is

[254] BCOAPO Argument, p. 15.
[255] BCSEA Argument, pp. 19-20.
[256] Exhibit B-1, Application, p. A-12; Exhibit B-1-1, Appendix A5.

compatible with continuing to give customers the choice to adopt and enjoy the benefits of natural gas.[257] FortisBC explained the need in this area as follows:

> Beyond FEI's statutory obligations to serve, FEI's efforts to acquire new customers are also in response to customer demand. As demonstrated by Figures B2-1 and B1-2 on page B-13 of the Application showing FEI customer attachments and residential market share, there is currently a desire and preference from customers for natural gas. Customers want natural gas for heating and hot water, but also for convenience appliances. FEI has seen burner tips per new residential attachments that average four appliances per new residential customer. Cost savings and affordability are also very important to customers. Natural gas is substantially less expensive than other energy sources and the cost savings from using natural gas helps customers manage affordability challenges they may face. Further, FEI's efforts to attract and retain customers are beneficial to existing customers. The addition of new customers helps spread fixed cost over a greater base, helping to offset other rate pressures. FEI therefore believes that it should continue to invest resources into the addition of new and retention of existing customers.
>
> FEI's efforts to attract and retain customers have not detracted from its focus in other areas, and FEI has, at the same time, continued to pursue and investigate new energy solutions. As noted in the Application, FEI provides a range of energy solutions that are aligned with Provincial Government direction and mandates around reducing emissions. For example, FortisBC's programs help convert customers to cleaner sources of energy in transportation and buildings, provide renewable energy options for new and existing customers, and reduce emissions through its DSM programs by increasing efficiencies.

165. As addressed on pages 119 to 122 of FortisBC's Final Argument, FEI needs to support the addition of new customers and foster customer retention to offset the impact of the increasingly complex market and carbon reduction policies that will restrict the use of natural gas in other areas. FEI's Connect to Gas activities also support conversions from higher GHG emitting resources.[258] Customers will directly benefit from Connect to Gas activities as increasing load on the system will reduce rates or mitigate rate pressures in other areas.

[257] Exhibit B-10, BCUC IR 1.3.6.
[258] Exhibit B-1, Application, pp. C-31 to C-32.

4. CUSTOMER ENGAGEMENT

166. Regarding FEI's incremental funding for Customer Engagement, BCOAPO supports FEI's incremental funding for Climate Action Partners, but submits that "absent any details, incremental spending of almost four times the 2018 total engagement spending is excessive: if any portion is added to the base, BCOAPO suggests a figure of $0.500M would be more appropriate."[259] Contrary to the BCOAPO's submission, however, FEI in fact put forward details of its incremental funding requests, which it addressed at pages 123 to 126 of its Final Argument, with references to evidence in this proceeding. BCOAPO does not cite any evidence or make any argument that contradicts FEI's rationale or evidence on the need for the incremental funding in the area of Customer Engagement. Specifically, BCOAPO does not provide any reason for why the incremental funding is "excessive" or why its proposed $0.5 million would be appropriate. In FEI's submission, BCOAPO's argument is not supported and should be given no weight.

5. SYSTEM OPERATION, INTEGRITY, AND SECURITY

167. BCOAPO does not say whether it supports or opposes FEI's incremental funding requests in the area of system operation, integrity and security, but asserts that if FEI had not "underspent" during the 2014-2019 PBR Plan, then it might not need the incremental funding.[260] FEI disagrees with the characterization that it "underspent" O&M, and has addressed this generally in Part Two, Section A 3, of this Reply Submission. Furthermore, it would have been contrary to the interest of customers for FEI to spend more than it needed in past years. Rather than needlessly spending dollars during the 2014-2019 PBR Plans, FEI sought out efficiencies and achieved savings which resulted in lower rates for customers. FEI has now transparently put forward its incremental funding requests as it looks out towards the next five years in an operating environment that is changing quickly and significantly. FEI's funding requests should be evaluated on their merits.

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[259] BCOAPO Argument, p. 15.
[260] BCOAPO Argument, p. 16.

168. FEI provided a detailed explanation of each incremental funding request for system operation, integrity and security.[261] Its requests related to integrity management, for example, are driven by increasing age of its system and evolving industry practice and regulatory expectations.[262] FEI has kept the BCUC informed of the increasing needs in this area through the recently approved Inland Gas Upgrades Project and its consultation with respect to the Transmission Integrity Management Capabilities project.[263] It also should not be a surprise that FEI has increasing needs in the area of cyber security.[264] In short, contrary to BCOAPO, FEI has explained why it is seeking incremental funding now, and shown why the funding is needed and reasonable at this time.

169. FEI submits that BCOAPO's unsubstantiated allegations of "under spending" are not helpful and should be given no weight.

E. FBC'S BASE O&M ADJUSTMENTS ADDRESS KNOWN CHANGES AND EVOLVING OPERATING ENVIRONMENT

170. The sections below address intervener submission on particular proposed adjustments to FBC's 2018 actual O&M to arrive at the 2019 Base O&M.

1. MANDATORY RELIABILITY STANDARDS (MRS)

171. BCOAPO proposes that the adjustment for Assessment Report ("AR") No. 8 and No. 10 be $1.51 million, which is $30 thousand less than FBC's proposed $1.54 million.[265] The difference is attributable to the fact that FBC's forecast for compliance with AR No. 10 in 2020 was in 2019 dollars, and thus does not need to be reduced by the 2020 inflation factor as submitted by BCOAPO.[266]

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[261] FortisBC Final Argument, pp. 128-133.
[262] FortisBC Final Argument, pp. 128-129.
[263] Exhibit B-1, Application, p. 38.
[264] FortisBC Final Argument, p. 130.
[265] BCOAPO Argument, p. 8.
[266] Exhibit B-1, Application, p. C-45; Exhibit B-10, BCUC IR 1.36.4.

2. FHI MANAGEMENT FEE AND FHI CORPORATE SERVICES

172. BCOAPO calculates that the adjustment to the 2019 Base O&M for the FHI management fee should be $3.339 million instead of FBC's proposed $3.374 million,[267] and the adjustment for the FHI Corporate Services should be ($0.306 million) instead of FBC's proposed ($0.308 million).[268] FBC has explained how it started with the 2020 forecast of these items and then built up the 2019 Base O&M through adjustments.[269] BCOAPO's approach is another way in which the 2019 Base O&M could have been calculated for these amounts, but it does not result in a material difference and should not be adopted.

173. The CEC argues that "the variation in the actual costs and allocation percentages suggests that the costs could be afforded Flow Through treatment".[270] As FortisBC submits above, treating controllable O&M costs as a flow-through is contrary to the principles of PBR ratemaking and would weaken the incentive properties of the Proposed MRPs. FBC's corporate services fees have not previously been treated as a flow-through and have been part of Base O&M in past PBR plans, and there is no reason why the approach should change at this time. The nature of the corporate services provided over the term of the Proposed MRPs is consistent with past years.[271] While there is variation in the actual costs and allocation, the amounts are relatively minor.[272] Finally, the allocation of corporate services costs will increase in line with the cost allocation drivers in the Massachusetts formula, including revenues, payroll and capital assets,[273] which are themselves in driven by inflation and customer growth.[274] These costs should therefore remain in Base O&M.

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[267] BCOAPO Argument, p. 9.
[268] BCOAPO Argument, p. 9.
[269] Exhibit B-10, BCUC IR 1.36.4.
[270] CEC Argument, para. 143.
[271] Exhibit B-1, Application, pp. D-42, D-44 and D-49.
[272] Exhibit B-1, Application, p. D-51; Exhibit B-1-1, Appendix D5, p. 31.
[273] Exhibit B-1-1, Appendix D5, p. 22, pdf p. 1281.
[274] Exhibit B-1-1, Appendix D5, p. 9 and p. 29.

3. INCREMENTAL FUNDING FOR CUSTOMER ENGAGEMENT

174. BCOAPO submits that the BCUC should not approve both the incremental funding for customer engagement and the customer engagement Targeted Incentive.[275] However, there is no overlap between the incremental funding and the Targeted Incentive for customer engagement. FortisBC clarified this apparent misunderstanding in response to IRs as follows:[276]

> As noted in Section C8.3.5 of the Application, the Customer Engagement incentive relates to increasing customer adoption of digital service channels, including the use of email, mobile applications, and on-line account services. In contrast, the incremental funding requests noted above are specific to communications channels, such as FortisBC's website and social media accounts that are not measured by the Customer Engagement incentive. The interactions that are measured as part of the Customer Engagement incentive are managed by our Customer Service team, while the incremental funding for Customer Expectations and Engagement supports broader communication with the general public on various topics and is managed by our Corporate Communications and External Relations teams.

175. Thus, the incremental funding is not for initiatives to increase use of the service channels that are the subject of the Targeted Incentive.

4. INCREMENTAL FUNDING FOR NETWORK OPERATION APPRENTICE PROGRAM

176. BCOAPO contends the Network apprentice funding of $0.197 million is not sufficiently justified based on historical expenditures in this area.[277] FBC has explained that this incremental funding for the Network Operations Apprentice Program includes the non-labour cost for apprentice development and is composed of annual trade school fees, expenses, personal protective equipment required for the program, tools and recruitment costs.[278] The increase in costs to develop apprentices noted by BCOAPO is driven by the increased need for ongoing

[275] BCOAPO Argument, p. 10.
[276] Exhibit B-10, BCUC IR 1.29.2.
[277] BCOAPO Argument, p. 11.
[278] Exhibit B-10, BCUC IR 1.39.3.

training to help transition FBC through the current period of high retirements and transitions.[279] FBC has managed and mitigated the risks associated with employee turnover through proactive workforce planning, including training, transition planning, and knowledge transfer across the Companies.[280] FBC explained:[281]

> In the case of FBC, a similar situation exists concerning transition and succession for employees in the Operations area, but FBC does require some incremental O&M funding as discussed on page C-48 of the Application. In its incremental O&M funding requests, FBC has included funding for the Network Operations Apprentice program in part to address the issue. FBC plans to hire additional apprentices to help develop enough International Trade Administration apprentices to meets its anticipated needs. The additional apprentices will also help with transition and succession for the Operations area at FBC.

177. Given the number of retirements, FBC needs to produce approximately three apprentices per year.[282] Proper training is needed to ensure that these apprentices are properly skilled and available to complete work on a cost effective basis and in a timely manner.[283]

[279] Exhibit B-10, BCUC IR 1.22.6 and Exhibit B-12, BCUC IR 2.168.1: "FBC estimates that approximately 60 employees will retire during the proposed MRP term, and of those 60 employees, 40 retirements are expected to occur within the Operations department."
[280] Exhibit B-12, BCUC IR 2.168.3.
[281] Exhibit B-10, BCUC IR 1.22.6.
[282] Exhibit B-5, BCOAPO IR 1.50.1.
[283] Exhibit B-10, BCUC IR 1.39.3.

PART FIVE: FEI'S BASE GROWTH CAPITAL PER GROSS CUSTOMER ADDITION

178. The only intervener to comment on FEI's proposed Base Growth capital was the CEC. The CEC submits that FEI's Base Growth capital should not be augmented to a higher level.[284] The CEC's rationale for this submission is not clearly articulated, but appears to be rooted in its general opposition to the use of a formulaic approach with an inflation factor.[285] FortisBC responds to the CEC's general position on incentive-based ratemaking in Part Two of this Reply Argument and responds to the CEC's submissions on the design of the indexed-based approach to FEI's Growth capital in Part Three of this Reply Argument.

179. In reply to the CEC's assertion that no adjustments should be made to FEI's Base Growth capital,[286] it is essential that the 2019 Base Growth capital form a reasonable starting point for FEI's Growth capital formula. Otherwise, growth capital will remain underfunded for the entire Proposed MRP term and would compromise FEI's opportunity to earn a fair return. A reasonable starting point is a Base amount that reflects FEI's Growth capital unit costs at the outset of the Proposed MRPs. This will set the base line by which FEI's performance will be measured for the next five years. Accordingly, FEI's approach to setting the Base Growth capital has essentially been a COS approach. FEI starts with the 2016-2018 average unit cost and then makes two adjustments to calibrate the historical three-year average to more accurately reflect FEI's unit costs going into the MRP. FEI has filed detailed evidence on these adjustments which has been rigorously tested in this proceeding. FEI's adjustments are reasonable and supported by evidence of FEI's actual Growth capital unit costs. This topic was addressed in Part Five of FortisBC's Final Argument, pages 148 to 153.

180. The CEC has provided no cogent response to FEI's evidence and submissions on FEI's Base Growth capital. FEI submits that CEC's objection to FEI's proposed adjustments is unsupported and should be rejected.

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[284] CEC Argument, p. 48, para. 325.
[285] CEC Argument, p. 47.
[286] CEC Argument, p. 48, para. 325.

PART SIX: REGULAR CAPITAL FORECAST IS REASONABLE AND REFLECTS FORTISBC'S CAPITAL REQUIREMENTS

181. In this part, FortisBC responds to the submissions of ICG, CEC, and BCOAPO on FortisBC's forecast of Regular capital.

A. FORTISBC'S FIVE YEAR FORECAST IS BASED ON A ROBUST PLANNING PROCESS AND DOES NOT INCORPORATE AN "UNCERTAINLY PREMIUM"

182. Despite FortisBC's evidence to the contrary, BCOAPO takes the view that FortisBC's managers must have implicitly added an "uncertainty premium" in the Regular capital forecast.[287] BCOAPO's submission is based on Mr. Bell's experience at other companies.[288] Mr. Bell's evidence regarding his personal experience at other companies has marginal relevance. FortisBC follows its own practices and not Mr. Bell's or those of the companies at which Mr. Bell used to work.

183. FortisBC described its capital planning process in detail in this proceeding and explicitly denied that any "uncertainty premium" is included in its forecast. FortisBC summarized in its Rebuttal Evidence as follows:[289]

> FortisBC has not included any "premium" in its capital forecasts for future uncertainty.
>
> FortisBC agrees that the longer the forecast period, the more uncertain the forecast becomes, but the result of this can go both ways since actual capital requirements may be either more or less than forecast. FEI's and FBC's Capital Planning Process is described in Section C3.2 of the Application. The forecasts provided by FEI and FBC were created using a bottom-up approach to quantify system needs based on identified projects and programs that are planned for execution. Detailed descriptions of the methods used for forecasting non-formulaic capital expenditures during the Proposed MRP term have been provided in various IR responses (for example, BCUC IRs 1.10.6, 1.46.5, 1.57.7, 2.202.4). As described in the response to BCUC IR 1.46.5, there is less certainty

[287] BCOAPO Argument, p. 53.

[288] Exhibit C7-5, p. 11. Mr. Bell states: "Further, when I have been involved in forecasting, the further out one forecasts, the less reliable the forecast is, and the more an uncertainty premium one puts into the forecast."

[289] Exhibit B-23, Rebuttal Evidence, Q&A 19.

> in the estimates for projects that are planned for execution more than two years in the future, and that uncertainty is reflected by an AACE Class 4-5 cost estimate for the project. In recognition of the uncertainties that are inherent in a five-year forecast, which FortisBC explained in detail in response to BCUC IR 1.51.5, FEI and FBC have proposed to review their 2023 and 2024 forecasts during the Annual Reviews for 2023 rates.

184. BCOAPO's submission that managers must have nonetheless included an uncertainty premium is baseless. The evidence is that FortisBC's planning process is robust and that uncertainty is appropriately addressed in estimated contingency consistent with Association for the Advancement of Cost Engineering International standards,[290] as well as the level of accuracy of the cost estimate of projects. FortisBC will also address the uncertainty in the forecast by reviewing the 2023 and 2024 forecasts in 2022.

185. On the other end of the spectrum, ICG argues that capital forecasts often decline during a five-year period because capital projects have not yet been fully considered in the latter years of the forecast period.[291] As noted above, FortisBC acknowledges the uncertainties inherent in a five-year forecast and proposes to review the 2023 and 2024 forecast during the Annual Reviews for 2023 rates.

186. The CEC does not accept FBC's forecast "without any metrics to evaluate the potential control of the capital expenditures and their benefits".[292] The CEC has not explained what metrics it is referring to and its position is obscure. FBC has filed evidence to demonstrate the need for its forecast Regular capital expenditures. The CEC had the opportunity to ask questions on the benefits of the capital expenditures if further explanation was needed, and ask IRs on how FBC will control capital expenditures. Under the Proposed MRPs, FBC will have an incentive to keep its actual capital expenditures within this forecast amount, similar to a COS approach, except that variances will be shared 50/50 with customers pursuant to the Earnings Sharing Mechanism.

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[290] Exhibit B-10, BCUC IR 1.53.1.
[291] ICG Argument, p. 11.
[292] CEC Argument, p. 46, para. 313.

187. FortisBC submits the unsupported claims made by interveners about its Regular capital forecasts are without any evidentiary support and must be given little, if any, weight in comparison to FortisBC's detailed evidence that has been tested in this proceeding. FortisBC has created a robust forecast of Regular capital expenditures and its evidence has been the subject of rigorous testing in this proceeding. No material issues were raised in this proceeding with respect to any specific aspect of FortisBC's forecast through IRs or in the submissions of interveners. FortisBC submits that the evidence overwhelming supports the determination that its Regular capital forecast is reasonable and reflective of FortisBC's requirements for the 2020-2024 test period.

B. FORECAST APPROACH TO CAPITAL IS REASONABLE AND MAINTAINS INCENTIVE PROPERTIES OF PROPOSED MRPS

188. ICG argues that there should either be formulas or COS for both Capital and O&M.[293] BCOAPO similarly argues that there are trade-offs between O&M and capital and moving to a forecast approach for aspects of capital mutes the incentive properties of PBR.[294] FortisBC's proposed forecast approach to Regular capital is in response to the universally acknowledged challenges with managing capital under the formula during the 2014-2019 PBR Plans.[295] A forecast approach to capital has been used in MRPs in other jurisdictions, such as Ontario, Quebec, and New York.[296]

189. The Proposed MRPs address the concern regarding trade-offs between O&M and Capital by including the same earning sharing mechanism for both indexed-based O&M and FEI's Growth capital, and forecast Regular capital. In its Rebuttal Evidence, FortisBC explained this feature of the Proposed MRPs and BCOAPO's expert's apparent confusion on this topic:[297]

> Under FortisBC's Proposed MRPs, the variance between forecast capital and actual capital is still subject to the earnings sharing mechanism. This means that

[293] ICG Argument, pp. 12-13.
[294] BCOAPO Argument, p. 53. See also MoveUP Argument, at p. 19.
[295] FortisBC Final Argument, pp. 155-160.
[296] Exhibit B-1, Application, p. B-72; Exhibit B-1-1, Appendix C4-2; Exhibit B-7, CEC IR 1.11.2.
[297] Exhibit B-23, Rebuttal Evidence, p. 26.

> any achieved capital and O&M savings would be subject to the same treatment and that there is no inconsistency in their associated incentives.
>
> Mr. Bell conflates tradeoffs between capital and O&M spending with tradeoffs between the use of forecast and formulas in ratemaking. BCOAPO IR 1.24.4 asked whether a utility should trade-off capital and O&M expenditures to maximize efficiency. In response, FortisBC explained that as long as the incentives between O&M and capital are similar, trade-offs between O&M and capital may be used to increase overall efficiency. In the Proposed MRPs, both O&M and capital are subject to the same incentive mechanism and therefore any trade-off between O&M and capital expenditures that can increase overall efficiency will be pursued.
>
> FortisBC's response to BCOAPO IR 1.24.4 also explained that, irrespective of the methodology used to determine the capital and O&M expenditures (forecasts or formulas), certain innovative O&M-intensive solutions disrupt the balance of incentives. In these cases, more innovative regulatory and accounting treatments may be needed (examples provided are non-wire and non-pipe solutions as well as on-premise versus cloud-based computing systems). These innovative treatments are needed even if the capital expenditures were set using a formula since using a formula does nothing to balance the incentives associated with these projects.
>
> In summary, none of the points made in FortisBC's response to BCOAPO IR 1.24.4 have any bearing on tradeoffs between the use of forecast and formulas. The incentive issues associated with O&M versus capital spending arise from factors such as implications of capitalization versus expensing for earnings, the ability of certain O&M programs and practices to defer (but not eliminate) the need for capital replacement and new capital expenditures, and other factors that do not arise when considering the use of forecast versus formula.

190. FortisBC also explained in its Rebuttal Evidence why the claim that the use of a forecast approach dulls the incentives of the Proposed MRPs is incorrect, as follows:[298]

> Mr. Bell's arguments regarding both the reduced risks to the Utilities and reduced overall incentives for the MRPs are misguided.
>
> Mr. Bell ignores several important factors that have been explained in FortisBC's Application and responses to information requests (e.g., BCUC IR 1.17.8 and 1.19.8). A summary is provided below:

[298] Exhibit B-23, Rebuttal Evidence, p. 25.

- Although the majority of capital is forecast, the variance between the forecast and actual amount is still subject to the earnings sharing mechanism. This means that the Utilities have incentives to manage their capital expenditures.

- Contrary to Mr. Bell's claim regarding reduced risks to the Utilities, the elimination of the capital dead band as a safeguard mechanism increases the risks and rewards of the Proposed MRPs. This is particularly true for FEI's growth capital since, unlike other capital categories, there is no opportunity to update the related funding in year three of the Proposed MRPs.

- The proposed changes to the Flow-through deferral account will also increase the Plans' risks and rewards and therefore the incentives. This is because cost items such as depreciation expense that are currently subject to flow-through treatment will be subject to the earnings sharing mechanism.

- The Proposed MRPs do not change the balance of risks and rewards in either the Utilities' or the customers' favour since the Proposed MRPs continue to maintain the 50/50 symmetric earnings sharing mechanism.

- The proposed efficiency carryover mechanism will increase the incentives in the last two years of the Proposed MRPs.

- The more stringent service quality indicator targets will increase the risk of penalties.

In summary, due to the reasons listed above, the proposed changes do not reduce the incentive properties of the Proposed MRPs nor would they change the balance of risk and rewards in the Utilities' favour.

191. In their submissions, neither BCOAPO nor ICG make any substantive response to FortisBC's evidence and argument. FortisBC submits that BCOAPO and ICG claims should be rejected.

C. INCENTIVES AROUND FORECAST REGULAR CAPITAL IS AN IMPORTANT ASPECT OF THE PROPOSED MRPS

192. CEC states at page 44 of its submission that it does not support inclusion of capital as a forecast against which "underspending generates earnings".[299] ICG similarly argues that "cost of service forecast should not be accompanied with PBR incentives" but should have COS incentives.[300] FEI's proposal that there be incentives around the forecast Regular capital (i.e. that it not be a flow through) is an essential feature of the Proposed MRPs that is necessary to maintain the incentive properties of the plan.

193. As discussed in Part Two, Section B 1, of this Reply Submission, ICG's understanding of the incentives under COS regulation is incorrect. Under COS regulation, the shareholder receives 100 percent of the benefit of spending under forecast and 100 percent of the cost of spending above forecast (all else equal).[301] In comparison, under the Proposed MRPs, any variances are shared 50/50 with customers pursuant to the Earning Sharing Mechanism.

194. It is important for the working of the Proposed MRPs that there be incentives related to the forecast of Regular capital. Having incentives around the forecast helps maintain the incentive properties of the Proposed MRPs and guards against improper incentives to trade-off between O&M and capital.[302]

195. The CEC's position is that Regular capital should be a flow through because there isn't "a better understanding of whether or not the Utility is actually becoming more efficient".[303] FortisBC believes that its capital expenditures are prudent, cost efficient and in the best interests of customers.[304] There is, however, no requirement under the UCA or otherwise that FortisBC needs to demonstrate on a forecast basis that it is "actually becoming more efficient".

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[299] CEC Argument, p. 44.
[300] ICG Argument, pp. 12-13.
[301] Exhibit B-1-1, Appendix C4-3, p. 2.
[302] Exhibit B-23, Rebuttal Evidence, pp. 25-26.
[303] CEC Argument, p. 49.
[304] Exhibit B-7, CEC IR 1.11.3.

It is challenging to attempt to demonstrate the cost efficiency of capital spending for a number of reasons, as explained by FortisBC as follows:[305]

> As discussed on page C-55 of the MRP Application, due to the non-repetitive nature of some capital work, efficiencies and savings achieved in one project are not necessarily applicable to the next project, and may be negated by cost pressures elsewhere. Further, not all capital projects result in quantifiable financial benefits and instead are completed for other reasons such as to maintain safety and reliability of the delivery system.
>
> This makes the task of identifying appropriate metrics to measure cost efficiency for capital spending on a cost-benefit basis challenging.
>
> Despite the challenges noted in identifying appropriate metrics, FortisBC believes that it is incurring capital expenditures in a prudent manner and that are considered cost efficient and in the best interests of ratepayers. This is evidenced by the robust Capital Planning Process and the Asset Investment Planning Process that the Companies use and as described on pages C-52 to C-55 of the Application. As part of the proposed MRPs, interveners will also be provided the opportunity as part of the Annual Review process to review the Companies' capital expenditures.

196. In addition, like the 2014-2019 PBR Plans, what the Proposed MRPs create is an environment where the Utilities will have an incentive to become more efficient.[306]

197. FortisBC does not recommend treating all Capital as a flow through as the Utilities would have less incentive to pursue capital efficiencies and there would be no penalty to the Utilities for over-spending, as the revenue requirements impacts would be fully recovered from customers by way of the flow-through mechanism.[307] The BCUC has never treated all of FortisBC's Regular capital as a flow through, whether under PBR or COS ratemaking. The CEC's proposal is not supported, and would significantly compromise the balance and incentive properties of the Proposed MRPs. FortisBC submits the CEC's recommendations should be rejected.

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[305] Exhibit B-7, CEC IR 1.11.3.
[306] E.g., Exhibit B-7, CEC IR 1.1.1.
[307] Exhibit B-10, BCUC IR 1.64.2 and 1.68.1; Exhibit B-7, CEC IR 1.6.6 and 1.11.3.

D. FORECAST APPROACH WILL FACILITATE EXPLANATION OF VARIANCES

198. CEC incorrectly claims that FEI and FBC will not know the cause of variances in its capital expenditure, stating: "With the FEI and FBC proposals there is no way to know what is causing the underspending or overspending, because FEI and FBC do not have sufficient analytical capabilities to demonstrate the result."[308] In fact, a benefit of FortisBC's forecast approach to Regular capital is that FEI and FBC will be able to determine the reasons for variances. With the forecast approach, FortisBC will be able to compare actual spending to its forecast and explain variances.

E. FORECAST APPROACH IS WARRANTED FOR FBC'S REGULAR CAPITAL

199. ICG argues that FBC's Regular capital isn't lumpy and therefore should be subject to formula.[309] Contrary to the ICG's submission, the variability in FBC's 2020-2024 capital is demonstrable. The 2020-2024 average (excluding major projects as is appropriate) is $88.4 million. The annual expenditures vary from $93.5 million (+6.45% greater than the average) to $82.2 million (-6.44% less than the average), which is a range of approximately 13% between years.[310] This demonstrates why attempting to fashion a formula for capital expenditures is challenging.

200. BCOAPO argues that FBC should return to a formulaic approach to FBC Growth capital.[311] FBC has addressed above each of BCOAPO's reasons for this request, including that there is no "uncertainty premium" in the forecast, that having incentives around both Base O&M and the capital forecast guards against any inappropriate trade-offs between O&M and Capital, and the incentive properties of the Proposed MRPs are maintained. Further, FBC's experience under the 2014-2019 PBR Plans was that the Capital formula drivers did not properly fund FBC's actual capital expenditure requirements, resulting in FBC's in ability to keep capital expenditures under the formula amounts. The challenges faced by FBC in managing

[308] CEC Argument, p. 49, para. 328.
[309] ICG Argument, pp. 12-13.
[310] Exhibit B-10, BCUC IR 1.51.1.
[311] BCOAPO Argument, p. 53.

capital expenditures on a formula-driven basis are discussed in Section B2.3.2 and in Appendix B8-3. Given these challenges, which were recognized by interveners during the 2014-2019 PBR Plan term,[312] a formula is not the most appropriate approach for FBC's Growth capital for the Proposed MRPs. The extent of capital spending variability for FBC over the term of the MRPs, as shown in the responses to BCUC IR 1.51.1,[313] demonstrates how a formula would continue to be challenging. Unlike FEI's Growth capital, electric system capacity additions are generally comprised of discrete projects sufficient in size to meet future load growth, as opposed to small incremental additions. FBC's forecast of Growth capital shows significant variation from year to year.[314] Therefore, FBC's proposal to use a forecast approach for its Growth capital is a reasonable approach.

F. FBC'S FORECAST OF REGULAR CAPITAL IS REASONABLE

201. ICG argues that increases in FBC's sustainment capital should not be approved until SAIDI and SAIFI justify an increase or root cause analysis of outages shows a direct correlation to equipment condition.[315] ICG's submission has no merit and is directly in conflict with the expectation that FBC is to maintain service quality as measured by its SQIs, including SAIFI and SAIDI. FBC presented its forecast Sustaining capital in detail, including the need for specific projects.[316] The need for FBC's Sustaining expenditures was available for exploration in this proceeding, and FBC addressed all issues raised in IRs. In particular, FBC has shown that the great majority of the increase in the Proposed MRP term compared to the 2017-2019 period is driven by discrete and non-recurring projects.[317] These non-recurring projects and programs are driven by increasing demand for electricity, by the need to upgrade or replace infrastructure to ensure safe and reliable service, and by legislative requirements. The need to complete these forecast non-recurring projects or programs has been extensively canvassed.[318] While FBC is cognizant of the rate impacts of higher capital spending, it is unable to

[312] Exhibit B-10, BCUC IR 1.19.4.
[313] Exhibit B-10, BCUC IR 1.51.1.
[314] Exhibit B-1, Application, p. 82.
[315] ICG Argument, at pp. 11-12.
[316] Exhibit B-1, Application, Section 3.4; FortisBC Final Argument, pp. 178-202.
[317] Exhibit B-23, Rebuttal Evidence, p. 19.
[318] Exhibit B-23, Rebuttal Evidence, Table 2, pp. 20-22.

compromise its ability to serve load, maintain reliability, ensure public and employee safety, and meet legislative requirements.[319]

202. BCOAPO submits that the scope and spending for the Summerland Transformer Replacement project should be reviewed as part of the Annual Review process prior to being incorporated into rates.[320] FBC's obligation under its wholesale supply contract with the District of Summerland is to increase supply capacity to bring future demand to or below 95 percent of the demand limit. Peak load at this wholesale delivery point to the District of Summerland is forecast to exceed 95 percent of the contract demand limit in 2021. Based on development information from the District of Summerland, it is unlikely that FBC will be able to significantly defer the Summerland Transformer Replacement project.[321] Therefore, the project should be incorporated into the forecast spending at this time given that it is expected to proceed during the MRP term.[322]

G. FEI'S FORECAST OF CAPITAL IS REASONABLE

203. Interveners did not question any specific item of FEI's forecast of its Regular capital.

H. REVIEW OF FORECAST FOR 2023 AND 2024

204. As discussed on pages 200-201 of its Final Argument, FortisBC proposes to review its forecast capital for 2023 and 2024 in its Annual Review for 2023 rates. ICG makes the claim that this "will almost certainly result in capital expenditures that materially exceed the capital formula for the full term of the MRP."[323] This submission is not coherent. FBC is not proposing a capital formula, and there is no logical link between exceeding the formula (or forecast) and FortsBC's proposal to review the forecast for 2023 and 2024. FBC's review of its Regular capital forecast will provide an opportunity to address any uncertainty in the latter two years of the

[319] Exhibit B-23, Rebuttal Evidence, p. 19.
[320] BCOAPO Argument, p. 21.
[321] Exhibit B-12, BCUC IR 2.197.7.
[322] Exhibit B-12, BCUC IR 2.197.4
[323] ICG Argument, p. 12.

forecast. If FBC exceeds the forecast, then the shareholder will bear the burden of 50 percent of the overage during the term of the MRP. ICG's submission should be rejected.

I. EXOGENOUS FACTORS AND REGULAR CAPITAL FORECAST

205. BCOAPO submits that it is not clear if exogenous factor criteria would be applied to the capital forecast.[324] FortisBC's proposal is that the exogenous factor criteria would continue to apply to both capital and O&M as it did under the 2014-2019 PBR Plans. An exogenous event may have an impact on both O&M and Capital, and it is therefore essential that both be included. Whether any particular event will qualify as an exogenous factor will need to be determined by the BCUC based on the facts at the time. BCOAPO will therefore have an opportunity to explore any exogenous event in the Annual Review process.

J. CPCN FOR PROJECTS WITH SIGNIFICANT PUBLIC INTEREST ISSUES

206. FortisBC acknowledges that the BCUC may direct it to file a CPCN for extension projects that are below the major project threshold. The BCOAPO expresses the view that interveners should have the opportunity in the Annual Review process to explore and make submissions on whether public interest issues have arisen in respect to particular projects.[325] Under the 2014-2019 PBR Plans, interveners have been able to ask IRs at the Annual Review process and express their opinion in their submissions. FortisBC expects that this process will continue.

[324] BCOAPO Argument, p. 19.
[325] BCOAPO Argument, p. 19.

PART SEVEN: SERVICE QUALITY INDICATORS ARE APPROPRIATE AND USEFUL IN MONITORING SAFETY, RELIABILITY AND RESPONSIVENESS TO CUSTOMER NEEDS

207. In this part, FortisBC replies to the submissions of BCMEU, ICG, CEC and BCOAPO on SQIs. Overall, there is a significant level of support for FortisBC's proposal.

A. BENCHMARKS AND THRESHOLD ARE REQUIRED

208. FortisBC's proposed suite of SQIs is based on the SQIs reviewed and approved by the BCUC for the 2014-2019 PBR Plans. In its September 15, 2014 Decisions on FEI's and FBC's Applications for Approval of a Multi-Year Performance Based Rate Making Plan for 2014, the BCUC approved the suite of SQIs and set benchmark "targets" for each SQI. To establish the satisfactory SQI performance ranges around the benchmark "targets", the Commission directed FEI and FBC "in consultation with stakeholders, to develop a performance range for each SQI covering the range of scores where performance would be found to be satisfactory".[326] FortisBC consulted as directed, and the result was the Consensus Recommendation approved by BCUC Order G-14-15, dated February 4, 2015. The Consensus Recommendation reflected the mutual agreement of FortisBC and the four interveners that participated in the process, including the CEC.[327]

209. In the Consensus Recommendation, the Parties "defined performance ranges for each SQI as being the range between the benchmark set by the Commission in the Decisions and a "threshold" agreed to in this Consensus Recommendation."[328] The identified objectives of the performance ranges and review process were:[329]

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[326] 2014 PBR Decision, at p. 155. Online: https://www.bcuc.com/Documents/Proceedings/2014/DOC_42181_09-15-2014-FEI-2014-18-DecisionWEB.pdf.

[327] An Application by FortisBC Energy Inc. and FortisBC Inc. for Approval of the Service Quality Indicator Performance Ranges, BCUC Order G-14-15, dated February 4, 2015, Appendix A ("Performance Ranges Decision"), p. 4, Recital L.
Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/119407/1/document.do.

[328] Performance Ranges Decision, p. 5.
Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/119407/1/document.do.

[329] Performance Ranges Decision, p. 5.
Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/119407/1/document.do.

a. identify instances of potential deterioration of service quality during the PBR period for which the utility may be accountable

b. give due recognition to normal volatility which may produce SQI scores inferior to the benchmarks that do not represent serious degradation of service

c. provide a transparent and efficient Annual Review process in which all stakeholders have confidence

210. Contrary to the Consensus Recommendation approved by the BCUC, the CEC puts forward the view that the threshold is not needed and that the Benchmark figure should be the target, with poorer than Benchmark performance being carefully scrutinized.[330] FortisBC disagrees with this approach.

211. It is important to have both a threshold and benchmark so that there is a range within which performance is considered satisfactory. As stated in the Consensus Recommendation approved by Order G-14-15, this gives "due recognition to normal volatility which may produce SQI scores inferior to the benchmarks that do not represent serious degradation of service". The threshold therefore provides an important aid to the Utilities, interveners and the BCUC when interpreting SQI results.

212. No other intervener took issue with the use of benchmarks and thresholds. FortisBC submits that the benchmark and threshold framework worked well in the 2014-2019 PBR Plans, is an important aid to the interpretation of SQI results, and should continue for the Proposed MRPs.

B. FEI'S AND FBC'S ALL INJURY FREQUENCY RATE SQI

213. To reflect recent performance, BCOAPO submits that FBC's threshold value for the All Injury Frequency ("AIFR") should be set at the more aggressive value of 2.0, rather than 2.8 as under the 2014-2019 PBR Plans.[331] Similarly, BCOAPO submits that FEI's AIFR benchmark

[330] CEC Argument, p. 61.
[331] BCOAPO Argument, p. 30.

should be more aggressive at 1.9 and the threshold should be 2.77.[332] While FortisBC has improved its AIFR performance in recent years as well documented in the Annual Review processes, it is still assessing the trend and the sustainability of these improvements. Although FortisBC continues to focus effort on the AIFR metric, it is too early to conclude that FortisBC will able to reasonably maintain the recent improvements in AIFR. The results need to be monitored on a longer term and trend basis before the threshold and benchmark values are adjusted.[333]

C. FBC'S AND FEI'S BILLING INDEX SQI

214. BCOAPO submits that FBC's and FEI's Billing Index benchmark should be 1.5 and the threshold value should be 3.0 (compared to FortisBC's proposed 3.0 and 5.0).[334] FortisBC does not recommend that BCOAPO's more aggressive values be accepted. FortisBC proposed values already represent a high level of service, and are not more aggressive because minor issues can cause large fluctuations in the billing index. FBC explained its proposal, as follows:[335]

> The proposed benchmark and threshold levels take into consideration that there are a combination of factors reflected in the index, which may create larger fluctuations if issues occur even if they may be relatively minor. For example, a weather event or unplanned information system outage may cause unexpected impacts to billing processes.
>
> In addition, the proposals are consistent with FEI and reflect that all customers should have similar experiences with respect to billing services. Finally, the proposed levels reflect a high level of service quality overall with a benchmark of 3 equating to 97 percent of bills delivered within 2 days to Canada Post, 97 percent of customers billed within two business days of the scheduled billing date, and 99.95 percent of bills completed accurately.

215. FEI also notes that more aggressive values will typically require more costs to maintain. As there does not appear to be any concern with the level of service being provided or the level

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[332] BCOAPO Argument, p. 35.
[333] Exhibit B-5, BCOAPO IR 1.88.2; Exhibit B-10, BCUC IR 1.84.3.
[334] BCOAPO Argument, p. 32 and p. 36.
[335] Exhibit B-5, BCUC 1.91.1.

of service represented by the proposed Billing Index benchmark and threshold, then FortisBC recommends its proposals for acceptance.

D. FBC'S METER READING ACCURACY SQI

216. For FBC's Meter Reading Accuracy SQI, BCOAPO submits that the threshold value should be 96% (rather than FBC's proposed 95%), the lowest value experienced during the 2014-2018 period.[336] FortisBC does not consider this proposal to represent a material change, but disagrees with the logic that the best result achieved from the 2014-2018 period should be used for the threshold. Reading 95% of meters on schedule represents an acceptable level of service and is an appropriate threshold.

E. FBC'S SAID SQI AND SAIFI SQI

217. BCSEA states that FBC should address major events in conjunction with its SAIDI and SAIFI results in its Annual Review materials.[337] FBC would be amenable to including a discussion of major events in future annual review materials.

218. In reply to the ICG's comment that SAIDI and SAIFI are not sufficiently sensitive to performance changes,[338] SAIDI and SAIFI are industry standard reliability indicators, which were approved for use by the BCUC for the 2014-2019 PBR Plans and FBC has not received any feedback that they were not useful. Because the impact of any change in investment strategies or operating practices may not be fully realized over the MRP term, it is important to maintain consistent reporting on SQIs in order to identify longer-term trends against an established baseline of performance.[339] For this reason, FBC has proposed to maintain consistency with its suite of SQIs for the Proposed MRPs.

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[336] BCOAPO Argument, p. 32.
[337] BCSEA Argument, p. 24.
[338] ICG Argument, p. 14.
[339] Exhibit B-10, BCUC IR 1.90.2.2.

219. ICG also submits that FBC should use a three-year rolling average for the benchmark for SAID and SAIFI.[340] The ICG's rolling average proposal is not logical as it would establish a moving benchmark, which could decrease as performance decreases and vice versa. The purpose of monitoring SQIs is to maintain service levels to ensure the MRPs do not result in degradation of service levels. Having a benchmark based on rolling three-year average of actual results going forward would be contrary to this purpose, as the benchmark service level would decrease if FBC's performance decreased.

F. INTERCONNECTION UTILIZATION

220. BCMEU states that there was an outage that did not show up on the Utilities "online outage detection tool" and that this gives rise to the concern that the Interconnection Utilization SQI may not be accurate.[341] The outage map is a tool that FBC recently introduced to allow customers to see where outages are in real time.[342] As a matter of course, FBC will work to ensure that its online outage detection tool is reporting outages accurately and that its Interconnection Utilization SQI is also measured accurately.

221. In response to the BCMEU's submission that interconnection utilization should be subject to penalties, please see pages 219 to 221 of FortisBC's Final Argument which explains why the Interconnection SQI is an informational indictor only.

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[340] ICG Argument, p. 14.

[341] BCMEU Argument, p. 10.

[342] FBC provided a detailed presentation on its outage map in FBC's 2018 Annual Review for 2019 Rates. See Exhibit B-11, pp. 37-38, in that proceeding. Online: https://www.bcuc.com/Documents/Proceedings/2018/DOC_52648_B-11-FBC-WorkshopPresentation.pdf.

PART EIGHT: CLEAN GROWTH INNOVATION FUND

222. MoveUP supports and the BCSEA strongly supports the approval of the Clean Growth Innovation Fund (the "Innovation Fund").[343] The CEC supports approval of the Innovation Fund subject to its conditions.[344] The ICG and BCOAPO are opposed, while BCMEU is silent on the Innovation Fund. FortisBC responds to submissions from the CEC, ICG, and BCOAPO on the Innovation Fund below.

A. THERE ARE NO EXISTING ALTERNATIVES TO THE INNOVATION FUND

223. BCOAPO argues that there are sufficient alternatives for promoting innovation.[345] The CEC also refers to the NGIF and the provisions of the *Greenhouse Gas Reduction (Clean Energy) Regulation* ("GGRR") as alternatives.[346] In reply, the existing support for innovation leaves material gaps that need to be filled:

(a) **NGIF:** This national fund does not provide support to commercial innovations and is limited to innovation in the natural gas value chain. The Innovation Fund will fill these gaps by prioritizing provincial objectives and interests, and by investing in commercial innovations in the electric value chain.[347]

(b) **DSM Innovative Technologies:** Funding under this program is constrained by the definition of demand-side measures in the *Clean Energy Act*. Activities that reduce GHG emissions, but do not necessarily result in significant reductions of energy use, cannot be supported by this program. An example of a technology that doesn't meet the definition of demand-side measure would be a device that doesn't capture waste heat to reduce the overall buildings natural gas

[343] MoveUP Argument, pp. 22-23; BCSEA Argument, pp. 35-44.
[344] CEC Argument, p. 85, para. 599.
[345] BCOAPO Argument, p. 43.
[346] CEC Argument, pp. 70-71.
[347] Exhibit B-10, BCUC IR 1.26.9.

consumption but rather scrubs carbon from exhaust gases to reduce the amount of GHGs emitted to the atmosphere.[348]

(c) **GGRR-enabled Innovation (NGT and RNG programs)**: These programs do not include pre-commercial expenditures and are limited by the scope of prescribed undertakings under the GGRR. For example, FEI has only provided incentives for vehicles that have original equipment manufacturer (OEM) support as this ensures our customers have the requisite support to operate their businesses. Pre-commercial technologies would not meet this critical OEM support threshold.[349]

In reply to the CEC's comments regarding the GGRR being an incentive,[350] this is a red herring. The benefit of the GGRR is that it represents a pre-determination of the public interest, thereby fast tracking the regulatory process. To the extent that these prescribed undertakings result in capital investments, FortisBC may earn a fair return on that investment as determined by the BCUC. The prescribed undertakings may also help address challenges, such as acquiring renewable natural gas. Whether one characterizes these as an "incentive" does not matter. The key point is that the scope of the prescribed undertakings does not cover the innovation gaps that need to be filled. FortisBC's proposed Innovation Fund will fill those gaps.

B. INNOVATION FUND BENEFITS ARE NEEDED NOW

224. BCOAPO argues that the Innovation Fund cannot be approved until the province and the regulator establish a province-wide regulatory framework and implementation plan.[351] While such a framework or plan could be beneficial, it is not necessary and there is no reason to believe that such a plan will be in place in the foreseeable future. Government intentions are

[348] Exhibit B-7, CEC IR 1.34.1.
[349] Exhibit B-1, Application, p. C-138.
[350] CEC Argument, p. 71.
[351] BCOAPO Argument, p. 43.

already clear: all levels of government have signalled that immediate innovation is required to meet legislated GHG emission reductions targets.[352] The benefits of the Innovation Fund are needed now and should not be delayed indefinitely to the detriment of all British Columbians.

225. BCOAPO also submits that all innovation projects should be approved annually.[353] As set out on page 246 of FortisBC's Final Argument, FortisBC's proposed approach already provides for significant regulatory oversight through the annual review process and reporting. However, the annual approval of innovation projects is not feasible. FortisBC explained:[354]

> FortisBC has not proposed seeking approval of innovation expenditures in Annual Reviews as it believes its proposed approach will result in greater benefits to customers as it gives flexibility for FortisBC to grant funding proposals in a timely manner while allowing sufficient oversight through the governance and reporting processes. Under the proposed approach, FortisBC has the flexibility to grant funding in response to proposals throughout the year and on the timelines that may be required by applicants. This should result in FortisBC being able to grant funding in a way that maximizes opportunities as they arise for the benefit of customers.
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> If individual innovation projects were approved during the Annual Review process, funding decisions would occur only once per year and there would be no opportunity to increase funding for a specific initiative or to add an initiative during the year. Since some approved innovation initiatives may be dropped during the year, and the need for increased funding and new funding opportunities could arise mid-year, the once-a-year approval process is likely to result in underspending and missed opportunities.
>
> Furthermore, if individual innovation projects were approved during the Annual Review process, FortisBC may not be able to process applications quickly enough to meet the needs of applicants. FEI's experience with the NGIF is that funding is generally required in much less than a year from an applicant's initial request, often due to government co-funding requirements related to budget cycles.
>
> These timing requirements are incompatible with a project-by-project approval process at the annual review, which would add up to a year of lag time (depending on when an innovation proposal is received). Before the proposals

[352] Exhibit B-1, Application, p. C-130.
[353] BCOAPO Argument, p. 44.
[354] Exhibit B-12, BCUC IR 2.214.13.

> could be included in the Annual Review, they would need to go through the process for selection and approval described in the response to BCUC IR 2.218.3. This process itself is expected to take three to six months to complete. FortisBC would then need to prepare the information on the proposal for inclusion in its Annual Review materials. Based on the Annual Reviews over the Current PBR Plan, there is then usually approximately four months between the filing of the Annual Review materials and a decision from the BCUC. The end result is that proposals for funding would need to be received around the beginning of each year for a final funding decision by the beginning of the following year.
>
> Since FortisBC intends to pursue innovative projects that already have established co-funding, which is often time dependent, the additional time required to pre-approve innovation proposals in the Annual Review will limit the number of initiatives that can be considered.

226. BCOAPO has not explained how an annual approval process could overcome the timing challenges identified by FortisBC in its IR response above. FortisBC's proposed approach includes a rigorous governance structure and a sufficient level of BCUC oversight to protect customer interests. FortisBC submits that BCOAPO's proposed annual approval process should not be accepted.

C. INNOVATION FUND BILL IMPACTS ARE LOW

227. BCOAPO submits that the Innovation Fund should be funded volumetrically[355] BCSEA and ICG support FortisBC's fixed rate proposal,[356] while CEC suggests that the BCUC "may want to look at a volumetric base for innovation".[357] While FortisBC believes that a fixed rate is the most reasonable approach for the reasons explained in its evidence and Final Argument, FortisBC is amenable to a volumetric approach.[358] FortisBC notes, however, that low-income customers are not necessarily low volume customers.[359]

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[355] BCOAPO Argument, p. 44-45.

[356] ICG Argument, para 79, "The ICG believes volumetric funding of the Clean Energy Innovation Fund would be unfair, given the material increase in charges to large electrical customers; BCSEA Argument, para 208.

[357] CEC Argument, para 465.

[358] FortisBC Final Argument, pp. 237-238.

[359] FEI 2016 Rate Design Application, BCUC Decision and Order G-135-18, dated July 20, 2018, p. 9. Online: https://www.bcuc.com/Documents/Proceedings/2018/DOC_52063_2018-07-20_FEI-RDA-Decision-and-Order-G-135-18.pdf.

228. BCOAPO submits that the BCUC should establish protections for low-income and middle income customers.[360] Under FortisBC's proposed fixed rate, the maximum bill impact for residential customers would be $4.80 annually for FEI and $3.60 for FBC.[361] Although the BCUC does not have jurisdiction to implement rates on the basis of income level in the absence of an economic or cost of service justification,[362] FortisBC recognizes that these customers already experience difficulty with their bills. Accordingly, customer service representatives will continue to help low-income customers access government and non-profit organization financial assistance programs.

229. BCOAPO submits that the External Advisory Council should include representatives of low-income customers.[363] The External Advisory Council's role is to provide feedback on proposed innovation projects[364] and not to consider bill impacts or the level of funding for innovation overall. However, FortisBC expects the External Advisory Council would include at least one representative with "clean technology" experience from FortisBC's regulatory process interveners,[365] and expects that intervener groups representing customers will volunteer to be part of the External Advisory Council.[366] For the proper functioning of the group, FortisBC would prefer to keep the membership to 10 or fewer, and it is important that members have relevant experience.[367]

230. BCOAPO submits that a volumetric rate rider should appear separately on customers' bills.[368] Presenting the rider in this fashion would be different than any other FortisBC rate rider and is not necessary as the rate rider will appear separately within FortisBC's tariff documents.[369] As FortisBC has over 1 million customers, it is important for bills to be clear and easy to understand. Embedding a rate rider within the delivery or commodity rates allows for a

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[360] BCOAPO Argument, p. 44.
[361] Exhibit B-10, BCUC IR 2.214.8.
[362] A decision that our Court of Appeal held was reasonable in *British Columbia Old Age Pensioners' Organization v. British Columbia Utilities Commission*, 2017 BCCA 400, paras. 37-38, at Tab 3 of the Book of Authorities.
[363] BCOAPO Argument, p. 45.
[364] Exhibit B-12, BCUC IR 2.218.3.
[365] Exhibit B-12, BCUC IR 2.218.3.
[366] Exhibit B-14, BCOAPO IR 2.173.2.
[367] Exhibit B-12, BCUC IR 2.218.3.
[368] BCOAPO Argument, p. 45.
[369] Exhibit B-12, BCUC IR 2.214.3.

greater ease of understanding of rates overall, reducing the potential for confusion that can result from individual items being displayed.[370] FortisBC explained:[371]

> The challenge with this approach is that it is a departure from existing rate rider treatment and as such, having an additional line item on the bill may create unnecessary confusion as well as call into question the importance of other rate riders relative to the Innovation Fund Rate Rider. Further, although expected to be minimal, there would be additional time and costs associated with this approach. Finally, recent customer research conducted as part of the bill redesign initiative indicates that customers prefer simplicity and focus on higher level information such as amount owing, consumption information and payment due dates. That is, more detailed rate information on a bill does not mean that it is more understandable or meaningful from a customer perspective.

231. Therefore, FortisBC does not recommend showing the rider as a separate line item on the bill.

D. BENEFITS TO CUSTOMERS ARE EXPECTED TO EXCEED COSTS

1. DIRECT BENEFITS TO CUSTOMERS

232. FortisBC agrees with the CEC that the Innovation Fund should provide benefits to customers.[372] In fact, the Innovation Fund is expected to provide such benefits, including improved energy choices and reliability.[373] Experience in other jurisdictions demonstrates that overall customer benefits will likely exceed the Innovation Fund's costs.[374]

2. INITIATIVE-SPECIFIC COST/BENEFIT ANALYSES ARE UNTENABLE

233. The CEC recommends that a cost/benefit analysis be part of the project selection process and that a cost/benefit analysis be performed on completion of each project.[375] As

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[370] Exhibit B-12, BCUC IR 2.214.3.
[371] Exhibit B-12, BCUC IR 2.214.5.
[372] CEC Argument, p. 73, para. 519.
[373] FortisBC has summarized the anticipated benefits in Exhibit B-10, BCUC IR 1.81.1, and in Exhibit B-1, Section C6.3 and Exhibit B-1-1, Appendix C6 of the Application.
[374] Exhibit B-1, p. C-135.
[375] CEC Argument, p. 72.

demonstrated by the design of well functioning innovation funds, applying a cost/benefit analysis for each Innovation Fund project is unnecessary and is untenable. Cost/benefit analyses in the context of climate change and emissions reduction initiatives are a complex and evolving area of inquiry. In short, emissions reductions do not lend themselves to simple cost/benefit analyses that can be broadly applied. Comparing the costs of each Innovation Fund initiative to the economic and non-economic benefits attributable only to that initiative is impractical, especially for initiatives that have lower Technology Readiness Levels.[376]

234. That said, FortisBC designed the Innovation Fund's governance process and selection criteria to consider the benefits that each Innovation Fund-supported activity is expected to provide including GHG emission reductions and energy cost reductions.[377] Accordingly, it is unnecessary to add onerous requirements to the project selection criteria which already incorporate a review of the benefits of each project prior to receiving funding. Before making funding recommendations, the Working Group will consider the selection criteria outlined in BCUC IR 2.210.2, including the estimated energy cost reduction for customers. This estimate will be based on retail cost and energy use reduction estimates provided by the applicant, combined with BC market potential estimations from the applicant and FortisBC.

3. FortisBC Will Not Earn A Return on the Innovation Fund

235. In response to the CEC's incorrect assertion that the shareholder earns an "attractive return on equity investments…in innovation",[378] the Innovation Fund will not be capitalized and as such, FortisBC will not earn a return on the Innovation Fund. Successful commercial innovations can lead to new growth opportunities for which the utility may provide the requisite capital, and in return, earns a return on its investment.[379] However, like all other utility investments, the shareholder must provide the requisite equity investment for any utility asset, including those resulting from innovation.[380]

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[376] As depicted in Figure C6-6 at p. C-141 of the Application, Exhibit B-1.
[377] See Exhibit B-12, BCUC IR 2.20.2 for the selection criteria and BCUC IR 2.218.3 for the governance structure.
[378] CEC Argument, p. 72.
[379] Exhibit B-12, BCUC IR 2.207.2.
[380] Exhibit B-12, BCUC IR 2.207.1.

E. THE INNOVATION FUND IS COMPELLING FOR FBC

236. Contrary to the ICG's claim,[381] the justification for the Innovation Fund is compelling for FBC. Activities funded by FBC's fund are required to support increased reliance on electricity infrastructure as British Columbians transition to a lower carbon economy. [382]

237. Similar to FEI, these activities will directly benefit FBC customers. The Innovation Fund will support initiatives aimed at reducing costs while increasing safety and reliability. For example, funding related to high-speed charging technologies for medium and heavy-duty vehicles, if successful, would increase the demand for electricity. All else equal, higher electricity sales will benefit electricity customers by lowering rates while also reducing emissions for the benefit of all British Columbians.[383]

238. As another example, innovation funding directed toward improved electricity storage technologies, if successful, could benefit customers by making renewable sources of electricity more cost-effective to integrate and by making the grid more resilient to outages and power quality fluctuations. Without this kind of investment, FBC may have to restrict the use of distributed generation or risk a less reliable electricity grid.[384]

F. THE BCUC HAS JURISDICTION TO APPROVE THE INNOVATION FUND

239. The ICG cites the Creative Energy CPCN Decision for the proposition that the Innovation Fund cannot be approved as it would be inconsistent with COS rate design principles.[385] The Creative Energy CPCN Decision is not comparable to the Innovation Fund, and can be distinguished for a number of key reasons:

(a) Creative Energy's rate rider was a pre-collection of capital intended to offset the costs of uncertain future capital expenditures. The Innovation Fund is a collection of funds to be invested each year in innovation as specified by the

[381] ICG Argument, p. 24, para. 76.
[382] Exhibit B-12, BCUC IR 2.207.6.
[383] Exhibit B-12, BCUC IR 2.207.6.1.
[384] Exhibit B-12, BCUC IR 2.207.6.1.
[385] ICG Argument, p. 25, para. 78.

fund's governance process and selection criteria for the benefit of customers. While the Innovation Fund could potentially give rise to future potential capital investments, the capital costs of any such project would be collected from customers once an asset is in service, not pre-collected.[386]

(b) Creative Energy proposed collecting funds from 2016 to 2020 that would not be used until 2020 and beyond. The Innovation Fund will be used during the term of the Proposed MRP.[387] No funds will be held "in trust" or held for use in future phases. The fund will be used on research and development activities during the term of the Proposed MRPs for clean energy solutions that are related to FortisBC's customers.[388]

(c) Creative Energy's funds would not be returned to customers if unused over the future phase. FortisBC's funds will be returned to customers at the end of the Proposed MRPs if not invested in innovation.[389]

240. Therefore, the Creative Energy CPCN Decision is not applicable in this case.

241. Other than the Creative Energy CPCN Decision, the ICG cites no authority for its claim that the "Commission has consistently denied utility applications to pre-collect funds in advance of costs being incurred."[390] If the ICG's suggestion is that costs must be incurred before rates are approved, that is simply not true. The BCUC regularly approves rates on a forecast basis, in advance of costs being incurred, as it did through FBC's 2014-2019 PBR Plan and successive annual reviews under that plan. In each year, revenues are collected as costs are being incurred. The same will occur with the Innovation Fund.

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[386] Exhibit B-10, BCUC IR 1.79.7.
[387] Exhibit B-10, BCUC IR 1.79.7.
[388] Exhibit B-10, BCUC IR 1.79.8.
[389] Exhibit B-10, BCUC IR 1.79.7.
[390] ICG Argument, p. 25, para. 77.

242. The ICG claims that the BCUC can only approve rates if it has reviewed each individual initiative along with forecast costs.[391] There is nothing in the UCA that specifies that the itemized costs over a test period must be reviewed by the BCUC. To the contrary, sections 60(1)(b.1) of the UCA states that the BCUC "may use any mechanism, formula or other method of setting the rate that it considers advisable". The use of formulas in rate setting, such as in FBC's 2014-2019 PBR Plan, is an example of how the BCUC has set rates without reviewing forecast costs on a project-by-project basis.

243. The cost of the Innovation Fund is reasonably recovered in rates as investment in innovation will directly benefit customers and has become a necessary cost of service to customers given the unprecedented transition of the energy industry. The investments in innovation will be as directed by the governance process and selection criteria, and will be subject to review each year through the Annual Review process. Customers will directly benefit from Innovation Fund supported initiatives and true-ups will ensure that customer rates only include costs incurred.[392]

G. CONCLUSION

244. The evidence in this proceeding shows that the Innovation Fund and rate rider are just and reasonable. The Innovation Fund will provide direct benefits to customers while ensuring the long-term viability of the Utilities as British Columbians move towards a lower carbon economy. Innovation Fund investments will be made in accordance with sound principles and a robust governance model, and the BCUC will retain oversight of the Innovation Fund via annual reporting over the MRP term.

245. All levels of government are relying on Innovation Fund-supported initiatives to meet climate objectives, and the BCUC must consider how this proposal aligns with policy direction. Ultimately, the BCUC has jurisdiction to approve the Innovation Fund and doing so will provide benefits to ratepayers and all British Columbians.

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[391] ICG Argument, p. 25, para. 78.
[392] Exhibit B-10, BCUC IR 1.79.7-8.

PART NINE: TARGETED INCENTIVES

246. In this part, FortisBC responds to intervener submissions on its proposed Targeted Incentives. Both MoveUP and BCSEA support the Targeted Incentives, while BCMEU makes no submissions on the topic. BCOAPO and ICG are opposed, while CEC is supportive of the concept but proposes criteria for their review. At root, the ICG and CEC have not articulated any reason to deny the Targeted Incentives beyond reiterating their ideological opposition to incentive structures in general. FortisBC recommends its proposed Targeted Incentives for approval as they will use the ratemaking regime to help achieve beneficial outcomes for customers in line with the public interest. FortisBC replies to the specific submission of the ICG, BCOAPO and CEC, as well as reporting requests from BCSEA, below.

A. BCUC HAS JURISDICTION TO APPROVE TARGETED INCENTIVES

247. Contrary to the submission of the ICG,[393] the BCUC has the jurisdiction to approve Targeted Incentives as part of its ratemaking powers under sections 58 to 61 of the UCA. Section 60(1)(b.1) states that "the commission may use any mechanism, formula or other method of setting the rate that it considers advisable". Section 60(1) also requires the BCUC to have due regard to setting a rate that, amongst other things, encourages the utility to "enhance performance".

248. The Targeted Incentives are a form of performance-based ratemaking. The BCUC has been approving performance-based rates since the 1990s,[394] and its jurisdiction to do so is not reasonably in question. The performance-based rates approved by the BCUC to date include built-in incentives for the utilities to reduce costs. The targeted incentives proposed in this Application are no different and form part of a ratemaking plan designed to provide incentives to the utilities for achieving certain outcomes. The associated targets are stretch goals and are outcomes that would be to the benefit of customers and are in the public interest.[395] The

[393] ICG Argument, pp. 19-21.
[394] Exhibit B-1, Section B2.2, p. B-25.
[395] Exhibit B-10, BCUC IR 1.96.1.

associated reward provides an incentive to achieve these targets. FortisBC submits that it is within the BCUC's ratemaking power to design rates with such incentive properties.

249. The ICG submits that the Targeted Incentives do not encourage "public utilities to increase efficiency, reduce costs and enhance performance" because they are not designed to reduce costs.[396] The ICG argument would appear to be that section 60(1)(b)(iii) of the UCA requires that every individual component of a rate plan must encourage public utilities to increase efficiency, reduce costs and enhance performance. Such an interpretation is not reasonable, as it is not possible for every minutia of a rate to achieve these three objectives. The BCUC approves many components of a rate that are neutral as to these objectives, such as the recovery of tax or depreciation expenses, or aimed at only one of these objectives, such as SQIs that are aimed at enhancing performance, not reducing costs. If the ICG's interpretation were correct, the BCUC's power to approve rates would be severely circumscribed.

250. Therefore, as section 60(1) of the UCA applies "When setting a rate under this Act", the whole rate must be considered. The Proposed MRPs are a rate under the UCA, and as a whole will encourage the utilities to increase efficiency, reduce costs and enhance performance. For example, traditional incentives will encourage FortisBC to reduce cost and become more efficient and Targeted Incentives aimed at achieving specific beneficial outcomes will encourage FortisBC to increase performance. ICG's interpretation of the section 60(1) should be rejected.

251. ICG also argues that the outcomes encouraged by the Targeted Incentives are already being compensated by the approved rate of return[397] as part of FBC's regular business activities.[398] The ICG has not accurately characterized the fair return standard. The fair return standard is not based on the Utilities achieving certain business activities or positive outcomes for customers as contemplated by the Targeted Incentives. Rather, the return on equity is compensation that investors receive for the opportunity cost on their investment represented by the rate of return investors could expect to earn elsewhere without bearing more risk.[399]

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[396] ICG Argument, p. 20, para. 61 and p. 21, para. 64.
[397] ICG Argument, p. 19, para. 57.
[398] ICG Argument, p. 19, para. 59, referencing Exhibit B-8, ICG IR 1.25.3.
[399] Exhibit B-10, BCUC IR 1.96.1.

This may be confirmed by a review of the BCUC's Decision on FEI's Application for Common Equity Component and Return on Equity for 2016,[400] which includes no discussion of the return on equity being contingent on the achievement of certain outcomes by the utilities and, specifically, do not mention the particular outcomes that are the subject of the Targeted Incentives.

252. The fair return standard as described by the Courts and accepted by the BCUC does not refer to a business plan or activities contemplated by the Targeted Incentives.[401] For example, the leading case of *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] S.C.R. 186, at pages 192-193, describes the fair return standard this way: "By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise, (which will be net to the company,) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise." The BCUC has endorsed the following three part test for the fair return standard articulated by the National Energy Board:[402]

> "The Fair Return Standard requires that a fair or reasonable overall return on capital should:
>
> - Be comparable to the return available from the application of the invested capital to other enterprises of like risk (comparable investment requirement);
>
> - Enable the financial integrity of the regulated enterprise to be maintained (financial integrity requirement); and

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[400] BCUC Decision and Order G-129-16 dated August 10, 2016. p. 3. Online: https://www.bcuc.com/ApplicationView.aspx?ApplicationId=514. The same can be said for the BCUC's 2013 Decisions: G-75-13, Generic Cost of Capital (Stage 1), dated May 10, 2013. Online: https://www.bcuc.com/ApplicationView.aspx?ApplicationId=338; BCUC Decision and Order G-47-14, Generic Cost of Capital (Stage 2), dated March 25, 2014. Online: https://www.bcuc.com/ApplicationView.aspx?ApplicationId=388

[401] BCUC Decision and Order G-129-16 dated August 10, 2016. p. 3. Online: https://www.bcuc.com/ApplicationView.aspx?ApplicationId=514; BCUC Decision and Order G-47-14, Generic Cost of Capital (Stage 2), dated March 25, 2014. Online: https://www.bcuc.com/ApplicationView.aspx?ApplicationId=388

[402] BCUC Decision and Order G-47-14, Generic Cost of Capital (Stage 2), dated March 25, 2014, at p. 13.

- Permit incremental capital to be attracted to the enterprise on reasonable terms and conditions (capital attraction requirement)."

253. Therefore, the utility must be able to earn a return on investment commensurate with that of comparable risk enterprises, maintain its financial integrity, and attract capital on reasonable terms. These are the key considerations when setting the return on equity.

254. This point is further substantiated by reference to the BCUC's determination on the rate of return of the Utilities. For example, the following is the BCUC's determination in 2014 on FBC's rate of return:[403]

> **The Commission Panel has determined that an equity ratio of 40 percent and an equity risk premium of 40 bps for FBC is appropriate effective January 1, 2013.**
>
> While acknowledging that there are areas where its business risks are similar to the Benchmark, FBC outlined a number of key areas of risk that, in its view, differed from FEI. These included smaller size, more concentrated assets and less diverse customer and economic bases, energy price competitiveness, supply risk, operating risk and financial risk related to its credit profile. The Commission Panel has reviewed the evidence from the parties related to each of these areas in reaching its overall risk assessment. The evidence supports the findings that FBC faces additional price competitiveness risk as compared to the Benchmark and in addition there is some additional risk related to small size. The Panel finds no substantial difference in supply risk as compared to the Benchmark, and, regarding operating risks, we found there was no basis on which to establish the potential impact of any differential in risk. In addition, the Commission Panel has considered the observations of BCPSO that electricity is at lower risk from provincial GHG emissions policy as well as the difficulty and costs associated with moving from electrical space and hot water heating in favour of natural gas (BCPSO Final Submission, p. 7). The matters were raised in Stage 1 and soften the impact of some of the factors raised by FBC in support of the level of differential in business risk between it and the Benchmark.

255. The quote above exemplifies the type of analysis undertaken when determining the rate of return. Contrary to the ICG's submission, the rate of return is not a reward for carrying out

[403] BCUC Decision and Order G-47-14, Generic Cost of Capital (Stage 2), dated March 25, 2014, p. 86.

certain business activities or carrying out a regular course of business. Rather it is the fair return on the capital invested by utilities.

256. Finally, the law is that the BCUC's obligation to set a fair return for the utilities is distinct and absolute.[404] The BCUC has therefore "concluded that the opportunity to earn a fair return must be provided to each regulated utility as a separate obligation from those service and financing requirements detailed in other sections of the UCA."[405]

257. In summary, the BCUC has the jurisdiction to approve the targeted incentives under the same powers that it approves performance based rates. The ICG has not accurately characterized the fair return standard and its attempts to confuse the fair return standard with the BCUC's jurisdiction to approve performance-based rates should be rejected.

B. FEI'S INCENTIVES ARE BASED ON STRETCH TARGETS, NOT FORECASTS

258. BCOAPO incorrectly refers to FEI's proposed targets as a forecast,[406] when they are in fact stretch targets (except for the PSI, which uses neither a forecast or a stretch target). This was addressed in detail in FortisBC's evidence and in FortisBC's Final Argument, p. 248, para. 564 to p. 354, para. 577.

259. BCOAPO opposes FEI's Targeted Incentives, saying that FortisBC has an incentive to "over forecast".[407] FEI's Targeted Incentives are based on stretch targets, not forecasts. FortisBC's targets have been subject to scrutiny in this proceeding, including by BCSEA who agrees with FortisBC that the targets are stretch goals that will require significant effort to achieve.[408] In FortisBC's submission, BCSEA is in a better position to assess the targets related to GHG reductions than is BCOAPO.

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[404] *British Columbia Electric Railway Co. v. Public Utilities Commission*, [1960] S.C.R. 837 at 848 and 856-857, at Tab 2 of the Book of Authorities. *Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission)*, 1992 CanLII 5959 (B.C.C.A.) at para. 57, at Tab 4 of the Book of Authorities.

[405] BCUC Decision and Order G-75-13, Generic Cost of Capital (Stage 1), dated May 10, 2013, p. 11.

[406] BCOAPO Argument, pp. 40-41.

[407] BCOAPO Argument, p. 41.

[408] BCSEA Argument, p. 45, para 213.

C. INCREASED MARGIN FLOWS TO CUSTOMERS

260. BCOAPO says that there is already a financial incentive to achieve its targets related to RNG, NGT, gas conversions, and external GHG emissions because FEI earns a higher margin on deliveries.[409] In reply, the Utilities earn a return on their invested capital, not on revenues. Moreover, FortisBC's revenue margin is a flow-through item under the Proposed MRPs, so the benefits flow to customers. Therefore, increasing revenues and margins benefits customers, and does not in itself provide an incentive to the Utilities in these areas.

D. FEI'S INTERNAL GHG REDUCTION TARGET

261. BCOAPO says that FEI should not be incented to reduce its GHG emissions, because it should do this anyway.[410] In reply, BCOAPO has offered no evidence or argument for why an incentive structure will not work in this context. FEI will work towards its targets reducing its GHG emissions regardless of incentives. However, providing incentives to achieve stretch goals will increase the focus of the utilities and increase the likelihood that it will achieve these challenging targets within the test period, producing benefits for customers in the public interest that may not otherwise be achieved.

E. CUSTOMER ENGAGEMENT TARGET WILL BE CHALLENGING

262. The ICG says that FBC's Customer Engagement target must fail because it has always been necessary for utilities to engage with their customers.[411] While FBC is of course committed to engaging with its customers, the purpose of the Targeted Incentive in this area is to provide an incentive for FBC to achieve certain stretch targets that will be beneficial to customers and in the public interest. FortisBC explained as follows:[412]

> The targeted incentive for enhancing customer engagement by increasing digital communication channel adoption represents a stretch target. As discussed in the response to BCUC IR 1.96.7, the target will require an increase of 1.4 and 1.9

[409] BCOAPO Argument, p. 41.
[410] BCOAPO Argument, p. 41.
[411] ICG Argument, p. 2.
[412] Exhibit B-12, BCUC IR 2.239.1.

> fold increase for FBC and FEI, respectively. Accordingly, FortisBC will need to identify new and enhanced strategies, tactics and initiatives to increase customer adoption of existing and new channels above current rates in order to achieve the target. The development of strategies, tactics and initiatives will be informed by an analysis of existing channels and potential channels, customer and industry research, and industry best practices.
>
> Specifically, FortisBC intends to undertake a review of channel options, including a comparison of the channels customers identify as preferred versus their actual channel use. This type of analysis may identify potential opportunities for improvement to existing digital and self-service channels as well as customer preference for expanded channel options. For example, this may identify changes to the existing IVR system (system, menu options, etc.) that could potentially increase adoption of self serve IVR options or lead to greater satisfaction and engagement with this particular channel.
>
> It is expected that this channel option review and identification of next steps will occur by the end of 2020.

263. As discussed above and at paragraph 576 on page 253 of FortisBC's Final Argument, achieving the targets will be challenging and will require innovation. The ICG does not provide any substantial response to FortisBC's evidence on this topic.

264. BCOAPO asserts that that FortisBC's Customer Engagement targets should go beyond the historical trend.[413] BCOAPO does not appreciate the fact that maintaining the historical average would mean that FortisBC would need to achieve a continuous and significant year-over-year increase in the level of adoption of digital channels. Specifically, the target represents a 1.93-fold increase in customer adoption of digital communication channels (29% for 2016-2018 to 56% in 2024).[414] Keeping up the same rate of adoption will be challenging given that it can be expected that "early adopters" will have already adopted digital challenges. Meeting these targets each year will require innovative approaches to the promotion of these channels, consideration of improvements necessary to enhance their ease of use and a

[413] BCOAPO Argument, p. 40.
[414] Exhibit B-1, BCUC IR 1.96.7.

seamless integration of all channels such that customers have the ability to choose the most effective and convenient channel for their needs.[415]

265. BCOAPO's reference to additional O&M funding related to the customer engagement incentive is in error.[416] FortisBC clarified this apparent misunderstanding in response to IRs as follows:[417]

> As noted in Section C8.3.5 of the Application, the Customer Engagement incentive relates to increasing customer adoption of digital service channels, including the use of email, mobile applications, and on-line account services. In contrast, the incremental funding requests noted above are specific to communications channels, such as FortisBC's website and social media accounts that are not measured by the Customer Engagement incentive. The interactions that are measured as part of the Customer Engagement incentive are managed by our Customer Service team, while the incremental funding for Customer Expectations and Engagement supports broader communication with the general public on various topics and is managed by our Corporate Communications and External Relations teams.

F. TARGETED INCENTIVES AND COS RATEMAKING

266. ICG suggests that Targeted Incentives could also be part of COS ratemaking.[418] FortisBC agrees in the sense that the Targeted Incentives could be added to an otherwise COS ratemaking plan. However, the ICG's statement that this option would limit "returns to the Fair Return Standard under COS regulation" repeats the ICG's misconception of the fair return standard and COS regulation. The Targeted Incentives are a form of incentive-based ratemaking and are conceptually distinct from the fair return standard. As submitted above, the fair return standard is the same whether under PBR or COS ratemaking, and the BCUC has an obligation to set the fair return separate from other obligations under the UCA. Further, as discussed in Part Two above, the ICG appears to have the mistaken impression that under COS regulation, the utility's actual ROE always matches the approved ROE exactly. This is not the case; in fact, COS regulation provides an incentive for utilities to find efficiencies to decrease

[415] Exhibit B-6, BCSEA IR 1.15.1; Exhibit B-12, BCUC IR 2.239.1.
[416] BCOAPO Argument, p. 40.
[417] Exhibit B-10, BCUC IR 1.29.2.
[418] ICG Argument, p. 22.

costs below forecast to increase their achieved return.[419] Finally, if the Targeted Incentives did not produce any incentive (because the utility's actual ROE could never exceed the approved ROE), then there would be no incentive and the Targeted Incentives would be undermined. ICG's submission is therefore incoherent.

G. ICG'S PROPOSED CRITERIA

267. ICG states that the Targeted Incentives should "relate to either reliability or to new services and should reflect the unique drivers of change for electric and gas utilities."[420] Consistent with the ICG's suggestion, FortisBC has proposed targets in areas related to challenges and opportunities in its operating environment. However, reliability does not appear to be a viable area, as reliability of service is already addressed by Service Quality Indicators that indicate the level of service that is expected of the utilities. Targeted Incentives in the area of reliability would also unhelpfully blur the distinction between SQIs to monitor against degradation of service and Target Incentives aimed at achieving superior performance in particular areas.

H. CEC'S PROPOSED CRITERIA

268. The CEC proposes in its final argument the criteria under which it would support Targeted Incentives.[421] FortisBC modeled its Targeted Incentives on the guidelines from jurisdictions such as New York that are experienced in developing and implementing complex MRPs.[422] FortisBC provided a detailed discussion of how its proposals compare to the frameworks in these other jurisdictions.[423] In contrast, the CEC's criteria were not presented in this proceeding until CEC filed its argument, are not based in any authority or guidelines from another jurisdiction. FortisBC submits that guidance from other jurisdictions with experience in this area significantly outweighs the CEC's proposed criteria.

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[419] Exhibit B-1-1, Application C4-3, Fundamentals of Rate Setting, pp. 2-3 (PDF pp. 464-465).
[420] ICG Argument, p. 22, para. 69.
[421] CEC Argument, pp. 76-81.
[422] Exhibit B-1, Application, pp. B-73 to B-77; Exhibit B-1-1, Appendix C4-2 – Jurisdictional Comparison; Exhibit B-10, BCUC IR 1.18.6.
[423] E.g. Exhibit B-10, BCUC IR 1.18.1 to 1.18.8.

269. Nonetheless, FortisBC comments on each of the CEC's suggested criteria and its proposed cost treatment below.

1. RISK/PENALTY TO THE SHAREHOLDER IF TARGETS NOT ACHIEVED IS NOT REASONABLE

270. FortisBC cannot agree with CEC's position that the shareholder should be penalized if it does not meet the targets.[424] FortisBC addressed the rewards-only aspects of its proposal in paragraphs 588 to 592 of its Final Argument, to which the CEC did not provide any substantive response. To highlight some of the key points, the rewards-only nature of the Targeted Incentives is reasonable as the purpose is encourage the Utilities to make progress towards, and if possible achieve, desirable outcomes. It would be perverse to impose penalties as progress towards the targets can only be beneficial, and the targets may not be achievable. As customers will only benefit by progress towards the target, there is no rationale for penalizing failure to achieve a positive value. The BCUC can also be comforted by the fact that targeted incentives in other jurisdictions are also rewards-only, including New York where the New York Public Service Commission's Earnings Adjustment Mechanism guidelines specify that incentives shall ordinarily be positive only.[425] The rewards-only incentive is also complementary to the penalty-only nature of SQIs that seek to avoid undesirable outcomes. Thus, the Proposed MRPs reasonably use the prospect of penalties to ensure that satisfactory service levels are maintained and provides the prospect of rewards to encourage superior performance in specific areas.

2. PROJECTS TO BE SUBJECT TO REVIEW IN ANNUAL REVIEW

271. The CEC proposes that all investments be made with a submission to the Commission for approval of the project or program.[426] More specifically, CEC's proposal is that all spending to achieve the targets cannot be part of the formulas[427] and would only be approved if specific

[424] CEC Argument, p. 76.
[425] Exhibit B-10, BCUC IR 1.18.6.
[426] CEC Argument, p. 76.
[427] CEC Argument, p. 80.

projects were found to be "beyond what may be anticipated by prudent management."[428] This is not a feasible concept or process, and would undermine the value of the Targeted Incentives. The CEC's process is a highly directed approach that would remove any opportunity for the Utilities to seek innovation solutions to achieve the targets.

272. The test of "beyond what may be anticipated by prudent management" has no basis in the tests or approvals required under the UCA. FortisBC is not aware of any jurisdiction that applies such a test in any context, and the CEC cites no authorities.

273. The test of "beyond what may be anticipated by prudent management" is also not clear. It is routine to make the binary determination of whether spending is prudent or not. However, it is not clear how one determines what is "beyond" prudent management. Attempting to use this test would give rise to uncertainty for the Utilities as to what would be approved, and therefore would be a disincentive to invest towards the goals. If any investment were put forward, there would be inevitable disputes before the BCUC as to what qualifies and no clear test by which to decide the matter.

274. Denying investments towards the targets if they were not "beyond prudent management" is a perverse result. Progress towards the targets is beneficial and therefore it should not matter whether it is accomplished through prudent management or activities "beyond" prudent management.

275. FortisBC's proposal is more practical, would use the familiar processes under the UCA, and would still result in Commission review of spending:

(a) For investments outside of indexed-based O&M or FEI Growth capital, FortisBC would forecast spending each year in the annual review.

(b) FortisBC would also report on its progress towards the targets each year in the Annual Reviews.

[428] CEC Argument, p. 81, paras. 562-563.

(c) Investments that required approval of an energy supply contract would be filed under section 71 of the UCA as usual.

(d) Investments exceeding the CPCN threshold would be filed as CPCNs.

276. FortisBC's proposal would therefore allow for BCUC oversight, but without imposing novel and uncertain tests. FortisBC submits that the CEC's proposal has no basis in law or practice and should be rejected.

3. BASE LINE AND COST/BENEFIT ANALYSIS

277. The CEC submits that base lines should be captured and cost benefit metrics should be defined and measured quantitatively.[429] FortisBC's proposal is aligned with this criteria as shown in detail in FortisBC's response to BCUC IR 1.96.7, which has been thoroughly tested in this proceeding. FortisBC has set out clear base lines and quantitative targets for each of its Targeted Incentives. FortisBC has also shown that the net impact is positive where possible to quantify. Please refer to paragraphs 559 to 560 of FortisBC's Final Argument.

4. INVESTMENTS CONTINUE TO BE EVALUATED DURING ANNUAL REVIEWS

278. FortisBC agrees that it should be reporting on progress towards the targets in the Annual Review process and has committed to doing so as part of its Targeted Incentives.[430]

5. UTILITIES CAN PROPOSE NEW INITIATIVES

279. FortisBC agrees that it would be reasonable to propose new Targeted Incentives in annual reviews for BCUC review and approval. FBC has proposed to bring an incentive forward regarding EVs after legislation is in place clarifying FBC's role in this regard.[431]

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[429] CEC Argument, p. 77.
[430] Exhibit B-1, Section C1.7, p. C-13.
[431] FortisBC Final Argument, p. 244, para. 557.

I. POWER SUPPLY INCENTIVE WOULD CONTINUE HISTORY OF INCENTIVES IN THIS AREA

280. ICG, CEC and BCOAPO take the simplistic view that optimizing FBC's power supply costs is a matter of ordinary course of business,[432] as if the results are binary and there is no scale of potential benefits to be achieved commensurate with increased effort. The interveners do not accurately represent the complexity of the task of optimizing FBC's power supply or the power of incentives to spur on innovation and increased focus and efforts. As a matter of course, FBC prudently manages its power supply costs and seeks to optimize them. However, optimal results require optimal effort. When FBC both buys and sells capacity and energy in the market, there are many different decision points (e.g. pre nomination, post nomination, day ahead, real-time) and FBC must balance FBC resources, load conditions, outages and other factors.[433] The potential benefits of low market prices do not automatically flow through to customers as ICG appears to believe.[434] Rather, strategies are required to take advantage of higher or lower market prices. That is, FBC has to put in effort, and have approved policy and procedures in place, and talented staff to execute at optimal times.[435] FBC's proposal is that, given the complexity of this task and the ongoing, sustained effort it requires, an incentive framework will produce better results for customers.

281. ICG points out that there was no power supply incentive from 2014 to 2019.[436] However, FBC has had power supply incentive structures in place for 15 of the last 24 years.[437]

282. BCOAPO's submission that it is 'inherently "wrong"' to incent FBC to manage the system is baseless.[438] The fact that the BCUC has approved such an incentive for more years than not in the past 24 years shows that the BCUC has found such an incentive to be just and reasonable and it cannot be "inherently wrong". BCOAPO's apparent disavowal of incentives in this

[432] ICG Argument, pp. 22-24; BCOAPO Argument, p. 39.
[433] Exhibit B-10, BCUC IR 1.96.3, 1.102.1.1 and 1.102.17.
[434] ICG Argument p. 23, para. 71.
[435] Exhibit B-10, BCUC IR 1.102.8.
[436] ICG Argument, p. 23.
[437] Exhibit B-1, Application, p. C-167.
[438] BCOAPO Argument, p. 39.

context is also inconsistent with its own expert's recommendation to continue an incentive-based ratemaking approach.

283. The BCOAPO expresses concern that the results will be submitted confidentially with the BCUC.[439] Confidentiality is necessary due to the commercially sensitive nature of the information. It would be detrimental to customers if FBC were to release its strategies publicly, as it would undermine its negotiating position in the market, leading to poorer results. FBC will comply with the BCUC's guidelines for confidential information.

284. ICG's characterization of the power supply incentive as encouragement to participate in power markets is misleading.[440] FBC will of course participate in the power markets. Rather, the proposal is that FBC will have an incentive to generate better results through that participation.

285. ICG claims that the PSI is not fair to customers because there is no downside for FBC's shareholder.[441] The purpose of the PSI is to provide an incentive to increase efforts and achieve greater benefits for customers. The design of the PSI allows the utility to earn an incentive only after it creates $7.5 million in positive value for customers.

286. The 30 BPS incentive referenced by ICG[442] is a high case only, based on the highest power supply mitigation over the past 5 years.[443] Customers received a 6.1 percent rate decrease as a result of FBCs mitigation efforts.[444] As shown in response to BCUC IR 1.102.3, between 2014 and 2019 the incentive would have ranged from 0 to the 29.6 BPS.[445] The incremental ROE per year from the PSI would be dependent on the actual level of power supply mitigation each year, which in turn depends on the market environment, system conditions, and FBC's ability to capitalize on mitigation opportunities from a highly volatile market. Accordingly, FBC cannot project a maximum power supply mitigation that could occur over the

[439] BCOAPO Argument, p. 39.
[440] ICG Argument, p. 23.
[441] ICG Argument, p. 24.
[442] ICG Argument, paras. 73-74.
[443] Exhibit B-10, BCUC IR 1.96.6.
[444] Exhibit B-10, BCUC IR 1.102.18.
[445] Exhibit B-10, BCUC IR 1.102.3.

proposed MRP term.[446] FBC adds that the customer will retain 90 percent of the benefit above the 7.5 million threshold.

287. ICG proposed capping benefits at 5 bps.[447] This is contrary to the BCUC's guiding principles, which specify that there should not be an upper limit on the potential to earn an incentive.[448] An upper limit would dull the incentive power of the PSI considerably, as it would cease to have any force after reaching the limit.

288. BCOAPO's suggestion to increase the $7.5 million floor to $15 million[449] would erode the incentive properties of the PSI. The PSI was designed to align the interests of FBC and the customer in reducing power supply costs by providing a continuous cost reduction incentive above the threshold.[450] BCOAPO's proposal reduces the range over which sharing occurs and therefore reduces alignment as well as the potential size of any incentive. As explained on pages 270 to 271 of FortisBC's Final Argument and referenced evidence, FBC's proposed PSI is designed to balance (1) ensuring the customer receives the benefit of what is reasonably expected in the ordinary course; (2) providing an incentive that is sufficient to align the interests of customers and FBC; and (3) ensuring the incentive it limited to the minimum necessary to obtain the desired benefit. BCOAPO's proposed change would upset this balance, and would decrease the alignment of interest between customers and FBC.

289. Interestingly, the CEC references the fact that Powerex has been successful in generating benefits for BC Hydro ratepayers.[451] Powerex is not a regulated entity and therefore its success has not been the function of the scrutiny or mandates of a regulator. This is contrary to the CEC's suggestion that it would be appropriate for the BCUC to increase scrutiny of FBC's management of its power supply.[452] The PSI for FBC would help emulate the competitive

[446] Exhibit B-10, BCUC IR 1.96.6.
[447] ICG Argument, p. 24.
[448] Exhibit B-1-1, Table C7-1; FortisBC Final Argument, p. 267.
[449] BCOAPO Argument, p. 39.
[450] Exhibit B-10, BCUC IR 1.102.10.
[451] CEC Argument, p. 82.
[452] CEC Argument, p. 82.

market in which non-regulated entities such as Powerex compete to optimize power supply purchases and sales.

290. In reply to the CEC's comments that the BCUC should consider increased scrutiny of FBC's power supply costs,[453] FBC already reports on its power supply costs each year in the Annual Review and regularly responds to multiple information requests on its historical and forecast costs, and how it manages it powers supply generally. As required by the UCA, FBC also already files for acceptance of all power supply agreements and these are thoroughly reviewed by the BCUC. Therefore, FBC is unclear what increased scrutiny the CEC is suggesting is available to the BCUC under the UCA. The CEC also does not explain how any such increased scrutiny will increase benefit to ratepayers. FBC submits that the most effective way to regulate FBC's power supply costs is to approve a framework like the PSI that gives incentives to FBC's management and those at FBC with the specialized expertise in this area to maintain an ongoing focus and find ways to increase value for customers.

291. Ultimately, BCOAPO, ICG and CEC simply do not believe, or refuse to acknowledge, the benefits of incentives in the context of power supply. In FortisBC's submission, the value and power of incentive structures is a fundamental fact that has been proven out in multiple contexts.[454] BCOAPO, ICG and CEC, however, have not offered any evidence or rationale as to why incentives will not work in the context of managing FBC's power supply costs. FBC submits that it stands to reason that an incentive structure will work in the context of its power supply costs just as it has worked in the past.

292. FBC's proposed PSI is reasonable and has been designed to meet BCUC guidelines. Amongst other features, it provides the minimal incentive possible to achieve results. FBC recommends the PSI for approval.

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[453] CEC Argument, p. 82.

[454] Exhibit B-1-1, Appendix C3, Dr. Kaufmann, Multi-Year Rate Plans and Cost of Service Regulation, p. 28 (PDF p. 365); Weisman and Pfeifenberger, at p. 57, at Tab 6 of the Book of Authorities.

J. REPORTING REQUESTED BY BCSEA IS NOT FEASIBLE

293. BCSEA request that FEI monitor the potential interference between incentives for NGT and adoption of electric vehicles, and report on any impacts on residential conversions to heat pumps.[455] FEI does not have the ability to monitor or report on these items as it unclear how this could possibly be tracked. It would appear to require knowing what each individual customer might have done in different circumstances.

[455] BCSEA Argument, pp. 53-55.

PART TEN: SUPPORTING STUDIES TO IMPROVE CALCULATION OF REVENUE REQUIREMENT

294. For the most part, interveners either did not comment[456] or were supportive[457] of FortisBC's proposals regarding supporting studies. In this part, FortisBC responds to the limited comments of ICG and BCOAPO on this topic.

A. LEAD/LAG STUDIES

295. BCOAPO submits that at the Annual Reviews FBC should be required to report on changes in the percentage of customers on monthly billing and that parties should be able to make submissions on whether or not the revenue lag should be adjusted.[458] Given the small amounts involved, FBC does not recommend that the revenue lag be reviewed at each annual review. The length of time since FBC's last lead/lag study in 2005 warranted an update.[459] However, it would be a significant change in regulatory practice to examine the revenue lag every year. Given that the impact of the entire updated study is only $105 thousand to FBC's revenue requirement,[460] updates to the revenue lag due to the change in percentage of customers on monthly billing is likely to be immaterial.[461] Further, FortisBC considers that if the lead/lag days are to be updated, they should be fully refreshed, rather than focusing on one variable, which could be offset by other changes in other variables if a full study were conducted. FBC therefore recommends instead that it refresh the lead/lag study again in 2025.[462]

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[456] MoveUP, BCMEU, and BCSEA did not take a position on the supporting studies. ICG's only comment was on page 8 of its Argument regarding FBC's shared services costs. BCOAPO only commented on three of FBC's studies at pages 36 to 38 of its Argument.
[457] CEC Argument, p. 89, para. 625; BCOAPO Argument, pp. 36-38.
[458] BCOAPO Argument, p. 37.
[459] Exhibit B-10, BCUC IR 1.132.1.
[460] Exhibit B-12, BCUC IR 2.250.1.
[461] Exhibit B-10, BCUC IR 1.134.3.
[462] Exhibit B-10, BCUC IR 1.132.1.

B. SHARED SERVICES STUDY

296. ICG argues that FBC's shared services should continue to be on a time sheet basis "which would reflect the relative size of FEI and FBC" and because "cost allocation should match cost causation as close as possible".[463] FBC submits that the ICG has not identified a valid reason for maintaining a timesheet approach. FBC's reply to the ICG is threefold:

- First, the cost driver approach reflects the relative size of FEI and FBC due to the cost drivers used. For example, the cost drivers of number of customers and number of employees reflect the size of the Utilities.[464]

- Second, the cost driver approach reflects cost causation. The cost driver approach is consistent with the shared services approach approved previously by the BCUC.[465] A comparison to the timesheet approach shows that the difference between the two approaches has narrowed over the past four years to immaterial amounts, as the shared services have stabilized.[466] In short, both approaches accurately match cost causation.

- Third, consistent with accepted rate design principles (i.e. Bonbright),[467] the BCUC does consider factors other than cost causation. In this case, practical considerations favour the cost driver approach, as it is simpler to understand, easier to administer, and more efficient and stable.[468]

297. Overall, a cost driver approach is the most reasonable approach at this time, as discussed in section D4 of the Application and pages 285 to 286 of its Final Argument.

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[463] ICG Argument, p. 8.
[464] Exhibit B-1, Application, p. D-39 shows the cost drivers.
[465] Exhibit B-10, BCUC IR 1.135.3.
[466] Exhibit B-10, BCUC IR 1.135.2.
[467] E.g. see the FEI 2016 Rate Design Application, Decision and Order G-135-18, dated July 20, 2018, at p. 4 of 87. Online: https://www.bcuc.com/Documents/Proceedings/2018/DOC_52063_2018-07-20_FEI-RDA-Decision-and-Order-G-135-18.pdf
[468] Exhibit B-1, Application, Section D4; Exhibit B-12, BCUC IR 2.251.1 and 2.251.2.

298. The ICG's suggestion[469] that costs be directly assigned to FEI and FBC using timesheets and then use the cost driver approach for the "residual costs" is not recommended by FortisBC. This approach would be inconsistent, inefficient, and confusing. The need to maintain timesheets would cancel out the practical benefits of the cost driver approach. FBC submits that there is no merit to the ICG's suggestion.

[469] ICG Argument, p. 8.

PART ELEVEN: CONCLUSION

299. Intervener submissions reflect a range of responses to FortisBC's proposals, from strong support to ideological opposition. As reflected in this Reply Submission, those interveners who are ideologically opposed generally do not support their position with evidence, authority or cogent argument. FortisBC submits that the evidence overwhelmingly supports its approvals sought and recommends that the BCUC approve the Proposed MRPs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: March 2, 2020 ***[original signed by Chris Bystrom]***

Chris Bystrom

Counsel for FortisBC Energy Inc. and FortisBC Inc.

Dated: March 2, 2020 ***[original signed by Niall Rand]***

Niall Rand

Counsel for FortisBC Energy Inc. and FortisBC Inc.

Dated: March 2, 2020 **[original signed by Madison Grist]**

Madison Grist

Counsel for FortisBC Energy Inc. and FortisBC Inc.

BRITISH COLUMBIA UTILITIES COMMISSION

FortisBC Energy Inc. and FortisBC Inc.
Multi-Year Rate Plan Application for 2020 to 2024

Project No. 1598996

BOOK OF AUTHORITIES

Reply Argument

of

FortisBC Energy Inc. and FortisBC Inc.

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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.

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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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Referred to: *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65, July 31, 2001; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41, July 5, 2000; *Pushpanathan v.*

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]

Jurisprudence

Citée par le juge Bastarache

Arrêts mentionnés : *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65, 31 juillet 2001; *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41, 5 juillet 2000; *Pushpanathan c.*

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Hongkong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167.

By Binnie J. (dissenting)

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353; *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991; *Re Natural Resource Gas Ltd.*, O.E.B., RP-2002-0147, EB-2002-0446, June 27, 2003; *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984.

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R.C.S. 919, 2000 CSC 64; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167.

Citée par le juge Binnie (dissident)

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Interpretation Act, R.S.A. 2000, c. I-8, s. 10.
Public Utilities Act, S.A. 1915, c. 6, ss. 21, 23, 24, 29(g).
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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.

BRITISH COLUMBIA ELECTRIC RAILWAY CO. LTD. ..... APPELLANT;

1960

*May 4, 5, 6
Oct. 4

AND

THE PUBLIC UTILITIES COMMISSION OF BRITISH COLUMBIA, BRITISH COLUMBIA LUMBER MANUFACTURERS' ASSOCIATION, THE CORPORATION OF THE CITY OF VICTORIA, THE CORPORATION OF THE DISTRICT OF OAK BAY, THE CORPORATION OF THE DISTRICT OF SAANICH, CORPORATION OF THE TOWNSHIP OF ESQUIMALT AND CITY OF VANCOUVER ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—Case stated by Public Utilities Commission—Matters to be considered by Commission in changing rates—Order of priority to be given to factors considered—The Public Utilities Act, R.S.B.C. 1948, c. 277, s. 16(1)(a) and (b).

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Ritchie JJ.

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. *et al.*

The first of a series of questions submitted for the consideration of the Court of Appeal for British Columbia, in a case stated for the opinion of the Court, asked if the Public Utilities Commission of that Province was right in deciding "that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion."

The question was answered in the affirmative. The appellant appealed from that portion of the judgment of the Court of Appeal which comprised this answer.

Held (Kerwin C.J. *dissenting*): The appeal should be allowed.

Per Locke J.: There is an absolute obligation on the part of the Commission on the application of the utility to approve rates which will produce the fair return to which the utility has been found entitled, and the obligation to have due regard to the protection of the public is also to be discharged. It is not a question of considering priorities between "the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of s. 16", but consideration of these matters is to be given by the Commission in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

Per Cartwright, Martland and Ritchie JJ.: The combined effect of the two clauses referred to is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but it must when actually setting the rate, meet the requirements specifically mentioned in clause (*b*), i.e., the rate to be imposed should be neither excessive for the service nor insufficient to provide a fair return on the rate base. These two factors should be given priority over any other matters which the Commission may consider.

Although there is no priority directed by the Act as between these two matters, there is a duty imposed on the Commission to have due regard to both of them, and accordingly there must be a balancing of the interests concerned.

Per Kerwin C.J., *dissenting*: The statute does not require that any weight be given to the matters and things referred to in the two clauses after they have been considered, and therefore the weight to be assigned is a question of fact for the Commission to decide in each instance.

APPEAL from a portion of a judgment of the Court of Appeal for British Columbia[1], comprising the answer to the first of five questions submitted to it by the Public Utilities Commission. Appeal allowed, Kerwin C.J. dissenting.

J. W. de B. Farris, Q.C., A. Bruce Robertson, Q.C., and *R. R. Dodd*, for the appellant;

[1] (1959), 29 W.W.R. 533.

J. A. Clark, Q.C., for The Public Utilities Commission of British Columbia, respondent;

T. P. O'Grady, for The Corporation of The City of Victoria, The Corporation of The District of Oak Bay, The Corporation of the District of Saanich and Corporation of The Township of Esquimalt, respondents;

R. K. Baker, for City of Vancouver, respondent.

THE CHIEF JUSTICE (*dissenting*):—Pursuant to s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission stated a case for the opinion of the Court of Appeal for that Province. The case was stated in respect of five questions but we are concerned only with Question 1 as, by order of this Court, British Columbia Electric Railway Company, Limited was granted leave to appeal only from that portion of the judgment of the Court of Appeal comprising the answer given thereto. That question is as follows:

1. (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?

(*b*) If the answer to question (1) (*a*) is "No", what decision should the Commission have reached on the point?

The Court's answer to Question 1 reads:

The Commission was right in deciding as appears in its Reasons for Decision of 14th July, 1958 that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the Public Utilities Act R.S.B.C. 1948, chapter 277 should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion.

At the conclusion of the argument the judgment of the Court of Appeal appeared to me to be correct and further consideration has confirmed me in that view. Reasons were given by Sheppard J.A. on behalf of himself and the other four members of the Court who heard the argument on the

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stated case. I adopt all that he said and would have nothing to add were it not for an argument presented on behalf of the appellant. Section 16(1)(*a*) and (*b*) read as follows:

16. (1) In fixing any rate:—

(*a*) The Commission shall consider all matters which it deems proper as affecting the rate:

(*b*) The Commission shall have due regard, among other things, 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; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:

Mr. Farris submitted that the Court of Appeal had not taken into consideration the words in (1)(*b*) "The Commission shall have due regard.....and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:". However, I am satisfied upon a review of the reasons of Sheppard J.A., relevant to Question 1, and particularly of the extract transcribed below, which is the substance of his reasoning upon the matter, that he did consider and apply these words. The extract reads:

A further inquiry is what weight should be given to the matters required to be considered by Sec. 16 (1) (*b*) and particularly to the "fair and reasonable return". Under Sec. 16 (1) (*b*), the Commission is required to consider "the protection of the public" and the "giving to the public utility a fair and reasonable return". Although clauses (*a*) and (*b*) of Sec. 16 (1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16 (1) (*a*), namely, "all matters which it deems proper as affecting the rate" and those falling within Sec. 16 (1) (*b*), namely, "the protection of the public" and "a fair and reasonable return" to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance.

Furthermore, as Mr. Clark pointed out, the Commission when dealing with the electric rates applications, had, under heading "III.—A Fair Return", discussed that subject; and that in their reasons for decision with reference to the transit fares applications the Commission speaks "of the misunderstanding which arose from the recent decision on

electric rates"; and that later, in the same paragraph, they said: "The 6.5% rate remains the standard of the fair and reasonable return to which the Commission has due regard".

The appeal should be dismissed but there should be no costs.

LOCKE J.:—The sections of the *Public Utilities Act*, R.S.B.C. 1948, c. 277, which must be considered in deciding the first question are quoted in the reasons of my brother Martland which I have had the advantage of reading.

The real question might have been stated more clearly had it asked whether as a matter of law a duty rested upon the Commission to approve rates which would produce for the appellant a fair and reasonable return upon the appraised value of the property used or prudently and reasonably acquired by it to enable it to furnish the service described in the Act when the fact as to what constituted a fair return had previously been determined by the Commission. This is the matter to be determined.

Some assistance in interpreting the sections of the Act is to be obtained by an examination of the earlier legislation dealing with the control of rates charged for electrical power in British Columbia.

The first statutory provision dealing with the matter appears in the *Water Act Amendment Act* of 1929 which appeared as c. 67 of the statutes of that year. This Act provided for the control of such rates and imposed upon a power company producing electrical energy by water power the duty of supplying electrical energy to the public in the manner defined. Power companies were required to file schedules of their tolls with the Water Board constituted under the *Water Act*, R.S.B.C. 1924, c. 271.

"Unjust and unreasonable" as applied to tolls was declared to include injustice and unreasonableness, whether arising from the fact that the tolls were insufficient to yield fair compensation for the service rendered or from the fact that they were excessive as being more than a fair and reasonable charge for service of the nature and quality furnished.

Section 141B authorized the Board upon the complaint of any person interested that a toll charge was unjust, unreasonable or unduly discriminatory to enquire into the matter,

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to disallow any rate found to be excessive, and to fix the tolls to be charged by the power company for its service or respecting the improvement of the service in such manner as the Board considered just and reasonable.

Section 141C read:

> Every power company shall be entitled to a fair return on the value of all property acquired by it and used in providing service to the public of the nature and kind furnished by such power company or reasonably held by such power company for use in such service and the Board in determining any toll shall have due regard to that principle.

Section 141D read in part:

> In considering any complaint and making any order respecting the tolls to be charged by any power company the Board shall have due regard, among other things, to allowing the company a fair return upon the value of the property of the company referred to in Clause 141C and to the protection of the public from tolls that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the company.

These amendments to the *Water Act* appeared as ss. 138 to 157 in the Revision of the Statutes of 1936 and these sections were repealed when the first *Public Utilities Act* was passed by the Legislature, c. 47 of the statutes of 1938.

It will be seen by an examination of the *Public Utilities Act* that in large measure the language of the amendments to the *Water Act* made in 1929 was adopted. The definition of the terms "unjust" and "unreasonable", which appeared in the 1929 amendment as part of s. 2, was reproduced in s. 2 of the Act of 1938. The prohibition against levying any unjust and unreasonable, unduly discriminatory or unduly preferential rate appearing as s. 8 of the *Public Utilities Act* merely expresses in slightly different terms the prohibition contained in s. 141B. The expression "shall have due regard" which appears in s. 16(1)(*b*) of the *Public Utilities Act* was apparently taken from ss. 141C and D.

The *Public Utilities Act,* however, did not, when first enacted, and does not now contain any section which declares in express terms, as did s. 141C of the *Water Act Amendment Act,* that the power company shall be entitled to a fair return on the value of its property. Had the present Act contained such a provision it appears to me to be perfectly clear that the answer to be made to the first question should differ from that given by the Court of Appeal.

Whether its omission affects the matter is to be determined.

As it has been pointed out, the utility in the present matter is required by the Act to maintain its property in such condition as to enable it to supply an adequate service to the public and to furnish that service to all persons who may be reasonably entitled thereto without discrimination and without delay. It may not discontinue its operations without the permission of the Public Utilities Commission. The utility has, so far as we are informed, a monopoly on the sale of electrical energy in the Cities of Vancouver and Victoria and in my opinion at common law the duty thus cast upon it by statute would have entitled it to be paid fair and reasonable charges for the services rendered in the absence of any statutory provision for such payment.

I consider that, in this respect, the position of such a utility would be similar to that of a common carrier upon whom is imposed as a matter of law the duty of transporting goods tendered to him for transport at fair and reasonable rates. This has been so from very early times. In *Bastard v. Bastard*[1], in an action against a common carrier in the Court of King's Bench for the loss of a box delivered to him for carriage, in delivering judgment for the plaintiff it was said that, while there was no particular agreement as to the amount to be paid for the carriage, "then the carrier might have a *quantum meruit* for his hire".

In *Great Western Railway v. Sutton*[2], Blackburn J. said in part:

> The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a reasonable compensation for so doing.

The result of the authorities appears to me to be correctly summarized in Browne's Law of Carriers, at p. 42, where it is said:

> We have already seen that the law imposes very onerous duties, and very considerable risks, upon a person who is designated a common carrier. As to his duty, he is bound by law to undertake the carriage of goods. Another man is free from any such duty until he has entered into a special agreement; but the law holds that the common carrier, by the very fact of his trade and business, has, on his side, entered into an agreement with the public to carry goods, which becomes at once a complete and binding contract when any person brings him the goods,

[1] (1679), 2 Show. 81, 89 E.R. 807.
[2] (1869), L.R. 4 H.L. 226 at 237, 38 L.J Ex. 177.

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and makes the request that he should carry them to a certain person or place. To make such a contract binding upon him as a common carrier, it is not necessary that a specific sum of money should be promised or agreed upon; but where that is not the case, there is an implied undertaking upon the part of the bailor that the remuneration shall be reasonable.

The *Water Act Amendment Act* of 1929 appears to have followed closely the form of public utilities legislation in certain of the United States. There had been statutes of this nature in force in various parts of the Union for a considerable time prior to the year 1929.

I do not find that the American statutes generally declared in terms as did s. 141C of the *Water Act Amendment Act* that a power company providing service to the public should be entitled to a fair return on the value of all property acquired by it and used in providing service to the public. This method, however, of establishing a fair and reasonable rate would appear to have been followed universally.

The authorities in the American cases are to be found summarized in Nichols—Ruling Principles of Utility Regulation, at p. 49—where a passage from the judgment of the Supreme Court of the United States in *Bluefield Water Works & Improvement Co. v. West Virginia Public Service Commission*[1] is quoted reading:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary.

In *New Jersey Public Utility Commissioners v. New York Telephone Company*[2], Butler J. said:

> The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for public service. And rates not sufficient to yield that return are confiscatory.

While without the provision made in s. 141C of the *Water Act Amendment Act* a power company compelled by the amendment to furnish electrical service on demand

[1] (1923), 262 U.S. 679.

[2] (1925), 271 U.S. 23 at 31.

upon the conditions prescribed would in my opinion have been entitled to a fair and reasonable payment for such service, the Legislature, by s. 141C, defined the manner in which fair and reasonable rates should be established.

As I have said, the *Public Utilities Act* does not contain any provision which in terms declares the right of the utility to a fair return on the value of its property. It does, however, by the definition of the terms "unjust" and "unreasonable" adopted from the *Water Act Amendment Act* declare that these expressions include rates that are insufficient to yield fair compensation for the service rendered, and the Public Utilities Commission in the present matter have interpreted this in its context as indicating the yardstick to be used in determining the fair and reasonable return to which the appellant was entitled.

Under the powers given to the Commission by s. 45 of the Act the value of the property of the appellant used, or prudently or reasonably acquired to enable the company to furnish its services was determined as at December 31st, 1942, and since then has been kept up to date. On September 11th, 1952, the Commission, after public hearings, decided that until some change in the financial and market circumstances convinced the Commission that a different rate should be applied, the Commission would apply the rate of 6.5 per cent. on the rate base as a fair and reasonable rate of return for the company.

That decision remains unchanged and is not questioned by anyone in these proceedings.

In interpreting the statute, the position at common law of the utility after the repeal of the sections of the *Water Act* must be considered. Had the statute imposed upon the appellant the obligation to furnish service of the natures defined upon demand, without more, it would have been entitled as a matter of law to recover from a person demanding service reasonable and fair compensation. It will not in my opinion be presumed that it was the intention of the Legislature to deprive a utility of that common law right.

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In *Colonial Sugar Refining Company v. Melbourne Harbour Trust Commissioners*[1], the Judicial Committee said:

> In considering the construction and effect of this Act the Board is guided by the well known principle that a statute should not be held to take away private rights of property without compensation, unless the intention to do so is expressed in clear and unambiguous terms.

In Maxwell on Statutes, 10th ed., at p. 286, the authorities are thus summarized:

> Proprietary rights should not be held to be taken away by Parliament without provision for compensation unless the legislature has so provided in clear terms. It is presumed, where the objects of the Act do not obviously imply such an intention, that the legislature does not desire to confiscate the property or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words at least by clear implication and beyond reasonable doubt.

Subsection 6 of s. 23 of the *Interpretation Act*, R.S.B.C. 1948, c. 1, directs that every Act shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act. In my opinion the true meaning of the relevant sections of the *Public Utilities Act* is that a utility is given a statutory right to the approval of rates which will afford to it fair compensation for the services rendered and that the quantum of that compensation is to be a fair and reasonable rate of return upon the appraised value of the property of the company referred to in s. 16(1)(*b*).

The appellant in addition to the sale of electrical energy operates a public transportation system and sells gas and by an Order-in-Council made under the provisions of s. 15(1)(*c*) of the Statutes of 1938 it was directed that these three categories of service should be considered as one unit in fixing the rates. In the reasons delivered by the Commission upon the application to increase the rates for electricity, it is said that the appellant has never earned the approved rate of return and that the rates proposed by it, and which were not approved, would not enable it to do so even in respect of the electrical system alone.

[1] [1927] A.C. 343 at 359, 96 L.J.P.C. 74.

Rates that fail to yield fair compensation for the service rendered are declared by s. 2 to be unjust and unreasonable as they were by s. 2 of the *Water Act Amendment Act* of 1929. The Commission is directed by s. 16(1)(*b*) to have due regard to fixing a rate which will give to the utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable it to furnish the service. It is the inclusion of the expression "shall have due regard" which has led the Commission and the Court of Appeal to conclude that this means that allowing a fair return upon the appraised value is simply one of the matters to be considered by the Commission in fixing the rate. Clearly no such interpretation could have been placed upon this expression under the provisions of the *Water Act* in view of the express provisions of s. 141C, and with great respect I think no such interpretation should be given to it in the present statute.

The fair compensation referred to in s. 2 of the *Water Act Amendment Act* of 1929 referred, and could only refer, to an aggregate produced by tolls sufficient to yield to the power company the fair return on the value of its property to which s. 141C declared it was entitled. The fair compensation referred to in s. 2 of the *Public Utilities Act* is in its context, in my opinion, to be construed in the same manner. The Order of the Commission of September 11th, 1952, determined what that compensation should be. The rates to be put into force to yield such fair compensation, which, at least in the case of electricity, vary in accordance with the use to which it is put and the quantities purchased, are matters to be determined by the Commission. The direction to the Commission in s. 16(1)(*b*) 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 the services requires it, in my opinion, to approve rates which are in its judgment fair and reasonable having in mind the purpose for which the electricity is used, the quantities purchased and such other matters as it considers justify the approval of rates which differ for different users.

I can find nothing in this legislation indicating an intention on the part of the Legislature to empower the Commission to deprive the utility of its common law right to be paid fair compensation for the varying services rendered or

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to depart from the declared intention of the Legislature in the *Water Act Amendment Act* that such companies upon whom these obligations are imposed are entitled to have the quantum of such fair compensation determined as a fair return upon the appraised value of the properties required.

I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases or that it is expedient to attempt to do so. It is a continuing obligation that rests upon such a utility to provide what the Commission regards as adequate service in supplying not only electricity but transportation and gas, to maintain its properties in a satisfactory state to render adequate service and to provide extensions to these services when, in the opinion of the Commission, such are necessary. In coming to its conclusion as to what constituted a fair return to be allowed to the appellant these matters as well as the undoubted fact that the earnings must be sufficient, if the company was to discharge these statutory duties, to enable it to pay reasonable dividends and attract capital, either by the sale of shares or securities, were of necessity considered. Once that decision was made it was, in my opinion, the duty of the Commission imposed by the statute to approve rates which would enable the company to earn such a return or such lesser return as it might decide to ask. As the reasons delivered by the Commission show, the present appellant did not ask the approval of rates which would yield a return of 6.5 per cent. to which it was entitled under the Order of the Board.

I do not consider that Question (1) can be answered by a simple affirmative or negative. The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute, which does not mean that the obligation of the Commission to have due regard to the protection of the public, as required by s. 16(1)(*b*), is not to be discharged. It is not a question of considering priorities between "the matters and things referred to in Clauses (*a*) and (*b*) of subsection (1) of s. 16". The Commission is directed by s. 16(1)(*a*) to consider all matters which it deems proper as affecting the rate but that consideration is to be given in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

In my opinion the answer to be made to Question (1)(*a*) is that the Commission was wrong in deciding that it was not required to approve rates which in the aggregate would produce for the utility the fair return which by its order of September 11, 1952, the Commission found it to be entitled or such lower rates as the utility might submit for approval. The duty of the Commission to have due regard to the protection of the public from excessive rates referred to in the first four lines of s. 16(1)(*b*) refers to the approval of rates according to the use to be made by and the quantities supplied to those to whom the service is rendered.

The second part of Question (1) reads:

> If the answer to (1)(*a*) is "No", what decision should the Commission have reached on the point?

As to this I agree with the answer proposed by my brother Martland.

I would allow this appeal but make no order as to costs.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—Pursuant to the provisions of subs. (1) of s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission of that Province stated a case for the opinion of the Court of Appeal of British Columbia. Five questions were submitted for the consideration of the Court, of which the first was as follows:

> (1) (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?
>
> (*b*) If the answer to question (1) (*a*) is "No", what decision should the Commission have reached on the point?

Question (1)(*a*) was answered in the affirmative. The appellant, by special leave of this Court, has appealed from that portion of the judgment of the Court of Appeal which comprises the answer given by it to question (1). The other four questions and the answers given to them are not in issue in this appeal.

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The relevant circumstances involved are contained in the case stated by the Public Utilities Commission and are as follows:

The appellant and British Columbia Electric Company Limited (together called "the Company") are related companies and between them own and operate equipment and facilities for the transportation of persons and property by railway, trolley coach and motor buses and for the production, generation and furnishing of gas and electricity, all for the public for compensation.

The Company is regulated by the Public Utilities Commission of British Columbia (called "the Commission") pursuant to the provisions of the *Public Utilities Act*.

By appraisal the Commission ascertained the value of the property of the Company used, or prudently and reasonably acquired, to enable the Company to furnish its services. The appraisal was made as of December 31, 1942, and since then has been kept up to date. The appraised value is referred to as "the rate base".

By Order-in-Council No. 1627, approved on July 16, 1948, the Commission was directed to consider the classes or categories of the regulated services of the Company as one unit in fixing the rates.

On September 11, 1952, the Commission after public hearing made "Findings as to Rate of Return" and decided that, "until changed financial and market circumstances convince the Commission that a different rate should be applied, the Commission will in its continuing examination of the Company's operations apply the rate of 6.5%" on the rate base as a fair and reasonable rate of return for the Company. This decision remains unchanged.

The Company from time to time amended its rate schedules with the consent of the Commission and filed with the Commission schedules showing the rates so established. On April 23, 1958, it applied for the consent of the Commission, under s. 17 of the *Public Utilities Act,* to file amended schedules containing increased rates for its electric service on the Mainland and on Vancouver Island. On July 28, 1958, it also applied for the consent of the Commission to file amended schedules containing increased transit fares for its transit systems in Vancouver and other Mainland areas and in Victoria and surrounding areas.

Public hearings were held by the Commission and it handed down its decision with respect to the electric applications on July 14, 1958, and with respect to the transit applications on October 30, 1958.

Briefly, the decisions of the Commission accepted the proposed rate schedules submitted by the Company, except that it refused to approve the proposed increases in the principal residential electric rates on the Mainland and on Vancouver Island. It directed that those rates be scaled down by approximately 25%. In its decision with respect to electric rates the Commission stated:

> The Commission has therefore consented to the filing to be effective July 15th, 1958, of all the rate schedules submitted by the Company for the Mainland and Vancouver Island, as modified and supplemented by the Company during the course of the hearings on its application, except the residential rate schedules and Mainland Rate 3035 for industrial users.
>
> The Commission has decided that the principal residential rate on the Mainland (Schedule 1109) and the principal residential rate on the Island (Schedule 1110 under which the principal divisions are Billing Codes 1110 and 1112) should be adjusted to yield not more than three-quarters of the additional revenue proposed. The adjustment must be applied primarily to reduce sharp changes in impact and lessen disproportionately large percentage increases in the consumption range of 60 KWH to 280 KWH per month. Comparable adjustments must also be made in some of the related special residential rates of lesser importance. Most of the relief would be given to the small residential user.

At the same time the Commission decided that further increases in the commercial and industrial rates to compensate for this reduction in the proposed residential rates would not be justified.

During the hearings it was contended by counsel for the Company that, the Commission, having determined on a fair and reasonable return to the Company, namely, 6.5%, the Commission should authorize rates which would yield that return, or whatever lesser return the Company's application requested for the time being. The Commission did not accept this contention and the rates which were approved by the Commission would yield approximately $750,000 less per annum than those applied for by the Company would yield. The rates for which the Company sought approval themselves would not have yielded to the Company the full allowed rate of return of 6.5%.

The relevant portions of s. 16(1) of the *Public Utilities Act* provide as follows:

> 16. (1) In fixing any rate:—

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(a) The Commission shall consider all matters which it deems proper as affecting the rate:

(b) The Commission shall have due regard, among other things, 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; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:

(c) Where the public utility furnishes more than one class of service, the Commission shall segregate the various kinds of service into distinct classes or categories of service; and for the purpose of fixing the rate to be charged for the service rendered, each distinct class or category of service shall be considered as a self-contained unit, and the rates fixed for each unit shall be such as are considered just and reasonable for that unit without regard to the rates fixed for any other unit. If it is considered by the Lieutenant-Governor in Council that the rates as so determined might be inequitable or contrary to the general public interest, the Lieutenant-Governor in Council may direct that two or more classes or categories of service shall be considered as one unit in fixing the rate:

In the reasons given for its decision the Commission deals with the effect of clauses (*a*) and (*b*) of s. 16(1) and says:

With great respect, the Commission considers that although for this purpose the statutory duty of the Commission to have due regard to all matters which the Commission deems proper as affecting the rate might without any significant inaccuracy be described as the right of the Commission, and its statutory duty to *have due regard to giving* the utility a fair and reasonable return might without significant inaccuracy be described as the Commission's *responsibility for giving* the utility a fair and reasonable return, there is nothing in the Act to relieve the Commission in the case now before it from complying with the language of the Act and giving due regard to all those matters to which the legislature has directed the Commission to give due regard in fixing a rate. No one of those matters should, in the opinion of the Commission, be given as a matter of law priority over any other of those matters and if, as the legislature appears to have thought possible, a conflict arises among those matters, the Commission considers that it is its duty to act to the best of its discretion.

The Court of Appeal concurred in this view. The judgment of the Court[1], delivered by Sheppard J.A., refers to this question in the following words:

A further inquiry is what weight should be given to the matters required to be considered by Sec. 16(1)(*b*) and particularly to the "fair and reasonable return". Under Sec. 16(1)(*b*), the Commission is required

[1] (1959), 29 W.W.R. 533 at 538.

to consider "the protection of the public" and the "giving to the public utility a fair and reasonable return". Although clauses (*a*) and (*b*) of Sec. 16(1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16(1)(*a*), namely, "all matters which it deems proper as affecting the rate" and those falling within Sec. 16(1)(*b*), namely, "the protection of the public" and "a fair and reasonable return" to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance.

From this decision the present appeal is brought.

To determine the intent and meaning of clauses (*a*) and (*b*) of s. 16(1) of the Act it is necessary to consider them in relation to the other provisions of the Act, with which they must be read.

Section 5 imposes upon a public utility the duty to maintain its property and equipment in such condition as to enable it to furnish, and to furnish, service to the public in all respects adequate, safe, efficient, just and reasonable. Section 7 prevents a public utility which has been granted a certificate of public convenience and necessity or a franchise from ceasing its operations or any part of them without first obtaining the permission of the Commission.

Section 6 requires every public utility, upon reasonable notice, to furnish to all persons who may apply therefor, and be reasonably entitled thereto, suitable service without discrimination and without delay.

Sections 38, 42 and 43 contain provisions whereby, in the circumstances therein defined, a public utility may be ordered by the Commission to extend its existing services.

These four sections last mentioned involve a statutory obligation on the part of a public utility to make capital outlays for extensions of its service. A public utility which operates in a rapidly expanding community may be required to make substantial expenditures of that nature in order to keep pace with increasing demands. It must, if it is to fulfil those obligations, be able to obtain the necessary

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capital which is required, which it can only do if it is obtaining a fair rate of return upon its rate base. The meaning of a fair return was defined by Lamont J. in *Northwestern Utilities, Limited v. City of Edmonton*[1]:

> By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise.

The necessity for giving a public utility fair compensation for the service which it renders appears in the definition of the words "unjust" and "unreasonable" in s. 2(1), which is as follows:

> "Unjust" and "unreasonable" as applied to rates shall be construed to include respectively injustice and unreasonableness, whether arising from the fact that rates are excessive as being more than a fair and reasonable charge for service of the nature and quality furnished by the public utility, or from the fact that rates are insufficient to yield fair compensation for the service rendered, or arising in any other manner:

The word "service", which appears in this definition, is defined in the Act to include:

> the use and accommodation afforded consumers or patrons, and any product or commodity furnished by a public utility; and also includes, unless the context otherwise requires, the plant, equipment, apparatus, appliances, property, and facilities employed by or in connection with any public utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which the public utility is engaged and to the use and accommodation of the public:

These defined words appear in two sections of the Act which relate to the rates to be charged by a public utility.

Section 8, which is among a group of sections dealing with the duties and restrictions imposed on public utilities, provides:

> 8. (1) No public utility shall make demand or receive any unjust, unreasonable, unduly discriminatory, or unduly preferential rate for any service furnished by it within the Province, or any rate otherwise in violation of law; and no public utility shall, as to rates or service, subject any person or locality, or any particular descripiton of traffic, to any undue prejudice or disadvantage, or extend to any person any form of agreement, or any rule or regulation, or any facility or privilege, except such as are regularly and uniformly extended to all persons under substantially similar circumstances and conditions in respect of service of the same description, and the Commission may by regulations declare what constitute substantially similar circumstances and conditions.

[1] [1929] S.C.R. 186 at 193, 2 D.L.R. 4.

(2) It shall be a question of fact, of which the Commission shall be the sole judge, whether any rate is unjust or unreasonable, or whether in any case there is undue discrimination, preference, prejudice, or disadvantage in respect of any rate or service, or whether service is offered or furnished under substantially similar circumstances and conditions. 1938, c. 47, s. 8; 1939, c 46, s. 5.

Section 20, which empowers the Commission to determine rates, reads as follows:

20. The Commission may upon its own motion or upon complaint that the existing rates in effect and collected or any rates charged or attempted to be charged by any public utility for any service are unjust, unreasonable, insufficient, or discriminatory, or in anywise in violation of law, after a hearing, determine the just, reasonable, and sufficient rates to be thereafter observed and in force, and shall fix the same by order. The public utility affected shall thereupon amend its schedules in conformity with the order and file amended schedules with the Commission.

It will be noted that this section, in addition to the use of the words "unjust" and "unreasonable", also uses the terms "insufficient" and "sufficient" in relation to rates.

Both of these sections contemplate a system of rates which would be fair to the consumer on the one hand and which will yield fair compensation to the public utility on the other hand.

Section 16, the section with which we are concerned in this appeal, also deals with this matter of fairness of rates. In addition, it spells out the method by which a public utility is to obtain fair compensation for its service; i.e., by a fair and reasonable return upon its rate base, which rate base, pursuant to s. 45, the Commission can determine by appraisal.

Section 16 deals with the duties of the Commission in fixing rates. Clause (*a*) of subs. (1) states that the Commission shall consider all matters which it deems proper as affecting the rate. It confers on the Commission a discretion to determine the matters which it deems proper for consideration and it requires the Commission to consider such matters.

Clause (*b*) of subs. (1) does not use the word "consider", which is used in clause (*a*), but directs that the Commission "shall have due regard", among other things, to two specific matters. These are:

(i) 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; and

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(ii) To giving to the public utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable the public utility to furnish the service.

As I read them, the combined effect of the two clauses is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*). It would appear, reading ss. 8, 16 and 20 together, that the Act contemplates these two matters to be of primary importance in the fixing of rates.

In my opinion, therefore, these two factors should be given priority over any other matters which the Commission may consider under clause (*a*), or any other things to which it shall have due regard under clause (*b*), when it is fixing any rate.

The second portion of question (1)(*a*) was as to whether, in case of conflict among the matters and things referred to in clauses (*a*) and (*b*) of s. 16(1), it was the Commission's duty to act to the best of its discretion. I have already expressed my view regarding the priority as between those things specifically mentioned in clause (*b*) and the other matters or things referred to in clauses (*a*) and (*b*). This leaves the question as to possible conflict as between the two matters specifically mentioned in clause (*b*).

Clearly, as between these two matters there is no priority directed by the Act, but there is a duty imposed upon the Commission to have due regard to both of them. The rate to be imposed shall be neither excessive for the service nor insufficient to provide a fair return on the rate base. There must be a balancing of interests. In my view, however, if a public utility is providing an adequate and efficient service (as it is required to do by s. 5 of the Act), without incurring unnecessary, unreasonable or excessive costs in so doing, I cannot see how a schedule of rates, which, overall, yields less revenue than would be required to provide that rate of return on its rate base which the Commission has determined to be fair and reasonable, can be considered, overall, as being excessive. It may be that within the schedule certain rates may operate unfairly, relatively, as

between different classes of service or different classes of consumers. If so, the Commission has the duty to prevent such discrimination. But this can be accomplished by adjustments of the relative impact of the various rates in the schedule without having to reduce the total revenues which the whole schedule of rates is designed to produce.

Accordingly, it is my opinion that the answer to question (1)(*a*) should be "No". My answer to question (1)(*b*) would be that the Commission, in priority to any other matters which it may deem proper to consider under clause (*a*) and any of the other things referred to in clause (*b*) of s. 16(1), should have due regard to the two matters specifically mentioned in clause (*b*). In the present case, having decided that certain of the rates proposed by the appellant would impose an unreasonable burden upon certain classes of consumers, the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, until a rate schedule is devised which meets the requirements of clause (*b*) of s. 16(1).

In my view the appeal should be allowed, but no costs should be payable.

Appeal allowed, Kerwin C.J. *dissenting.*

Solicitor for the appellant: A. Bruce Robertson, Vancouver.

Solicitors for The Public Utilities Commission of British Columbia, respondent: Clark, Wilson, Clark, White & Maguire, Vancouver.

Solicitors for The Corporation of The City of Victoria, The Corporation of The District of Oak Bay, The Corporation of The District of Saanich and Corporation of The Township of Esquimalt, respondents: Straith, O'Grady, Buchan, Smith & Whitley, Victoria.

Solicitor for City of Vancouver, respondent: R. K. Baker, Vancouver.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia Old Age Pensioners' Organization v. British Columbia Utilities Commission,* 2017 BCCA 400

Date: 20171117
Dockets: CA44248; CA44557

Docket: CA44248

Between:

British Columbia Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, Together Against Poverty Society, and the Tenant Resource and Advisory Centre ("BCOAPO et al.") and Movement of United Professionals

Appellants
(Intervenors)

And

British Columbia Utilities Commission

Respondent
(Administrative Tribunal)

And

British Columbia Hydro and Power Authority

Respondent
(Applicant)

And

FortisBC Energy Inc. and FortisBC Inc. (collectively, "Fortis"), Commercial Energy Consumers' Association of British Columbia, British Columbia Sustainable Energy Association, Sierra Club of British Columbia, Association of Major Power Customers, Non Integrated Areas Ratepayers Group, Zone II Ratepayers Group

Respondents
(Intervenors)

And

Attorney General of British Columbia

Respondent

- and -

Docket: CA44557

Between:

British Columbia Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, Together Against Poverty Society, and the Tenant Resource and Advisory Centre ("BCOAPO et al.") and Movement of United Professionals

Appellants
(Intervenors)

And

British Columbia Utilities Commission

Respondent
(Administrative Tribunal)

And

British Columbia Hydro and Power Authority

Respondent
(Applicant)

And

FortisBC Energy Inc. and FortisBC Inc. (collectively, "Fortis"), Commercial Energy Consumers' Association of British Columbia, British Columbia Sustainable Energy Association, Sierra Club of British Columbia

Respondents
(Intervenors)

And

Attorney General of British Columbia

Respondent

Before: The Honourable Mr. Justice Goepel
(In Chambers)

On appeal from: Decisions and Orders of the British Columbia Utilities Commission, dated January 20, 2017 (Order Number G-5-17) and June 2, 2017 (Order Number G-87-17).

Counsel for the Appellant, British Columbia Old Age Pensioners' Organization et al.:	M.G. Underhill E. Pritchard L. Worth
Counsel for the Appellant, Movement of United Professionals:	J. Quail
Counsel for the Respondent, FortisBC Energy Inc. and FortisBC Inc.:	L.B. Herbst, Q.C. N.T. Hooge
Counsel for the Respondent, British Columbia Hydro and Power Authority:	M. Vesely C.C. Ferguson
Counsel for the Respondent, British Columbia Utilities Commission:	P. Miller T. Shoranick
Place and Date of Hearing:	Vancouver, British Columbia September 19, 2017
Place and Date of Judgment:	Vancouver, British Columbia November 17, 2017

Summary:

BCOAPO and MoveUp apply for leave to appeal two orders of the BC Utilities Commission. The orders were made in the context of a Rate Design Application submitted by BC Hydro, which proposed utility rates for classes of customers. BCOAPO and MoveUp had intervened in the application process, requesting the implementation of strategies to assist low-income ratepayers. In the first order, the Commission denied most of the low-income proposals on the basis that it lacked jurisdiction under the Utilities Commission Act to set low-income rates without an economic or cost of service justification. The second order denied a request for reconsideration.

Held: Applications for leave to appeal dismissed. In the circumstances of this case the decision of whether or not to grant leave comes down to a consideration of the merits. Assessing whether there is some prospect the appeal will succeed on its merits must be done in light of the standard of review on which the merits of the appeal would be judged. In this case, the Commission interpreted and applied provisions of its home statute and thus its decision would be reviewed on a standard of reasonableness. Given the standard of review, this appeal has no prospect of success.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] The applicants, British Columbia Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, Together Against Poverty Society, and the Tenant Resource and Advisory Centre (collectively, "BCOAPO") and the Movement Of United Professionals ("MoveUp") seek leave under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 [*UCA*] to appeal the following orders of the British Columbia Utilities Commission:

1. Order G-5-17, pronounced on January 20, 2017 (the "Original Decision"); and

2. Order G-87-17, pronounced on June 2, 2017 (the "Reconsideration Decision").

[2] The orders were made in the context of a Rate Design Application submitted by BC Hydro, which proposed utility rates for classes of customers. BCOAPO and MoveUp had intervened in the application process, requesting the implementation of strategies to assist low-income ratepayers. In the first order, the Commission denied most of the low-income proposals on the basis that it lacked jurisdiction under the *UCA* to set low-income rates without an economic or cost of service justification. The second order denied a request for reconsideration

[3] The application for leave is opposed by the respondents, British Columbia Hydro and Power Authority ("BC Hydro") and FortisBC Energy Inc. and FortisBC Inc. (collectively, "Fortis"). BC Hydro and Fortis both submit that if leave is granted, it should be limited to the Reconsideration Decision.

[4] The Commission takes no position on the application for leave to appeal from the Reconsideration Decision. It does submit, however, that it is improper to grant leave to appeal the Original Decision because that decision has been the subject of reconsideration by the Commission and only the Commission's final decision should be subject to appellate review.

[5] For the reasons that follow, I would dismiss the applications for leave to appeal.

BACKGROUND

A. Legislative Scheme

[6] BC Hydro is the publicly owned monopoly electricity provider to the vast majority of the province. The Commission is empowered to regulate BC Hydro to ensure its quality of service, infrastructure, operations and rates are in the public interest. Pursuant to sections 23, 38, 59 and 60 of the *UCA*, the Commission is charged with ensuring that utilities provide safe, adequate, efficient and secure service to their customers and that the rates are fair, just and reasonable, and not unduly discriminatory or preferential. Those sections read as follows:

General supervision of public utilities

23 (1) The commission has general supervision of all public utilities and may make orders about

(a) equipment,

(b) appliances,

(c) safety devices,

(d) extension of works or systems,

(e) filing of rate schedules,

(f) reporting, and

(g) other matters it considers necessary or advisable for

(i) the safety, convenience or service of the public, or

(ii) the proper carrying out of this Act or of a contract, charter or franchise involving use of public property or rights.

(2) Subject to this Act, the commission may make regulations requiring a public utility to conduct its operations in a way that does not unnecessarily interfere with, or cause unnecessary damage or inconvenience to, the public.

Public utility must provide service

38 A public utility must

(a) provide, and

(b) maintain its property and equipment in a condition to enable it to provide,

a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable.

Discrimination in rates

59 (1) A public utility must not make, demand or receive

(a) an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia, or

(b) a rate that otherwise contravenes this Act, the regulations, orders of the commission or any other law.

(2) A public utility must not

(a) as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, or

(b) extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description.

(3) The commission may, by regulation, declare the circumstances and conditions that are substantially similar for the purpose of subsection (2) (b).

(4) It is a question of fact, of which the commission is the sole judge,

(a) whether a rate is unjust or unreasonable,

(b) whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or

(c) whether a service is offered or provided under substantially similar circumstances and conditions.

(5) In this section, a rate is "unjust" or "unreasonable" if the rate is

(a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,

(b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or

(c) unjust and unreasonable for any other reason.

Setting of rates

60 (1) In setting a rate under this Act

(a) the commission must consider all matters that it considers proper and relevant affecting the rate,

(b) the commission must have due regard to the setting of a rate that

(i) is not unjust or unreasonable within the meaning of section 59,

(ii) provides to the public utility for which the rate is set a fair and reasonable return on any expenditure made by it to reduce energy demands, and

(iii) encourages public utilities to increase efficiency, reduce costs and enhance performance,

(b.1) the commission may use any mechanism, formula or other method of setting the rate that it considers advisable, and may order that the rate derived from such a mechanism, formula or other method is to remain in effect for a specified period, and

(c) if the public utility provides more than one class of service, the commission must

(i) segregate the various kinds of service into distinct classes of service,

(ii) in setting a rate to be charged for the particular service provided, consider each distinct class of service as a self contained unit, and

(iii) set a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates set for any other unit.

(2) In setting a rate under this Act, the commission may take into account a distinct or special area served by a public utility with a view to ensuring, so far as the commission considers it advisable, that the rate applicable in each area is adequate to yield a fair and reasonable return on the appraised value

> of the plant or system of the public utility used, or prudently and reasonably acquired, for the purpose of providing the service in that special area.
>
> (3) If the commission takes a special area into account under subsection (2), it must have regard to the special considerations applicable to an area that is sparsely settled or has other distinctive characteristics.
>
> (4) For this section, the commission must exclude from the appraised value of the property of the public utility any franchise, licence, permit or concession obtained or held by the utility from a municipal or other public authority beyond the money, if any, paid to the municipality or public authority as consideration for that franchise, licence, permit or concession, together with necessary and reasonable expenses in procuring the franchise, licence, permit or concession.

[7] Pursuant to s. 79 of the *UCA*, determinations of the Commission on questions of fact within its jurisdiction are binding and conclusive on all persons and all courts.

[8] Section 99 gives the Commission the power to reconsider a decision.

[9] Pursuant to s. 105(1) of the *UCA*, the Commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is confirmed on the Commission by statute. Section 105(2) provides that unless otherwise provided in the *UCA*, any order or decision of the Commission must not be questioned, reviewed or restrained by or on application for judicial review or other process or proceeding in any court.

[10] Section 101 of the *UCA* provides that an appeal lies from of an order or decision of the Commission to the Court of Appeal with leave of a justice of that court. Appeals from the Commission are restricted to questions of law or jurisdiction: *Plateau Pipe Line Ltd. v. British Columbia Utilities Commission*, 2002 BCCA 246 at paras. 8–9.

B. Procedural History

[11] The orders which are the subject matter of these leave applications were made in the context of a Rate Design Application ("RDA"). In an RDA the Commission is tasked with determining utilities rates for various classes of customers. The Commission hears evidence and submissions from the applicant utility and intervenor groups regarding the costs to serve each rate group, and the

proper rate structure to recover those costs from each rate group. The Commission then makes a determination regarding the costs of service, rate structures, and terms and conditions of service for residential, business, industrial and all other customers.

[12] On September 24, 2015, BC Hydro filed an application with the Commission, known as the 2015 RDA. It was the first comprehensive rate design application since 2007. BCOAPO, Move Up and Fortis were amongst the groups granted intervenor status in the 2015 RDA.

[13] BCOAPO asked the Commission to order BC Hydro to implement a strategy to assist low-income ratepayers. More specifically, BCOAPO asked that the Commission direct BC Hydro to:

(a) implement an "essential services usage block" ("ESUB") rate, which would allow low-income customers to receive the first 400 kWh of service each month at a discount; and

(b) amend the BC Hydro electric tariff to exempt low-income customers from late payment, minimum reconnection and account charges and security deposits (collectively, the "Low-Income Proposals").

[14] The Low-Income Proposals were opposed by BC Hydro as well as two intervenor groups, including Fortis.

THE ORIGINAL DECISION

[15] On January 20, 2017, the Commission issued the Original Decision and accompanying reasons. The Commission denied the majority of the Low-Income Proposals. It found that the *UCA* did not provide the Commission with the jurisdiction to approve a low-income rate in the absence of an economic or a cost of service justification. It found as a fact that it did not cost BC Hydro less to serve low-income customers than it did to serve other residential customers. It further found that low-income rates unsupported by an economic or cost of service justification would be

unjust, unreasonable and unduly discriminatory and therefore not in accordance with s. 59 of the *UCA* — and accordingly not within the Commission's jurisdiction to approve. Order G-5-17 contains the following paragraphs relevant to this appeal:

> 14. [BCOAPO's] request to establish an essential services usage block (ESUB) rate for qualified low-income ratepayers is denied.
>
> 16. BCOAPO's proposals to amend the Electric Tariff to exempt low-income customers from the minimum reconnection charge and account charge and to waive security deposits for low-income customers are denied.
>
> 17. BCOAPO's proposal to exempt low-income customers from late payment charges … [is] denied.

THE RECONSIDERATION DECISION

[16] On February 17, 2017, BCOAPO filed a request pursuant to s. 99 of the *UCA* that the Commission reconsider its decision. The grounds advanced were that the Commission erred in law in finding sections 23, 38, 59 and 60 of the *UCA* do not provide the Commission with jurisdiction to order or approve low-income rates.

[17] The Commission addresses reconsideration applications in two phases. The first phase is a preliminary examination: essentially a threshold test. In the case of a reconsideration application based on errors of law with respect to jurisdiction, the Commission examines the following two criteria to determine whether a reconsideration application should proceed to the second phase and be considered on its merits: (a) whether the claim of error is substantiated on a *prima facie* basis; and (b) whether the error has material implications.

[18] In the Original Decision, the Commission found no evidence of legislative intent to provide the Commission with jurisdiction to set low-income rates and no evidence the legislature intended the *UCA* to provide jurisdiction for low-income rates in the absence of economic or cost of service justification. It found as a fact

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 s. 59 of the *UCA*.

[19] On June 2, 2017, by way of Order G-87-17 the Commission denied the reconsideration request finding the errors claimed had not been substantiated on a *prima facie* basis. In the result, the reconsideration application did not proceed to phase two and was not considered on its merits.

TEST FOR LEAVE TO APPEAL

[20] Pursuant to s. 101 of the *UCA*, an appeal lies to this Court with leave of a justice. The judge who hears the leave application acts as a gatekeeper. The judge's task is to ensure judicial resources are not expended on matters that do not merit the attention of a division of the Court: *Teck Cominco Metals Ltd. v. British Columbia (Minister of Revenue)*, 2009 BCCA 3 (in Chambers) at para. 27.

[21] The factors to be considered in deciding whether leave to appeal from a statutory tribunal should be granted were summarized in *Queens Plate Development Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 at 109–110:

> (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from …;
>
> (b) whether the appeal is limited to questions of law involving:
>
> (i) the application of statutory provisions ...;
>
> (ii) a statutory interpretation that was particularly important to the litigant ...; or
>
> (iii) interpretation of standard wording which appears in many statutes …;
>
> (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...;
>
> (d) whether there is some prospect of the appeal succeeding on its merits ... although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;
>
> (e) whether there is any clear benefit to be derived from the appeal ...; and

> (f) whether the issue on appeal has been considered by a number of appellate bodies ...
>
> [Case citations omitted.]

[22] Determining whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 75. While *Sattva* concerned leave to appeal a decision under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, the same principle applies to a leave application pursuant to s. 101 of the *UCA*: *Collins v. British Columbia Utilities Commission*, 2012 BCCA 455.

POSITIONS ON APPLICATION

[23] The applicants submit they should be granted leave to appeal both the Original Decision and the Reconsideration Decision. They submit the proposed appeal raises an important question about the Commission's jurisdiction under the *UCA* to order or approve low-income rates. They submit the answer to this jurisdictional question will have significant implications for BC Hydro, other utilities and low-income ratepayers all over the province.

[24] The applicants submit that whether the Commission has jurisdiction under the *UCA* to approve low-income rates is a question of statutory interpretation which should be determined on the basis of correctness. They submit the Commission erred in law in finding that it had no jurisdiction under the *UCA* to set low-income rates. The applicants submit that the appeals would have the clear benefit of settling an important jurisdictional question and would clarify whether the Commission can, as part of its public interest function, make distinctions between customers based on income to ensure vulnerable ratepayers can access essential services. The applicants note that while the issue of a regulatory body's jurisdiction to order low-income rates has been considered by other appellate bodies, none have considered the specific legislation set out in the *UCA*.

[25] In response, BC Hydro and Fortis both submit that if there is an appeal, it would lie only from the Reconsideration Decision. They submit that the factors in the *Queens Plate* test have not been met and the application for leave to appeal should be dismissed. In that regard, they submit that the proposed appeal does not raise a true question of jurisdiction that would justify appellate review. Furthermore, they submit the appeal has no prospect of success given the high level of deference that would be shown to the Commission, which interpreted and applied provisions of its home statute. They submit the applicants have failed to show the appeal has some prospect of success or that there is a substantial question to be argued. They further submit the Commission did in fact consider the applicants' proposals and found as a fact the low-income rates would be unduly discriminatory and therefore not in accordance with s. 59 of the *UCA*. They submit this finding of fact cannot be challenged on appeal.

[26] The Commission takes no position as to whether or not leave to appeal should be granted. It does however submit that if leave is granted, it should be limited to the Reconsideration Decision.

DISCUSSION

A. Which Decision Can Be Appealed?

[27] The Commission, BC Hydro and Fortis all submit that if leave is to be granted, it should only be from the Reconsideration Decision. The applicants do not seriously argue otherwise.

[28] This Court in *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329, set out the framework governing the determination of whether leave to appeal should be from a tribunal's original or reconsideration decision. Where a party has taken advantage of a tribunal's reconsideration power, and the tribunal has undertaken the reconsideration, the reconsideration decision represents the final decision of the tribunal and it is the decision which should be reviewed: *Yellow Cab Company Ltd.* at para. 40.

[29] The original decision of course gives rise to the reconsideration decision. It forms part of the appeal record and will inform the court's review of the reconsideration which is, in this case, an affirmation of the original order. This is the situation that arose in *Zellstoff Celgar Limited Partnership v. British Columbia Hydro and Power Authority et al.* (21 October 2014), Vancouver CA041888; CA042066 (B.C.C.A. in Chambers). In that case, as in this, the parties sought leave to appeal both the original and reconsideration decisions of the Commission. Madam Justice MacKenzie held that leave should only be granted in regard to the reconsideration decision. She noted that since the original decision forms part of the record and will inform the court's review on appeal, there was no prejudice in granting leave to appeal only the reconsideration decision. The same considerations apply in this case. If leave to appeal is to be granted, leave should only be granted with respect to the Reconsideration Decision.

B. Should Leave Be Granted?

[30] I turn to the question of whether leave to appeal should be granted. This requires a consideration of the *Queens Plate* factors. The applicants place particular emphasis on factors (a), (b) and (d).

[31] In their submission, the applicants stress that the proposed appeal raises a question of general importance concerning the Commission's jurisdiction. They submit that the jurisdictional question is critically important, as it will determine whether the Commission is empowered to order BC Hydro to implement low-income rates. They submit the proposed appeal is limited to questions involving statutory interpretation and will focus on the Commission's finding that sections 23, 38, 59 and 60 of the *UCA* do not provide the Commission with the jurisdiction to order and approve low-income rates. They submit the Commission erred in law in finding that the *UCA* did not confer jurisdiction on the Commission to set low-income rates. They submit the appeal has some prospect of success and their submissions raise a substantial question to be tried.

[32] The applicants further submit pursuant to factor (e) that there is a clear public benefit to be derived from the appeal. In this regard, they submit that the impact of the decision on BC Hydro's low-income customers is severe. They submit the appeal can settle an important jurisdictional question and if successful, will enable the Commission to consider a substantive issue of important public interest.

[33] The applicants also point out that the issue of a regulatory body's jurisdiction to order low-income rates has been considered by other appellate bodies, albeit not with respect to the specific legislation that governs the Commission. In that regard, they point to the decisions in *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.*, 2006 NSCA 74; *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 293 D.L.R. (4th) 684, 2008 CanLII 23487 (Ont. S.C.J.) and a recent Manitoba hydro general rate application: Manitoba Public Utilities Board Order No. 73/15, Final Order with respect to Manitoba Hydro's 2014/15 and 2015/16 General Rate Application.

[34] In my respectful opinion, the question of whether or not to grant leave on this application comes down to a consideration of the merits.

[35] The merits analysis plays a major role in the courts' gatekeeper function. In *Collins*, Mr. Justice Chiasson in discussing the merits test observed:

> [32] It is apparent to me that this Court equates "some prospect of success" with "a substantial question to be argued". I would not apply a test that limits the consideration to whether a proposed appeal is "not wholly devoid of merit". In my mind, that is not consistent with the gatekeeper function described by Frankel J.A. It also is not consistent with the development of the reasonableness standard in the law of judicial review and the deference owed by courts to tribunals where the issue does not concern true jurisdiction, and particularly, where the issue involves the construction of a tribunal's home statute or one closely related to its function.

[36] In this case, I find that the applicants' appeal is not one with some prospect of success. The foundation of the applicants' submission is that their appeal raises a jurisdictional issue which is to be determined on the question of correctness. The jurisprudence, however, suggests otherwise. This case involves the interpretation by the Commission of its home statute. A decision of an administrative tribunal

interpreting or applying its home statute is to be reviewed on a reasonableness standard: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39. The Supreme Court of Canada has recently reiterated this point in the context of a statutory right of appeal: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47.

[37] This case turns on the Commission's interpretation of its jurisdiction to approve a low-income rate in the absence of economic or cost of service justification. The Commission interpreted and applied the provisions of its home statute governing rate making. This lies at the core of its expertise and competence. In reaching its decision the Commission undertook a textual, contextual and purposive analysis of the key provisions. It considered the Hansard evidence tendered by each party and concluded that this extrinsic evidence reinforced its interpretation. It also extended its review to decisions of courts and tribunals from other Canadian jurisdictions and examined with care whether the relevant statutory provisions in those jurisdictions were comparable.

[38] Ultimately the Commission rejected the appellants' submissions and held that the *UCA* did not provide the Commission with the jurisdiction to approve a low-income rate in the absence of an economic or cost of service justification. In their submissions the applicants do not suggest the Commission's findings are unreasonable. They have not put forward a credible argument or basis for this Court, given the deferential standard of review, to reverse the Commission's conclusion. Given the standard of review, I have reached the conclusion that there is no prospect that this appeal can succeed.

[39] I would also note that pursuant to s. 59(4) of the *UCA*, it is a finding of fact of which the Commission is the sole judge, whether a rate is unjust, unreasonable or unduly discriminatory. The Commission in its reasons found as a fact that the low-income rates proposed by the applicants were unjust, unreasonable and unduly discriminatory and therefore not in accordance with sections 59–60 of the *UCA*. Pursuant to s. 79 of the *UCA* that finding, which goes to the heart of the applicants'

rate submissions, cannot be challenged on appeal. In the result, even if the applicants could convince this Court that the Commission's interpretation of its home statute was unreasonable the appeal would have no practical utility.

[40] The applications for leave to appeal are dismissed.

"The Honourable Mr. Justice Goepel"

Court of Appeal for British Columbia
Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission)
Date: 1992-03-26

Chris W. Sanderson and Barbara Cornish, for appellant.

Gordon A. Fulton, for respondent B.C. Utilities Commission.

Patrick G. Foy, for respondent Attorney General of British Columbia.

(Doc. Vancouver CA013604)

March 26, 1992. The judgment of the court was delivered by

CUMMING J.A.:–

DECISION APPEALED FROM

[1] This is an appeal from O. G-11-91 of the British Columbia Utilities Commission (the "commission") pronounced January 30, 1991 reaffirming the terms of O. G-77-90, made October 17, 1990, which permitted the appellant utility, Hemlock Valley Electrical Services Ltd. ("HVES"), to increase the rate it charges for the supply of electrical services, but ordered that the rate base costs be phased in over a period of three years.

[2] On March 7, 1991, pursuant to s. 115 of the *Utilities Commission Act,* S.B.C. 1980, c. 60, Toy J.A. granted leave to appeal to this court and directed that the operation of commission O. G-11-91 be stayed upon terms to which further reference will later be made.

FACTS

[3] HVES, a wholly owned subsidiary of Hemlock Valley Resorts Inc., is a small, special purpose utility which is the sole supplier of electrical service to a group of approximately 192 residential customers living in a single community located around the Hemlock Valley ski hill in the lower mainland of British Columbia. HVES also provides service to the ski hill itself.

[4] HVES was incorporated in 1979 and on June 20, 1980 was granted a certificate of public convenience and necessity by O. C-23-80 of the British Columbia Energy Commission, the predecessor of the present commission.

[5] On November 13, 1982 HVES filed a rate application with the commission (the "1982 application"). A public hearing was held on June 7, 1983 and the commission rendered its decision on July 8, 1983 (the "1983 decision").

[6] At that time HVES' operations were described as follows:

> Hemlock is a subsidiary of Hemlock Valley Recreations Ltd. ("Hemlock Recreations"), which company owns and leases land in the Hemlock Valley of the Lower Mainland of British Columbia for year-round recreational use. Hemlock provides underground electric service to residential consumers and to Hemlock Recreations for use in a ski lodge, lifts and a maintenance area; to Hemlock Property Management Ltd. for residential use on residential properties; and to Hemlock Valley Sanitary Service Ltd. for a sewer system serving the recreation area. All three companies are wholly owned subsidiaries of Hemlock Recreations.

[7] In the 1983 decision the commission declined to allow HVES a return on its rate base and ordered that electrical rates be set at 11.5¢ per kW.h with a $15 per month minimum charge, effective July 1, 1983. The commission noted:

(a) the Hemlock recreational area was still in the developmental stage;

(b) the development had been materially affected by a downturn in the provincial economy;

(c) HVES had taken significant steps to reduce the cost of power and improve the reliability of service through the interconnection with B.C. Hydro;

(d) undertakings were given in the prospectus of Hemlock Valley Estates Limited indicating that a purchaser of property could expect that all services would have been completed and paid for by the developer from its own resources.

[8] The commission concluded that in the circumstances of HVES a reasonable approach to rates would be based on a break-even approach between revenue and expenses.

[9] In its decision of October 17, 1990 the commission said of the 1983 decision:

> It is clear that in the 1983 decision the interdependency of electric and other services with the resort enterprise at Hemlock Valley was fully understood. It is also clear that the commission felt some consternation about the 7.69 per cent negative return on rate base flowing from the 1980 decision. It was also apprehensive that the continued existence of Hemlock Valley as a going concern was being "materially affected by the downturn in the provincial economy." Moreover, it was looking at the changeover from diesel generators to a tie-line with B.C. Hydro. The change in source of power was unquestionably correct in the long-term, but it imposed an annual amortization cost of $98,840.18 for the years immediately ahead. That addition of nearly $100,000 per year materially distorted the profit and loss statement. In the circumstances, the commission, in its 1983 decision, chose to ignore return on rate base as an appropriate means of fixing fair and reasonable rates, and chose instead a pragmatic break-even approach between revenue and expenses. It also added a small allowance for contingencies. Management of the utility was evidently prepared to accept this approach.

[10] By commission O. G-65-83, dated August 23, 1983, HVES was again ordered to amend its rates to reflect the sale of a portion of its electric utility plant to B.C. Hydro.

[11] On July 10, 1984 HV Recreations, the parent of HVES, went into receivership. HV Recreations remained in receivership until January 15, 1987 when Skipp L.J.S.C. (as he then was) approved the sale of the assets of HV Recreations, including the HVES shares, to one Michael Robbins or his assignee. Sometime after January 15, 1987 the HVES shares were transferred to Hemlock Valley Resorts Inc. ("HV Resorts"). HV Resorts remains the sole shareholder of HVES. Throughout 1987 and 1988 there were various changes in the ownership of HV Resorts and on October 27, 1988 its shares were acquired by Mr. Joseph Peters. There has been no change in the ownership of the assets or shares of HV Resorts since that date.

[12] In 1984 and again in 1986 increased rates were approved to reflect, firstly, an increase in B.C. Hydro's water rental fees and, secondly, an increase in the cost to HVES of purchasing power from B.C. Hydro.

[13] As of the spring of 1990 the rate being charged by HVES was 8.650 per kW.h. That rate had been in effect since September 26, 1986.

[14] On May 31, 1990 HVES applied to the commission to increase its tariff rates by 7.320 per kW.h, an 84.6 per cent increase. The reasons given were to permit the recovery of recently approved rate increases to B.C. Hydro, forecast operating costs and a return on rate base. In the 1990 application, HVES proposed a rate base of $366,511 with a 13 per cent return on the debt component and a 15 per cent return on the equity component of that rate base.

[15] Prior to a public hearing the commission, by O. G-58-90, ordered that effective July 1, 1990 HVES be allowed an interim increase of 3.70 per kW.h in its rates to permit the recovery of the increased cost of purchased power from B.C. Hydro and increased operating costs. The operative part of that order read:

> 1. The Rate Base costs included in the Application will not form part of the interim increase allowed in item No. 2 of this Order at this time.
>
> 2. The Commission will accept, subject to timely filing, effective July 1, 1990, an amendment to its Electric Tariff Rate Schedule incorporating an increase of 3.70 cents/kW.h over existing rates on an interim basis, with the interim increase subject to refund with interest calculated at the average prime rate of the bank with which HVES conducts its business.

> 3. HVES, by way of a Customer Notice, is to inform each customer, as soon as possible, of the application before the Commission, the approved interim increase and the effect on average annual billings. HVES is to provide the Commission with a copy of the Customer Notice.

[16] On August 2, 1990 the commission directed that a public hearing commencing September 24, 1990 be held in respect of HVES' application of May 31, 1990 and gave directions with respect to notice of the hearing and participation by intervenors and interested persons intending to participate in the public hearing.

[17] The Hemlock Valley Ratepayers Association intervened and, we were advised, played a significant role at the hearing. Its submissions covered many areas, correcting a number of statements in the application and disputing a number of forecasts. Among other things, the rate base component in the application was opposed on the basis that the utility systems were fully paid for by the developers.

[18] The commission received evidence of complaints of unsatisfactory service, inadequate HVES accounting documentation, concerns about paying for the recreational commercial venture through utility payments (commercial power use is unmetered), detailed comments on HVES' proposed operating and maintenance expenses, comparisons to residential rates in other areas, and other matters.

[19] Following the public hearing on September 24 and 25, 1990, by commission O. G-77-90 dated October 17, 1990, the commission issued a decision (the "original decision") with respect to the 1990 application.

[20] The operative part of O. G-77-90 reads:

> 1. The Rate Base and Revenue Requirement for the Test Period are set out in Schedules contained in the Decision.
>
> 2. The Commission will accept, subject to timely filing, amended Electric Tariff Rate Schedules which confirm to the terms of the Commission's October 17, 1990 Decision.
>
> 3. HVES is to proceed with refunds to its customers of record on and after July 1, 1990, where necessary. Such refunds are to include interest calculated as specified in O. G-51-90.
>
> 4. HVES will comply with the several directions incorporated in the Commission Decision.

I have appended as App. A to these reasons [pp. 25-30] the schedules referred to in para. 1 of the commission order.

[21] By the original decision the commission declined to permit the full implementation of the approved rate increase immediately but instead directed that it be phased in by

increases of 1.510 per kW.h effective July 1, 1990, and 1.510 per kW.h and 0.750 per kW.h effective May 1, 1991 and May 1, 1992 respectively.

[22] It is this rate adjustment phase-in which is the principal focus of this appeal.

[23] By letter dated November 8, 1990, HVES requested that the commission reconsider certain aspects of the original decision pursuant to s. 114 of the Act on the basis that:

(a) Reconsideration was appropriate because HVES had not been provided with an opportunity to deal with the phase-in issue in its rate application;

(b) Once the commission had determined that there was a rate base and that a 13 per cent return on it was "just and reasonable," pursuant to the Act, the commission was obliged to permit HVES an opportunity to recover sufficient revenue to capture that return.

[24] On January 30, 1991, by O. G-11-91, the commission ordered that the request by HVES to vary O. G-77-90 be denied and that HVES was to proceed with refunds to customers and to comply with all other directions in that order.

[25] The operative part of O. G-11-91 reads:

> Now THEREFORE the Commission orders as follows:
>
> 1. The Request, by HVES to vary the October 17, 1990 Commission Decision and Order No. G-77-90, is denied and the Commission's Reasons for Decision is attached as Appendix A.
>
> 2. The Commission reaffirms and orders HVES to proceed with refunds to customers along with other directions incorporated in its October 17, 1990 Decision and Order No. G-77-90.

[26] It is from O. G-11-91 that this appeal is taken.

GROUNDS OF APPEAL

[27] As set out in the appellant's factum the grounds of appeal are:

> that the Commission erred in pronouncing Order No. G-11-91, which reaffirmed Commission Order No. G-77-90 when Order No. G-77-90 contained an error in law … in that the Order:
>
> (a) failed to permit HVES the opportunity to recover a portion of its rate base costs over three years notwithstanding that the Commission had determined that that portion of its rate base costs was necessary for the establishment of rates which were just and reasonable under the *Utilities Commission Act,* S.B.C. 1980, c. 60 (the "Act");
>
> (b) required a refund of monies which the Commission had determined were necessary to permit HVES an opportunity to receive a just and reasonable rate under the Act.

REASONS FOR THE DECISIONS OF THE COMMISSION

1*. Original Decision*

[28] In the original decision of October 17, 1990, under the heading “Determination of Rate Base,” the commission, after reviewing the 1983 decision, went on to say:

> This division of the commission considers that the 1983 decision was a practical decision to tide the enterprise at Hemlock Valley over a particularly difficult period. Sooner or later, however, longer-term prospects must be faced squarely. The tie-line has been amortized over five years. Evidence (Exs. 14 through 21) clearly indicates that recovery of plant expenditures was anticipated through utility rates. *Therefore the commission believes that a return to more traditional rate-making practice is justified.*
>
> It was proposed to the commission by the intervenors at the hearing that rate base should not be recognized. The cornerstone of rate base is appraised value of utility property, which is usually taken to be original cost of plant. The commission cannot, by a stroke of the pen, eliminate the appraised value of the property; to do so would be confiscation of property ...

And concluded:

> *The commission has considered alternative calculations for rate base and concludes that no material difference results from any refinements which might be made. Therefore, the commission accepts the company’s evidence, and finds the rate base to be $366,511 for the test period.*

[29] The commission then continued:

> 4.2 *Capital Structure*
>
> The company currently has no viable capital structure of its own. Its financing has been by way of loans from the parent company. The applicant proposes a deemed 50/50 per cent debt/equity ratio in this application. It is a frequent practice of regulatory tribunals to use a notional capital structure. While 50 per cent equity is much higher than would be usual for utilities in general, the higher proportion of equity in this case can be considered as reasonable, bearing in mind the relative risks in the case of the company.
>
> 4.3 *Return on Rate Base*
>
> The company has proposed a return of 13 per cent on the debt component, and 15 per cent on the equity component of the rate base. Standing alone, these figures certainly fall within a reasonable range in today’s market. Nevertheless, the commission considers it essential to consider the particular circumstances of the company in this decision. While it is true that risky investments typically command higher returns, that position considers primarily the potential investors’ point of view in placing funds at the utility’s disposal. From the existing shareholders’ point of view, the realization of an allowable rate of return depends upon the ability of management to run an efficient organization, and for external factors to favourably affect the prosperity of the company. Bearing in mind the interrelationship of the resort and utility elements at Hemlock, and the current circumstances of the utility, the commission cannot accept a return on equity for rate-making purposes of 15 per

cent. *For the foregoing reasons, the commission believes that a 13 per cent return on debt and a 13 per cent return on equity are both just and reasonable within the spirit of s. 65(3) and (4) of the Act,* which states:

> "(3) It is a question of fact, of which the commission is the sole judge, whether a rate is unjust or unreasonable, or whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate of service, or whether a service is offered or furnished under substantially similar circumstances and conditions.
>
> "(4) In this section a rate is 'unjust' or 'unreasonable' if the rate is
>
> "(*a*) more than a fair and reasonable charge for service of the nature and quality furnished by the utility,
>
> "(*b*) insufficient to yield a fair and reasonable compensation for the service rendered by the utility, or a fair and reasonable return on the appraised value of its property, or
>
> "(*c*) unjust and unreasonable for any other reason."

[30] Under the heading "Cost of Service" the commission, over several pages, reviewed in detail various components of the cost of service which HVES estimated it would incur and for which it sought a rate sufficient to enable it to recover, and considered the objections to and criticisms of those cost components raised by the intervenors and various witnesses. It is not necessary here to review this aspect of the material in any great detail: it is sufficient to say that where the commission did not accept in full the submissions of HVES it reduced the eligible cost component by the amounts set out in the schedules to its order (see, in particular, sheet 5 of App. 1) with the result that HVES' revenue requirements, for rate-making purposes, were reduced accordingly. The commission also made a number of directions and recommendations to the company, of which the following are examples:

> *The commission directs the company to prepare and file with the commission an operating budget at the beginning of each fiscal year …*
>
> *The commission therefore directs that the company provide the commission with a time schedule for the completion of the work, as well as specific advice when the work is completed. In addition, the company is directed to file a copy of its preventive maintenance program by November 1, 1990,*

but these did not result in any further adjustments to the estimates of allowable and recoverable costs of service.

[31] The commission then turned its attention to the question of "quality of service" and reviewed a number of complaints and dissatisfactions expressed by the intervenors. It concludes its discussion of this issue by saying:

> During the course of the hearing, the commission was impressed with the sincerity, variety and degree of expertise shown by the witnesses for the principal intervenor, the Hemlock Valley Ratepayers' Association. It is suggested to the company that

consideration might well be given to drawing on this pool of talent. *The commission strongly recommends that a "utility consultation committee" be established by HVES, with members from the utility and representative ratepayers. Quarterly information meetings should serve to improve communications in the interest of the common goals of all the participants on the mountain.*

Apart from the recommendation which the commission made in this passage, nothing else was said by the commission with regard to quality of service and, most importantly, as will be noted later, no further adjustments were made to the rate base, rate of return or the allowable components of recoverable cost of service (other than those specifically referred to) by reason of any concern related to the quality of service provided by HVES to its customers.

[32] The commission summarized its decision as follows:

7.0 Decision Summary

7.1 *Revenue Requirement*

Section 44 of the *Utilities Commission Act* requires that:

"44. Every public utility shall maintain its property and equipment in a condition to enable it to furnish, and it shall furnish, a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable."

It is the duty of the commission to see that this is done. It is also the duty of the commission to ensure that the utility has sufficient revenue to enable it to perform these functions. However, it must always be satisfied that the level of funding provided for is within the company's ability to use efficaciously.

On the basis of the evidence presented, the commission has set a revenue requirement to satisfactorily meet the above objectives (refer to attached schedules).

7.2 *Rate Adjustment Phase-In*

As mentioned in s. 1.0, the application contemplated a rate increase of 84.6 per cent in the test year. The adjustments to the cost of service in this decision have mitigated some of the potential rate shock. The commission considers that a return on rate base should be allowed; however, it believes that the ratepayers should be protected from the full impact initially. In arriving at this conclusion, the commission has recognized that there was a hiatus of some seven years between applications. In addition, the future economics and the viability of the mountain are at stake.

Accordingly, the commission orders that the rate base costs be phased in over three years. The commission requires the utility to file amended rate schedules incorporating an increase of 1.51¢ per kW.h over permanent rates effective July 1, 1990, and for further increases of 1.51¢ per kW.h and 0.750 per kW.h effective May 1, 1991 and May 1, 1992, respectively.

2. Reconsideration Decision

[33] In refusing the request of HVES for reconsideration and confirming its original decision, the commission said, under the heading "Jurisdiction":

2.0 JURISDICTION

The argument made on behalf of HVES has as its essence the jurisdiction of the commission, and it is set out in the letter dated December 14, 1990.

On p. 2 of that letter, s. 65(4) of the Act is quoted in its entirety, as is s. 66(1)(*a*) and (*b*). The submission then goes on:

"The words of Section 65(1)(b) [reference should be s. 65(4)(*b*)] and Section 66(1)(b) of the Act are a clear statutory direction to the Commission on how to determine a just and reasonable rate. In our respectful submission, in the presence of clear language, the Commission may not disregard those statutory provisions and substitute its own opinion of what is just or reasonable in any given case."

It is the commission's view that the submission is flawed in that it evidently invites the commission to ignore the clear language of s. 65(4)(*a*) and (*c*), and concentrate instead only on s. 65(4)(*b*) which supports the position of HVES. The commission holds that, in fixing a rate, it must have due regard to the whole of s. 64. Section 66(1)(*b*) makes this abundantly clear:

"the Commission shall have due regard, among other things, to the fixing of a rate that is not unjust or unreasonable, within the meaning of Section 65."

[34] After referring to and distinguishing the decision of the Supreme Court of Canada in *British Columbia Electric Railway Co. v. British Columbia Public Utilities Commission,* [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689, the commission continued:

The point which seems to be missed is that the commission's decision of October 17, 1990 must be taken as a whole and should be read and understood as such. It is not a decision on rate of return, followed by decisions at a later time on other matters. The phase-in is an integral part of the finding on just and reasonable rates. The decision as a whole should make it abundantly clear that the commission had concerns about "the nature and quality (of service) furnished by the utility." The impact on the customers of a large percentage increase suddenly imposed was another example of an "other reason" [s. 65(4)(*c*)] to which the commission gave due regard in deciding to phase in the increase in three steps. The commission was not prepared to grant an immediate increase in the amount requested by the applicant, but granted instead a modest increase initially and set a target for an allowable rate of return which HVES could work towards, together with suggestions and commentary on how the company might improve its operation.

[35] The commission then turned to the question of "rate shock" and rejected the submission of HVES with respect to the three-year phase-in of the allowed rate increase. It stated its determination as follows:

The *Utilities Commission Act* places a duty upon the commission to balance all the factors which the Act includes as matters for due regard when fixing rates. HVES has emphasized one element, namely, return on the appraised value of the utility's property in terms of typical costs of money in the financial markets. It refers, in reply to argument by HVES to "the absolute limitation imposed by s. 65(4)(b)." The commission does not accept that any such absolute limitation applies, but is of the view that counsel for HVES, at pp. 4 and 5 [There is an error in Karen Knott's quote.] has correctly recognized the breadth of the commission's mandate.

ISSUE

[36] The issue before us, simply stated, is: “was the commission right?”

DISCUSSION

[37] Any discussion of the scope of the commission’s rate-making powers begins, of necessity, with the seminal decision of the Supreme Court of Canada in *British Columbia Electric Railway Co. v. British Columbia Public Utilities Commission,* supra. In that case the Supreme Court had before it a legislative scheme prescribed by the *Public Utilities Act,* R.S.B.C. 1948, c. 277 (the “old Act”) similar to (and here the appellant submits, identical to) the scheme found in the *Utilities Commission Act* (the “new Act”). It will, I think, be convenient to set out side by side the relevant provisions of the two statutes so that their similarities or differences may be readily apparent.

OLD ACT	**NEW ACT**
Interpretation.	**Discrimination in rates**
2.(1) In this Act …	65. (1) A public utility shall not make, demand or receive an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service furnished by it in the Province, or a rate that otherwise contravenes this Act, regulations, orders of the commission or other law.
“Unjust” and “unreasonable” as applied to rates shall be construed to include respectively injustice and unreasonableness, whether arising from the fact that rates are excessive as being more than a fair and reasonable charge for service of the nature and quality furnished by the public utility, or from the fact that rates are insufficient to yield fair compensation for the service rendered, or arising in any other manner:	(2) A public utility shall not, as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, or extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description, and the commission may, by regulation, declare the circumstances and conditions that are substantially similar.
16. (1) In fixing any rate	
(*a*) The Commission shall consider all matters which it deems proper as affecting the rate.	
(*b*) The Commission shall have due regard, among other things, 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; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service.

(*c*) Where the public utility furnishes more than one class of service, the Commission shall segregate the various kinds of service into distinct classes or categories of service; and for the purpose of fixing the rate to be charged for the service rendered, each distinct class or category of service shall be considered as a self-contained unit, and the rates fixed for each unit shall be such as are considered just and reasonable for that unit without regard to the rates fixed for any other unit. If it is considered by the Lieutenant-Governor in Council that the rates as so determined might be inequitable or contrary to the general public interest, the Lieutenant-Governor in Council may direct that two or more classes or categories of service shall be considered as one unit in fixing the rate.

(3) It is a question of fact, of which the commission is the sole judge, whether a rate is unjust or unreasonable, or whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or whether a service is offered or furnished under substantially similar circumstances and conditions.

(4) In this section a rate is “unjust” or “unreasonable” if the rate is

(*a*) more than a fair and reasonable charge for service of the nature and quality furnished by the utility,

(*b*) insufficient to yield a fair and reasonable compensation for the service rendered by the utility, or a fair and reasonable return on the appraised value of its property, or

(*c*) unjust and unreasonable for any other reason.

Rates

66. (1) In fixing a rate under this Act or regulations

(*a*) the commission shall consider all matters that it considers proper and relevant affecting the rate,

(*b*) the commission shall have due regard, among other things, to the fixing of a rate that is not unjust or unreasonable, within the meaning of section 65, and

(*c*) where the public utility furnishes more than one class of service, the commission shall segregate the various kinds of service into distinct classes of service; and in fixing a rate to be charged for the particular service rendered, each distinct class of service shall be considered as a self contained

> unit, and shall fix a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates fixed for any other unit.

[38] The facts giving rise to the *British Columbia Electric* case are succinctly set forth in the majority judgment of Martland J. (for himself and Cartwright and Ritchie JJ.) at pp. 850-51 of the report [S.C.R.]:

> The appellant and British Columbia Electric Company Limited (together called "the Company") are related companies and between them own and operate equipment and facilities for the transportation of persons and property by railway, trolley coach and motor buses and for the production, generation and furnishing of gas and electricity, all for the public for compensation.
>
> The Company is regulated by the Public Utilities Commission of British Columbia (called "the Commission") pursuant to the provisions of the *Public Utilities Act.*
>
> By appraisal the Commission ascertained the value of the property of the Company used, or prudently and reasonably acquired, to enable the Company to furnish its services. The appraisal was made as of December 31, 1942, and since then has been kept up to date. The appraised value is referred to as "the rate base".
>
> By Order-in-Council No. 1627, approved on July 16, 1948, the Commission was directed to consider the classes or categories of the regulated services of the Company as one unit in fixing the rates.
>
> On September 11, 1952, the Commission after public hearing made "Findings as to Rate of Return" and decided that, "until changed financial and market circumstances convince the Commission that a different rate should be applied, the Commission will in its continuing examination of the Company's operations apply the rate of 6.5%" on the rate base as a fair and reasonable rate of return for the Company. This decision remains unchanged.
>
> The Company from time to time amended its rate schedules with the consent of the Commission and filed with the Commission schedules showing the rates so established. On April 23, 1958, it applied for the consent of the Commission, under s. 17 of the *Public Utilities Act,* to file amended schedules containing increased rates for its electric service on the Mainland and on Vancouver Island. On July 28, 1958, it also applied for the consent of the Commission to file amended schedules containing increased transit fares for its transit systems in Vancouver and other Mainland areas and in Victoria and surrounding areas.
>
> Public hearings were held by the Commission and it handed down its decision with respect to the electric applications on July 14, 1958, and with respect to the transit applications on October 30, 1958.
>
> Briefly, the decisions of the Commission accepted the proposed rate schedules submitted by the Company, except that it refused to approve the proposed increases in the principal residential electric rates on the Mainland and on Vancouver Island. It directed that those rates be scaled down by approximately 25%. In its decision with respect to electric rates the Commission stated:
>
> "The Commission has therefore consented to the filing to be effective July 15th, 1958, of all the rate schedules submitted by the Company for the Mainland and Vancouver Island, as modified and supplemented by the Company during the course

of the hearings on its application, except the residential rate schedules and Mainland Rate 3035 for industrial users.

"The Commission has decided that the principal residential rate on the Mainland (Schedule 1109) and the principal residential rate on the Island (Schedule 1110 under which the principal divisions are Billing Codes 1110 and 1112) should be adjusted to yield not more than three-quarters of the additional revenue proposed. The adjustment must be applied primarily to reduce sharp changes in impact and lessen disproportionately large percentage increases in the consumption range of 60 KWH to 280 KWH per month. Comparable adjustments must also be made in some of the related special residential rates of lesser importance. Most of the relief would be given to the small residential user."

At the same time the Commission decided that further increases in the commercial and industrial rates to compensate for this reduction in the proposed residential rates would not be justified.

At p. 849 Martland J. had said:

Pursuant to the provisions of subs. (1) of s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission of that Province stated a case for the opinion of the Court of Appeal of British Columbia. Five questions were submitted for the consideration of the Court, of which the first was as follows:

"(1) (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the 'Public Utilities Act' should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?

"(*b*) If the answer to question (1) (*a*) is 'No', what decision should the Commission have reached on the point?"

Question (1)(*a*) was answered in the affirmative. The appellant, by special leave of this Court, has appealed from that portion of the judgment of the Court of Appeal which comprises the answer given by it to question (1). The other four questions and the answers given to them are not in issue in this appeal.

[39] After summarizing the facts as I have set them out from the judgment of Martland J., his Lordship continued, at pp. 852-53:

In the reasons given for its decision the Commission deals with the effect of clauses (*a*) and (*b*) of s. 16(1) and says:

"With great respect, the Commission considers that although for this purpose the statutory duty of the Commission to have due regard to all matters which the Commission deems proper as affecting the rate might without any significant inaccuracy be described as the right of the Commission, and its statutory duty to *have due regard to giving* the utility a fair and reasonable return might without significant inaccuracy be described as the Commission's *responsibility for giving* the utility a fair and reasonable return, there is nothing in the Act to relieve the Commission in the case now before it from complying with the language of the Act and giving due regard to all those matters to which the legislature has directed the Commission to give due regard in fixing a rate. No one of those matters should, in

the opinion of the Commission, be given as a matter of law priority over any other of those matters and if, as the legislature appears to have thought possible, a conflict arises among those matters, the Commission considers that it is its duty to act to the best of its discretion."

The Court of Appeal concurred in this view. The judgment of the Court, delivered by Sheppard J.A., refers to this question in the following words:

"A further inquiry is what weight should be given to the matters required to be considered by Sec. 16(1)(*b*) and particularly to the 'fair and reasonable return'… Although clauses (*a*) and (*b*) of Sec. 16(1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16(1)(*a*), namely, 'all matters which it deems proper as affecting the rate' and those falling within Sec. 16(1)(*b*), namely, 'the protection of the public' and 'a fair and reasonable return' to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance."

[40] At p. 854 he observed, "The necessity for giving a public utility fair compensation for the service which it renders appears in the definition of the words 'unjust' and 'unreasonable' in s. 2(1)" (quoted above).

[41] At pp. 855-57, Martland J. said:

Section 16, the section with which we are concerned in this appeal, also deals with this matter of fairness of rates. In addition, it spells out the method by which a public utility is to obtain fair compensation for its service; i.e., by a fair and reasonable return upon its rate base, which rate base, pursuant to s. 45, the Commission can determine by appraisal.

Section 16 deals with the duties of the Commission in fixing rates. Clause (*a*) of subs. (1) states that the Commission shall consider all matters which it deems proper as affecting the rate. It confers on the Commission a discretion to determine the matters which it deems proper for consideration and it requires the Commission to consider such matters.

Clause (*b*) of subs. (1) does not use the word "consider", which is used in clause (*a*), but directs that the Commission "shall have due regard", among other things, to two specific matters. These are:

(i) 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; and

(ii) To giving to the public utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable the public utility to furnish the service.

As I read them, the combined effect of the two clauses is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*). It would appear, reading ss.8, 16 and 20 together, that the Act contemplates these two matters to be of primary importance in the fixing of rates.

> In my opinion, therefore, these two factors should be given priority over any other matters which the Commission may consider under clause (*a*), or any other things to which it shall have due regard under clause (*b*), when it is fixing any rate.
>
> The second portion of question (1)(*a*) was as to whether, in case of conflict among the matters and things referred to in clauses (*a*) and (*b*) of s. 16(1), it was the Commission's duty to act to the best of its discretion. 1 have already expressed my view regarding the priority as between those things specifically mentioned in clause (*b*) and the other matters or things referred to in clauses (*a*) and (*b*). This leaves the question as to possible conflict as between the two matters specifically mentioned in clause (*b*).
>
> Clearly, as between these two matters there is no priority directed by the Act, but there is a duty imposed upon the Commission to have due regard to both of them. The rate to be imposed shall be neither excessive for the service nor insufficient to provide a fair return on the rate base. There must be a balancing of interests. In my view, however, if a public utility is providing an adequate and efficient service (as it is required to do by s. 5 of the Act), without incurring unnecessary, unreasonable or excessive costs in so doing, I cannot see how a schedule of rates, which, overall, yields less revenue than would be required to provide that rate of return on its rate base which the Commission has determined to be fair and reasonable, can be considered, overall, as being excessive. It may be that within the schedule certain rates may operate unfairly, relatively, as between different classes of service or different classes of consumers. If so, the Commission has the duty to prevent such discrimination. But this can be accomplished by adjustments of the relative impact of the various rates in the schedule without having to reduce the total revenues which the whole schedule of rates is designed to produce.

He then answered the question posed as follows:

> Accordingly, it is my opinion that the answer to question (1)(*a*) should be "No". My answer to question (1)(*b*) would be that the Commission, in priority to any other matters which it may deem proper to consider under clause (*a*) and any of the other things referred to in clause (*b*) of s. 16(1), should have due regard to the two matters specifically mentioned in clause (*b*). In the present case, having decided that certain of the rates proposed by the appellant would impose an unreasonable burden upon certain classes of consumers, the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, until a rate schedule is devised which meets the requirements of clause (*b*) of s. 16(1).

[42] Locke J. delivered a separate concurring judgment in which, as appears at p. 849 of the report, he agreed specifically with the answer to the second part of the question proposed by Martland J.

[43] Both Mr. Sanderson for the appellant and Mr. Foy for the respondent Attorney General of British Columbia relied heavily upon the decision in the *British Columbia Electric* case, each asserting that it supported their opposing points of view.

[44] Mr. Foy firstly drew attention to the passage in the judgment of Martland J. at pp. 855-56 where that learned judge focused on the fact that, in s. 16 of the old Act, cl. (*b*) of

subs. (1) does not use the word “consider,” which is used in cl. (*a*), but directs that the commission “shall have due regard,” among other things, to two specific matters. He then pointed to the fact that, by virtue of the wording and structure of ss. 66(1)(*b*) and 65(4), and particularly by s. 65(4)(*c*), of the new Act, a third matter, namely, that a rate may be “unjust and unreasonable for any other reason,” has been elevated to being not merely one of the matters which the commission “considers proper and relevant affecting the rate” (its mandate under s. 66(1)(*a*)), but to one of the now three (formerly only two) specific matters to which the commission is directed to “have due regard.” Mr. Foy then referred to the statement of Martland J. at p. 856 that “there must be a balancing of interests.” From this he argued that the commission, in directing the three-year phase-in of the rate adjustment to ameliorate the rate shock, was simply “balancing” the interests of HVES on the one hand and its customers on the other, and contended that, in so doing, it was correctly applying the law which prescribes its mandate. It was entitled to what it did, he said, because the commission had concerns about “the nature and quality of service furnished by the utility.”

[45] Mr. Foy argued that to accede to the position of HVES would be to accord to one of the specific matters to which the commission must have due regard (the matter referred to in s. 65(4)(*b*)) a priority over the other two, something which cannot be done.

[46] Mr. Sanderson submitted that once the commission had settled the content of the rate base and determined a rate of return which is both just and reasonable, it cannot fix a schedule of rates which yields less revenue than would be required to provide that rate of return on its rate base. In this respect he relied upon what Martland J. said at p. 856 (above). He also referred at length to the judgment of Locke J. and drew attention firstly to this passage at p. 841:

> The real question might have been stated more clearly had it asked whether as a matter of law a duty rested upon the Commission to approve rates which would produce for the appellant a fair and reasonable return upon the appraised value of the property used or prudently and reasonably acquired by it to enable it to furnish the service described in the Act when the fact as to what constituted a fair return had previously been determined by the Commission. This is the matter to be determined.

[47] Locke J., in his reasons commencing at p. 841, reviewed the legislative history of the old Act and of its predecessor, the *Water Act Amendment Act,* S.B.C. 1929, c. 67, American regulatory jurisprudence, and the common law and said at p. 846:

> In my opinion the true meaning of the relevant sections of the *Public Utilities Act* is that a utility is given a statutory right to the approval of rates which will afford to it fair

> compensation for the services rendered and that the quantum of that compensation is to be a fair and reasonable rate of return upon the appraised value of the property of the company referred to in s. 16(1)(*b*).

[48] Locke J. continued at p. 847:

> Rates that fail to yield fair compensation for the service rendered are declared by s. 2 to be unjust and unreasonable as they were by s. 2 of the *Water Act Amendment Act* of 1929. The Commission is directed by s. 16(1)(*b*) to have due regard to fixing a rate which will give to the utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable it to furnish the service. It is the inclusion of the expression "shall have due regard" which has led the Commission and the Court of Appeal to conclude that this means that allowing a fair return upon the appraised value is simply one of the matters to be considered by the Commission in fixing the rate. Clearly no such interpretation could have been placed upon this expression under the provisions of the *Water Act* in view of the express provisions of s. 141C, and with great respect I think no such interpretation should be given to it in the present statute,

And at pp. 847-48:

> I can find nothing in this legislation indicating an intention on the part of the Legislature to empower the Commission to deprive the utility of its common law right to be paid fair compensation for the varying services rendered or to depart from the declared intention of the Legislature in the *Water Act Amendment Act* that such companies upon whom these obligations are imposed are entitled to have the quantum of such fair compensation determined as a fair return upon the appraised value of the properties required,

And finally, at p. 848:

> The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute, which does not mean that the obligation of the Commission to have due regard to the protection of the public, as required by s. 16(1)(*b*), is not to be discharged. It is not a question of considering priorities between "the matters and things referred to in Clauses (*a*) and (*b*) of subsection (1) of s. 16". The Commission is directed by s. 16(1)(*a*) to consider all matters which it deems proper as affecting the rate but that consideration is to be given in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

[49] Mr. Sanderson accepted that the commission is required to have due regard to what is referred to in s. 65(4)(*c*) but submitted that, in directing the three-year phase-in of the rate adjustment with no offsetting provision to permit HVES to obtain sufficient revenue to recover the shortfall, the commission has committed the very sin which Mr. Foy charges against the utility, namely, that instead of having due regard – and giving effect – to the three specific matters set out in s. 65(4), it has accorded priority to either s. 65(4)(*a*) or (*c*) and relegated s. 65(4)(*b*) to simply "a matter to be considered."

[50] Mr. Sanderson contended that if the commission was properly concerned to ameliorate the rate shock of a sharp rise in rates to be charged it could do so but only if, at the same time, it directed the filing of rate schedules which, over a reasonable period of time, would provide sufficient revenues to enable the utility to catch up and recover the shortfall. HVES, he said, is entitled to be made whole by the standards, in terms of the rate base and allowable rate of return thereon, which the commission itself fixed. It is only in this way that the commission can properly discharge its mandate and comply with the direction to have due regard to all the matters referred to in s. 65(4) without according priority to one or another of them.

[51] The addition of s. 65(4)(*c*) in the Act, however, is not an *alternative* to s. 65(4)(*a*) and (*b*), but rather is an *additional* basis on which rates may be found to be unjust and unreasonable. Accordingly, while rates may be unjust or unreasonable for reasons other than those set out in s. 65(4)(*a*) and (*b*), it remains the law that if a rate is insufficient to yield a fair and reasonable return on rate base, it is necessarily "unjust and unreasonable" within the meaning of s. 65(4)(*b*).

[52] Mr. Sanderson's submissions continued as follows:

[53] A distinction has been drawn in the case law between regulatory systems which afford the administrative tribunal an unfettered discretion to fix rates and those which provide the tribunal with specific statutory directions as to how these rates are to be fixed: see *British Columbia Hydro & Power Authority v. Westcoast Transmission Co.,* [1981] 2 F.C. 646, 36 N.R. 33 (C.A.).

[54] The current *Utilities Commission Act* is an example of the latter. Sections 65(4)(*b*) and 66(1)(*b*) amount to a statutory direction as to how the commission is to determine a just and reasonable rate. If, as posited by Martland J., a public utility is providing an adequate and efficient service, the statute is clear: a rate is unjust or unreasonable if it fails to yield a just and reasonable return on rate base. Here, while there may be room for improvement, the commission's recommendations with respect to quality of service referred to above are calculated to achieve what is desired. Accordingly, the commission has no discretion to fix rates which do not permit recovery of that return.

[55] The virtually identical nature of the relevant provisions of the old Act and the new Act compel the conclusion that pursuant to the new Act, HVES is similarly given a statutory right to the approval of rates which will afford it the opportunity to earn a fair and

reasonable rate of return upon the appraised value of its property. Commission O. G-77-90 denies HVES that opportunity.

[56] In my view Mr. Sanderson's submissions are sound and must be accepted.

[57] The *Utilities Commission Act* empowers the commission to determine what is a fair and reasonable rate of return upon the appraised value of the property of regulated utilities, but, having done so, requires the commission to set rates so as to allow recovery of a rate which permits an opportunity to earn that return. In this case, the commission correctly exercised its discretion to determine what a just and reasonable return was, but wrongly failed to permit HVES to charge a rate which gave it an opportunity to earn that return. For this reason, it is my view that commission O. G-77-90 cannot stand, and that O. G-l 1-91 must fall with it.

[58] With respect to Mr. Foy's able and forceful submissions they are, in my view, flawed, and for these reasons.

[59] Firstly, in directing the three-year phase-in, the commission was not balancing interests or, if it was purporting to do, it acted improperly. The proper balancing of interests which the commission carried out was done and completed when it settled the rate base, fixed the rate of return and determined the costs of operation allowable for rate-making purposes. It must be remembered that the rate base itself was the subject of much contention at the public hearing and that only after the commission had considered alternative calculations for rate base did it decide to accept HVES' evidence in this regard. It must be remembered as well that HVES had proposed a rate of return of 13 per cent on the debt component and 15 per cent on the equity component of the rate base. The commission denied HVES' request and fixed 13 per cent as the just and reasonable rate of return on both components. In addition, as can be seen from sheet 5 of the Appendix to these reasons, the commission made substantial downward adjustments to many of HVES' estimates of its costs of operation.

[60] This is the balancing of interests which the commission carried out in performing its function. HVES has accepted the commission's decision in these respects. None are the subject of this appeal. Once this balancing of interests had been performed, it was the commission's duty to have due regard to the factors referred to in s. 65(4).

[61] Secondly, I cannot accept Mr. Foy's contention that the three-year phase-in was the result of the commission's expressed concern over the quality of service. The analysis I

have made of the original decision and of the reconsideration decision in my view refutes this contention. Alternatively, if in fact the commission decreed the three-year phase-in for this suggested reason it was wrong in law in doing so for it gave an unwarranted priority to one or another of the matters set out in s. 65(4) at the sacrifice of s. 65(4)(*b*).

[62] Thirdly, Mr. Foy submitted that "rate shock" is a recognized phenomenon which has attracted a number of rate moderation plans, including rate base phase-ins, in the utility regulation field, and he referred to the following authorities: Bonbright, Danielsen and Kamerschen, *Principles of Public Utility Rates* (1988), pp. 260-64; D. Scotto, "Post-Operational Phase-in of Utility Plant: Prolonging the Inevitable" (1983), 112 Public Utilities Fortnightly, September 1, pp. 28-34; I.M. Massella, "Rate Moderation Plans – Cushioning 'Rate Shock' " (1984), 113 Public Utilities Fortnightly, February 16, pp. 52-56; *Re California-Pacific Utilities Co.,* 52 P.U.R. 3d 446 (1964); and *Re Pacific Telephone & Telegraph Co.,* 65 P.U.R. 3d 517 (1966).

[63] The underlying principle of this theory of gradualism in the implementation of new rate schedules is perhaps best explained in the article by Scotto, "Post-Operational Phase-in of Utility Plant: Prolonging the Inevitable." There the author wrote at p. 28:

> In 1982 two new terms were added to the electric utility industry's lexicon: "rate shock" and "phase-in." Rate shock refers to a sudden and "substantial" increase in electric rates. The concept can be illusive because the demarcation between "substantial" and "nonsubstantial" rate increases is usually a function of local political and economic sensitivities rather than a definitive, universal percentage increase. However, a 50 per cent jolt in rates would generally be considered substantial – well beyond the tolerance levels of most state commissions and ratepayers. Increases in the 20 per cent to 30 per cent vicinity, though, are more ambiguous. Rate shock is really a manifestation of the dollar disparity between rate base and new generating plant investment – the construction work in progress (CWIP) account. For a number of utilities the CWIP to net plant ratio can exceed 100 per cent, necessitating a high revenue increase – a rate shock – to reflect the plan in rate base upon commercial operation. As an alternative to the conventional one-shot hike in rates, new rate-making techniques have been proposed which are designed to spread the revenue impact of new plan investment into the postoperative years – hence, the term "phase-in".
>
> Post-operational phase-in can be accomplished in a variety of ways, most of which rely on accounting adjustments to protect the integrity of reported earnings. *The basic thesis in each case is the same: Capital recovery is spread over the asset's useful life with no economic loss (at least in theory) to the utility,* (emphasis added)

[64] It can be seen that the purpose of "phase-in" is two-fold: to ameliorate the shock of suddenly imposed significant rate increases and, at the same time, to protect the integrity of the utility's earnings. As the title to Mr. Scotto's article itself indicates, it is merely "prolonging the inevitable."

[65] The two regulatory decisions, *Re California-Pacific Utilities Co.,* decided in 1964, and *Re Pacific Telephone & Telegraph Co.,* decided in 1966, appear to be out of step with the main stream of American regulatory jurisprudence for, like the decision of the commission under consideration here, they did not provide for any catch up so that the utility could, over time, realize its authorized rate of return. I cannot regard them as binding or even persuasive.

[66] The power of the commission to phase in rates was perhaps presaged by Martland J. in the penultimate paragraph in his judgment in the *British Columbia Electric* case, where he said at p. 857:

> … the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, *until a rate schedule is devised which meets the requirements of clause (b) of s. 16(1).* (emphasis added)

[67] What the commission did here fails to meet the requirements of the legislation.

DISPOSITION

[68] In Pt. 4 of its factum, under the heading “Nature of Order Sought,” the appellant seeks an order that:

> (a) the decision of the British Columbia Utilities Commission, dated January 30, 1991 be quashed;
>
> (b) that portion of the decision of the British Columbia Utilities Commission, dated October 17, 1990 requiring rates to be phased in and directing a refund be quashed;
>
> (c) the British Columbia Utilities Commission be directed to order HVES to file new tariff schedules permitting it to recover 13% on rate base from July 1, 1990;
>
> (d) monies held by Lawson, Lundell, Lawson & McIntosh pursuant to the order of Mr. Justice Toy of March 7, 1990 be paid to HVES;
>
> (e) costs; and
>
> (f) such further relief as to this Honourable Court may seem just.

[69] I think the proper course for this court to adopt is to allow this appeal and to refer the matter back to the commission with the direction that it permit, or require, HVES to file new tariff schedules which will enable it to earn 13 per cent on its determined rate base from July 1, 1990.

[70] If the commission considers it necessary or appropriate to ameliorate rate shock by directing the phasing in of such revised rates, it shall do so in a way which meets the requirements of s. 65(4) as set out in these reasons.

[71] It will be for the commission to make an order for the appropriate disposition of the funds referred to in para. (d) above.

[72] Section 118 of the Act exempts the commission from any liability for the costs of this appeal. I do not think it appropriate to order that the Attorney General, and thereby the general public, bear those costs. However, I note from para. 5.3 of the original decision and from sheet 3 of the Appendix that provision was made for the recovery, through the rates to be charged, of the sum of $35,000 for HVES' rate application costs before the commission.

[73] Accordingly, I would direct that, failing agreement between the parties, HVES tax its costs for fees and disbursements of and incidental to this appeal and that the amount so determined be included in the rate application costs in the schedule.

Order accordingly.

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

UTILITY RATE BASE SCHEDULE 1		TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
ASSETS					
Structures and improvements		$5,560			$5,560
Overhead conductors and devices		44,891			44,891
UG Conductors and devices		479.504			479,504
Line transformers		90,693			90,693
PLANT IN SERVICE, opening		$620,648	$0		$620,648
Additions to plant in service		0			0
Disposals		0			0
PLANT IN SERVICE, closing		620,648	0		620,648
Add: Work in progress		0			0
Less:		620,648	0		620,648
Accumulated Depreciation		(178,677)			(178,677)
NET PLANT IN SERVICE		441.971	0		441,971
WORKING CAPITAL ALLOWANCE		0			0
RATE HEARING COSTS		0			0
CONTRIBUTIONS IN AID		(75,460)			(75,460)
UTILITY RATE BASE		$366,511	$0		$366,511
RETURN ON RATE BASE		14.01%	-1.01%		13.00%

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

UTILITY INCOME & RETURN SCHEDULE 2		TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
SALES VOLUME MWh		2,047			2,047
RATES					
Existing Revenue:¢/kWh		8.65	0.00		8.65
Interim Increase %		42.77%	0.00%		42.77%
Final Increase %		84.62%			43.54%
First year phase-in: ¢/KWh			1.51		1.51
Second year phase-in: ¢/kWh			1.51		1.51
Third year phase-in: ¢/kWh			0.75		0.75
Final Rate: ¢/kWh		15.97	-3.55		12.42
Interim Rate		12.35			
REVENUE					
Existing Rates		$177,066	$0		$177,066
Interim Rates		75,739			75,739
Required Increase		74,101	(72,740)		1,361
Discounts		0			0
Other Income		0			0
TOTAL REVENUE		326,906	(72,740)		254,166
Less: PURCHASED POWER		125,500	(15,371)	[1]	110,129
GROSS MARGIN		201,406	(57,369)		144,037
% excluding Other Income		61.61%	-4.94%		56.67%

Administration, Accounting and Office		68,300	(25,300)	[2]	43,000
UTILITY INCOME & RETURN SCHEDULE 2		TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
Repairs, Maintenance and Vehicle		31,000	(11,000)	[3]	20,000
Snow Removal		18.000	(18,000)	[4]	0
Depreciation		15,065			15,065
Amortization of Rate Application		10,000	1,667	[6]	11,667
OPERATING EXPENSES		142,365	(52,633)		89,732
Utility income before tax		59,041	(4,735)		54,306
INCOME TAX EXPENSE		7,693	(1,035)		6,658
EARNED RETURN		$51,348	($3,700)		$47,648
RETURN ON RATE BASE		14.01%	-1.01%		13.00%

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

INCOME TAXES SCHEDULE 3		TEST YEAR PPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR DJUSTED
UTILITY INCOME BEFORE TAX		$59,041	($4,735)		$54,306
Deduct – Interest		(23,823)	0		(23,823)
ACCOUNTING INCOME		35,218	(4,735)		30,482
Timing differences Depreciation		15,065	0		15,065
Amort, of hearing costs		10,000	1,667	[6]	11,667
Amortization of Line Costs		0			0
Capital cost allowance		(15,065)			(15,065)
Amort, of contributions					0
Overhead capitalized					0
Plant removal costs					0
Rate application costs		(30,000)	(5,000)	[6]	(35,000)
		(20,000)	(3,333)		(23,333)
TAXABLE INCOME		$15,218	($8,069)		$7,149
Income tax rate – deferred		21.84%	0.00%		21.84%
Income tax rate – current		21.84%	0.00%		21.84%
Income tax expense					
– Deferred		$4,369	$728		$5,097
– Current		3,324	(1,762)		1,561
INCOME TAX EXPENSE		$7,693	($1,034)		$6,658

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

RETURN ON CAPITAL SCHEDULE 4		TEST YEAR APPLICATION	BCUC ADJUSTMENT	NO.	TEST YEAR ADJUSTED
Contribution in Aid		$0	$0		$0
proportion		.00%	0.00%		.00%
Capital Loan		$0	$0		$0
proportion		.00%	0.00%		.00%
embedded cost		.00%	0.00%		.00%
$ return		$0	$0		$0
Current Debt		$0	$0		$0
proportion		.00%	0.00%		.00%
embedded cost		.00%	0.00%		.00%
$ return		$0	$0		$0
Notional debt		$183,256	$0		$183,256
proportion		50.00%	$0		50.00%
embedded cost		13.00%	0.00%		13.00%
$ return		$23,823	$0		$23,823
Preferred shares		$0	$0		$0
proportion		.00%	0.00%		.00%
embedded costs		.00%	0.00%		.00%
$ return		$0	$0		$0
Common equity		$183,256	$0		$183,256
proportion		50.00%	0.00%		50.00%
ROE		15.02%	-2.02%	[5]	13.00%

$ return		$27,525	($3,700)		$23,824
TOTAL CAPITAL		$366,511	$0		$366,511

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

ADJUSTMENTS				
1. $15,371	Adjust BC Hydro charges for error in Application			
2. $25,300	Adjust Administration, Accounting and Office expenses to approved amount.			
3. $11,00	Adjust Repair and Maintenance expenses to approved amount.			
4. $18,000	Eliminate Snow Removal expenses.			
5. 2.02%	Adjust return on equity to 13%			
6. $5,000	Adjust Rate Hearing costs.			
	Rate Increase Phase-in consists of:	Application	Final	First Year
	Purchased Hydro	6.13	5.38	5.38
	Operating expenses	6.22	3.65	3.65
	Rate Base costs	3.62	3.39	1.13
		---	---	---
	Total	15.97	12.42	10.16
			% Increase	17.42

1928
*Oct. 24.
1929
*Feb. 5.

NORTHWESTERN UTILITIES, LIMITED ..... APPELLANT;

AND

THE CITY OF EDMONTON AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF ALBERTA..... RESPONDENTS.

THE CITY OF EDMONTON..... APPELLANT;

AND

NORTHWESTERN UTILITIES, LIMITED, AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF ALBERTA ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Public utilities—Public Utilities Act, Alta.—Hearings and investigations by Board of Public Utility Commissioners—Powers of Board—Obtaining of evidence—Absence of evidence—Order of Board fixing rates for gas supply in municipality by franchise holder—Return on investment—Inclusion in "rate base" of discount on sale of bonds—Appeal from Board's order—"Question of law."

The Board of Public Utility Commissioners of Alberta made an order in 1922 fixing rates chargeable for gas proposed to be supplied in the city of Edmonton by the predecessor of the appellant company. The Board fixed the rates on the basis of an allowance of 10% as a fair return on the investment in the enterprise, and in determining the "rate base" (the amount to be considered as invested in the enterprise) it included as a capital expenditure a sum which was the discount on the sale of the company's bonds. The rates were to continue in force for three years from the date on which gas was first

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

supplied. In 1926 the appellant company applied for continuation of the rates. On this application the city objected to such a high rate of return and to the inclusion in the rate base of the item for bond discount. The Board continued said item in the rate base, but reduced the return to 9% "in view of the elements which go to make up the rate base, and in view of the altered conditions of the money market." The parties appealed (by leave) to the Appellate Division, Alta., and then to this Court, the company against the reduction of the rate of return, and the city against the inclusion of the bond discount item in the rate base. The company contended that no evidence was adduced before the Board of "altered conditions of the money market," and that, without hearing evidence upon the point and giving the company opportunity to establish that the conditions of the money market had remained unaltered since 1922, the Board acted without jurisdiction in making the reduction. Under s. 47 of *The Public Utilities Act, 1923,* Alta., c. 53, as amended 1927, c. 39, an appeal lies from the Board upon a question "of jurisdiction" or "of law," upon leave obtained.

Held 1. The company's last mentioned contention involved a "question of law," and therefore it had a right to appeal.

2. The city's appeal failed; the question raised thereon was not one of jurisdiction or law.

3. The company's appeal failed. The Board had power to reduce the rate of return, notwithstanding that at the hearing before it no witnesses testified as to altered conditions of the money market. The company's contention that to alter the rate of return would be unfair to its shareholders who had invested in the enterprise after the order fixing the rates in 1922, was not a matter open for consideration upon the appeal, as it did not involve a question of jurisdiction or law.

Per Rinfret and Lamont JJ.: A consideration of ss. 21 (4) (5), 25, 43, and 44 of the said Act, the purposes of the Act, and the extent of the powers vested in the Board, leads to the conclusion that the intention of the legislature was to leave it largely to the Board's discretion to say in what manner it should obtain the information required for the proper exercise of its functions; it was not to be bound by the technical rules of legal evidence, but was to be governed by such rules as, in its discretion, it thought fit to adopt. An inference that it had not the proper evidence before it as to the altered conditions of the money market could not be drawn from the fact that no oral testimony in respect thereof was given at the hearing. The company had notice that a reduction was sought and that the city was attacking the methods and principles adopted in fixing the rate of return in 1922. This put the whole question of a fair return at large and informed the company that it would have to establish to the Board's satisfaction every element and condition necessary to justify a continuation of the 10% rate; and there was nothing in the record to justify the conclusion that the company had not the opportunity of making proof at the hearing as to the conditions of the money market.

Per Smith J.: The Board has power to reduce the rate of return without evidence; the question of a fair rate of return is largely one of opinion, hardly capable of being reduced to certainty by evidence, and appears to be one of the things entrusted by the statute to the judgment of the Board.

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APPEALS by Northwestern Utilities, Limited, and the City of Edmonton, respectively, from the dismissal by the Appellate Division of the Supreme Court of Alberta of their respective appeals from the award of the Board of Public Utility Commissioners for the Province of Alberta fixing rates to be paid by consumers of natural gas, for the supply of which within the city of Edmonton the said company, Northwestern Utilities, Limited, has a franchise.

The company applied to the Board for an order continuing the rates which had been fixed for a certain period by an order of the Board made in 1922. The Board made an award fixing the rates, from which each party appealed to the Appellate Division. Under s. 47 of *The Public Utilities Act* of Alberta, 1923, c. 53, as amended 1927, c. 39, an appeal lies from the Board to the Appellate Division "upon a question of jurisdiction or upon a question of law," if leave to appeal is obtained as therein provided. Such leave to appeal was obtained, it being reserved to each party to move before the Appellate Division to set aside the order granting leave to the other party, on the ground that the matters as to which leave to appeal was given did not involve any question of law or jurisdiction.

The company's objection to the Board's award was that it fixed the rates on the basis of an allowance of only 9%, instead of 10% which was allowed under the order made in 1922, as the "rate of return" on the investment in the enterprise. The Board in its award said:—

> In view of the elements which go to make up the rate base, and in view of the altered conditions of the money market, the Board believes it is justified in reducing the rate of return that the company shall be allowed, to nine per cent., and the Board's estimates are on that basis.

The company contended that there was before the Board no evidence of any "altered conditions of the money market," that the "elements which go to make up the rate base" were the same as in 1922, and afforded no reason for changing the rate of return, that to reduce the rate of return would be unfair to its shareholders, who had invested in the enterprise after the order fixing the rates in 1922, that the money was invested and the plant constructed on the strength of the principles laid down in the 1922 award, and that it was clearly understood that the principles then adopted would govern all future revisions.

The city's objection to the award was that, in determining the "rate base" (the amount to be considered as invested in the enterprise) it included (as it had done in the 1922 award) as a capital expenditure a sum which was the discount on the sale of the company's bonds.

The Appellate Division dismissed both appeals (no written reasons being given). Subsequently it made separate orders giving each party leave to appeal to the Supreme Court of Canada. On an application by both parties in the Supreme Court of Canada, the appeals were consolidated.

By the judgment of this Court both appeals were dismissed with costs.

E. Lafleur K.C. and *H. R. Milner K.C.* for Northwestern Utilities, Limited.

O. M. Biggar K.C. for the City of Edmonton.

The judgment of Anglin C.J.C. and Mignault J., was delivered by

ANGLIN C.J.C.—While, with my brother Smith, I incline to the view that the appellant company may have some reason to complain of unfairness in the judgment of the Board of Public Utility Commissioners reducing the rate of return from 10% to 9%, I agree with the conclusion reached by my brother Lamont and concurred in by my brother Smith that it is not open to us to entertain the appeal of the company on that ground. It does not seem to raise either a question of law or jurisdiction within the purview of the statute on which the right of appeal rests. I would dismiss the appeal.

The judgment of Rinfret and Lamont JJ. was delivered by

LAMONT J.—These are separate but consolidated appeals by the Northwestern Utilities, Limited (hereinafter called the Company) and the City of Edmonton, respectively, from the dismissal by the Appellate Division of the Supreme Court of Alberta of their respective appeals against the award made by the Board of Public Utility Commissioners on an application by the company for an

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order fixing the price to be paid by the consumers of natural gas within the city. Subsequent to the dismissal of the appeals, the Appellate Division made separate orders giving each party leave to appeal to this Court. By a further order the appeals were consolidated.

The company is the successor of the Northern Alberta Natural Gas Development Company, which held a franchise from the city for the supply of natural gas to the inhabitants thereof.

Disputes having arisen between the Development Company and the city, and an action having been commenced, the parties, on August 28, 1922, agreed to a settlement of their difficulties. One of the terms of the settlement was that the prices or rates to be paid by the inhabitants of the city should be fixed by the Board of Public Utility Commissioners. An application was accordingly made to the Board, the parties were heard, and, on November 27, 1922, an order was made fixing the rates to be paid. These rates were to continue in force for three years from the date on which gas was first supplied to consumers.

In order to fix just and reasonable rates, which it was the duty of the Board to fix, the Board had to consider certain elements which must always be taken into account in fixing a rate which is fair and reasonable to the consumer and to the company. One of these is the rate base, by which is meant the amount which the Board considers the owner of the utility has invested in the enterprise and on which he is entitled to a fair return. Another is the percentage to be allowed as a fair return.

In the award of 1922, which came into operation in the fall of 1923, the Board included in the rate base as a capital expenditure the sum of $283,900 (10% of the cost of plant) as, " an allowance for the promotion and financing " of the company, and the sum of $650,000 which was the discount on the sale of the Development Company's bonds. It also determined that 10% was a fair return on the investment. The rates thus fixed by the Board, with certain alterations made with the consent of all parties, continued in force for three years. In October, 1926, the appellant company, which had succeeded to the rights of the Development Company, applied to the Board for an order continuing the rates for such period as the Board might see fit. In its

reply to the application the city submitted (par. 23) that the order of November, 1922, should in certain respects be disregarded. One of these was the following:—

(*e*) Rate of Return. It is submitted that the methods and principles adopted in the fixing of the rate of return are erroneous and that the rate of return allowed is too high.

The city also protested against including in the rate base the item for the promotion and financing of the company and the item for bond discount.

In its answer to the city's reply the company alleged (par. 10) that at the hearing in 1922 the city was fully and adequately represented, that it had submitted evidence, that upon the award being delivered it raised no objection to any part thereof, and, therefore, was now estopped from contending that the principles then laid down were wrong in principle or in fact.

In its award the Board continued both the above mentioned sums in the rate base, but reduced the rate of return to the company from 10% to 9%. The reason assigned by the Board for this reduction is as follows:—

In view of the elements which go to make up the rate base, and in view of the altered conditions of the money market, the Board believes it is justified in reducing the rate of return that the Company shall be allowed, to nine per cent., and the Board's estimates are on that basis.

From the award the parties appealed, first to the Appellate Division of the Supreme Court of Alberta, and now to this Court. The company appealed against the reduction of the rate of return on its capital expenditure to 9%. Referring to the reasons given by the Board for making the reduction the company in its factum says:—

1. The city adduced no evidence as to "altered conditions of the money market" and

2. "The elements which go to make up the rate base" in 1927 are the same as in 1922.

The city appealed against the inclusion in the rate base of the item of the bond discount above mentioned.

The *Public Utilities Act* allows an appeal from the Board only upon a question of jurisdiction, or upon a question of law, and even then only when leave to appeal has first been obtained from a judge of the Appellate Division.

As against the company's appeal the city raises the preliminary objection that no question either of jurisdiction or law is involved therein. In my opinion the objection cannot be sustained. The substance of the company's

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appeal is that the Board in making a reduction in the rate of return did so for two reasons, one of which was the "altered conditions of the money market," and that of this no evidence was adduced before the Board. The company contends that, without hearing evidence upon the point, and without giving it an opportunity to establish that the conditions of the money market had remained unaltered since 1922, the Board was without jurisdiction to make the reduction. This contention was not stated in this form in the order granting leave to appeal to the Appellate Division, but the fixing of the rate of return at 9% only, was there set out as an error of the Board in respect of which leave to appeal was granted.

Whether or not the Board can properly base an order (in part at least) on the existence of a state of fact of which no evidence was adduced before it at the hearing and as to which the party affected has not had any opportunity of being heard is, in my opinion, a question of law which depends for its answer upon the construction to be placed upon the *Public Utilities Act*.

I am, therefore, of opinion that the company had a right to appeal.

The question involved in this appeal is: Had the Board jurisdiction to find as a fact how the conditions of the money market had altered between November, 1922, and July, 1927, without any witness testifying at the hearing that an alteration had taken place.

As the Board was determining what would be a fair return on the capital invested by the company in the enterprise, and as it reduced the return from 10% to 9%, it can, I think, be taken that by "the altered conditions of the money market" the Board meant that the returns for money invested in securities in which moneys were ordinarily invested had decreased during the period in question. In other words, that the rate of interest obtainable for moneys furnished for investment was, generally speaking, lower by a certain percentage in 1927 than it was in 1922. That, in my opinion, is all that is involved in the finding.

The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other

hand, would secure to the company a fair return for the capital invested. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise. In fixing this net return the Board should take into consideration the rate of interest which the company is obliged to pay upon its bonds as a result of having to sell them at a time when the rate of interest payable thereon exceeded that payable on bonds issued at the time of the hearing. To properly fix a fair return the Board must necessarily be informed of the rate of return which money would yield in other fields of investment. Having gone into the matter fully in 1922, and having fixed 10% as a fair return under the conditions then existing, all the Board needed to know, in order to fix a proper return in 1927, was whether or not the conditions of the money market had altered, and, if so, in what direction, and to what extent.

For the city it was argued that, as one of the statutory powers of the Board was to deal with the financial affairs of local authorities (s. 20 (*d*)), and as this included the power to authorize the issue of new debentures by these authorities and to determine the rate of interest to be paid thereon and also the power to order a variation of the rate of interest payable upon any debt of the local authority (s. 103), the Board must necessarily be familiar with the rate of interest prevailing from time to time and therefore did not require to have witnesses called to furnish it with information which in the regular performance of its duty it was obliged to possess. In view of the powers and duties of the Board under the Act there is, in my opinion, considerable to be said for the city's contention. It is not necessary, however, to determine this question, for in the statute itself I find sufficient to justify the conclusion that the intention of the Legislature was to leave it largely to the discretion of the Board to say in what manner it should obtain the information required for the proper exercise of its functions.

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The material provisions of the Act on this point are as follows:—

21. (4) The Board may in its discretion accept and act upon evidence by affidavit or written affirmation or by the report of any officer or engineer appointed by it or obtained in such other manner as it may decide.

(5) All hearings and investigations before the Board shall be governed by rules adopted by the Board, and in the conduct thereof the Board shall not be bound by the technical rules of legal evidence.

Section 25 provides that upon a complaint being made to the Board that any proprietor of a public utility has unlawfully done or unlawfully failed to do something relating to a matter over which the Board has jurisdiction, the Board shall "after hearing such evidence as it may think fit to require" make such order as it thinks fit under the circumstances. Section 43 provides that the Board may "appoint or direct any person to make an inquiry and report upon any application * * * before the Board." And by section 44 the Board may "review, rescind, change, alter or vary any decision or order made by it." A perusal of these statutory provisions and a consideration of the purposes of the Act and the extent of the powers vested in the Board leads me to the conclusion that the Legislature intended to create a Board which in the exercise of its functions should not be bound by the technical rules of legal evidence but which would be governed by such rules as, in its discretion, it thought fit to adopt (s. 21 (5)). We have not been made acquainted with the rules, if any, adopted by the Board to govern its investigations. Nor do we know what information it possessed as to the altered conditions of the money market; but, as it had authority to act on evidence "obtained in such manner as it may decide" (s. 21 (4)), an inference that it had not the proper evidence before it cannot be drawn from the fact that no oral testimony in respect thereof was given at the hearing. If, in this case, the Board had asked its secretary to inquire from the various financial institutions in Edmonton if there had been any alteration in the conditions of the money market between 1922 and 1927, and the secretary had reported that there had been a certain decrease in the returns from invested capital, would it have been necessary to call witnesses to verify the report? In my opinion it would not. Nor would it have been necessary to afford to either party an opportunity to controvert before the

Board the information so obtained. Then would it have been necessary to mention in the award that the fact that such altered conditions had been established to the satisfaction of the Board by a report of its secretary? I can find nothing in the Act requiring mention to be made of the evidence or of the manner of obtaining it.

Reference was made to s. 86, which provides that no order involving any outlay, loss or depreciation to the proprietor of any public utility or to any municipality or person shall be made without due notice and full opportunity to all parties concerned to make proof to be heard at a public sitting of the Board, except in the case of urgency. A reduction in the rate of return to the company would, in my opinion, come within this section. The Board was, therefore, without jurisdiction to make the reduction unless the company had notice that a reduction was sought and had an opportunity of proving that under the circumstances existing at the time of the hearing the existing rate of return was fair and reasonable. That the company had notice that the city was demanding a reduction is beyond question (par. 23 (*e*)). It had more. It had notice that the city was attacking the methods and principles adopted in fixing the rate of return in 1922. This, in my opinion, put the whole question of a fair return at large and informed the company that it would have to establish to the satisfaction of the Board every element and condition necessary to justify a continuation of the 10% rate. The company does not say that it was refused an opportunity of putting in evidence as to the conditions of the money market. Nowhere does it deny that it could have put in evidence had it so desired. What it does say is that the city did not adduce evidence on the point and that no witnesses were called to testify before the Board in regard thereto. There is nothing before us to justify an inference that the company was not at liberty to call witnesses as to the conditions of the money market had it so desired. Moreover, in the order which the company obtained giving it leave to appeal it did not even suggest that it had no opportunity of submitting evidence as to the existing market conditions. The ground upon which the company relied to meet the city's demand for a reduction, as set out in the answer which it filed, was that as the city had ac-

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cepted the award when it was delivered and had raised no objection thereto, it was now precluded from seeking to set aside the principles upon which the rate of return was based. In its factum it went further and contended that, even if there was no estoppel, the principles then adopted should now be adhered to because it was on the strength of their having been adopted that the shareholders of the company invested their money in the enterprise. This contention cannot be made effective. In the first place, it involves neither a question of jurisdiction nor of law. In the second place, it is the duty of the Board to fix rates which, in its opinion, will be fair and reasonable at the time the order is made and for the period for which they are fixed. If any wrong principle or erroneous view has been adopted it is the duty of the Board at the next revision to correct the error. The argument that it would be unfair to the shareholders now to alter the rate of return is not a matter open for consideration on appeal. Moreover, when these shareholders invested their money they knew that the rates fixed were to be in force for three years only and that it would be the duty of the Board on the next revision to fix rates which at that time would be fair and reasonable under the circumstances then existing.

Our attention was also called to s. 47 (1*a*) as indicating an intention that evidence must be taken on all material points. That subsection reads as follows:—

(1a) On the hearing of any appeal referred to in subsection 1 of this section no evidence other than the evidence which was submitted to the Board upon the making of the order appealed from shall be admitted, and the Court shall proceed either to confirm or vacate the order appealed from, and in the latter event shall refer the matter back to the Board for further consideration and redetermination.

In my opinion this subsection means no more than that no new evidence is to be admitted on appeal.

The appeal of the company should therefore be dismissed with costs.

The appeal of the city should likewise be dismissed with costs. The items which should be included in the rate base cannot, in my opinion, be considered a question of jurisdiction or of law.

SMITH J.—The City of Edmonton had made an agreement with the Northern Alberta Natural Gas Development Company, by which the company obtained a fran-

chise to supply natural gas to the city, and agreed to construct the necessary works. The company failed to construct the works, and the city sued for damages for breach of contract. The actions were settled by an agreement dated 22nd August, 1922, under which the determination of the rates to be charged by the company for gas was referred to the Board of Public Utility Commissioners, and the company was, within six months after the fixing of the rates, to deposit $50,000 with the city, which was to be forfeited to the city as liquidated damages in case the company did not complete the construction of the works as agreed.

A rate hearing was held by the Board after this settlement, at which the company and the city were represented, and the Board made an award, setting out a rate basis and fixing prices for gas on this basis.

The difficulty about proceeding with the works had been the procuring of capital on the basis of prices provided in the original agreement and amendments made. The whole object of fixing a rate base and prices in advance of construction was to facilitate financing by the company. It would necessarily be on the basis of the award that investors would buy bonds and stock of the company. The company had the option of proceeding with the works or abandoning them and forfeiting the $50,000, after seeing the award. In July following the making of the award, the company assigned its franchise and property to the appellant, the Northwestern Utilities, Limited, which, by sale of its bonds and stock, raised the necessary capital, constructed the works, and put them in operation. The rate to be charged for gas was fixed by the award for three years, and at the end of this period the company applied to the Board for continuation of the rates fixed by the award. The rate base fixed by the Board in the award of 1922 contained many items, such as total investment, operating cost, depletion reserve, reserve for repayment of cost of plant, total necessary revenue, amounts of gas to be sold, and the rate of return on capital to be allowed. It is evident that, with the exception of the last of these items, the amounts fixed must have been estimates, liable to be varied by actual results.

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The rate of return to be allowed on capital was fixed in the award at 10%, not based on the ordinary rate of money on the market at the time or on an estimated future rate, but on consideration of the rate that would induce investors to risk their capital in an extremely hazardous and doubtful venture. At the hearing before the Board in 1922, the company had asked a 12% rate of return on capital, and the city had conceded 10%, which the Board fixed, though it stated that under the circumstances a return of more than 10% would not seem to be unjust. The reason set out for not fixing this higher rate was that it might so restrict the market that the higher rate would not compensate for the restriction of the market, and would therefore not be to the advantage of the company. It is, however, stated that in case of future revision, it may be found desirable, under certain circumstances, to increase this rate.

On the revision at the end of three years, this rate was not increased, but was reduced from 10% to 9%, at the instance of the city, and this reduction constitutes the ground of appeal.

In the reasons given by the Board in fixing the new rates, it is pointed out that, where rates have been fixed in advance of construction and financing, the Board is not precluded from subsequently making changes that may appear from subsequent reconsideration to be necessary, and it is then stated that

> those investing in such a case must depend on the fairness of the Board in seeing that the Company is allowed a fair and reasonable return upon its investment, but the Board may, and indeed it should, take into consideration the circumstances under which such investment was made.

In discussing these circumstances in reference to a request by the city for elimination from the rate base of the 1922 award of the item for bond discount, the Board says:

> There is, moreover, an additional factor to be considered in the present case and that is, that in 1922 the inclusion of the allowance for bond discount was practically agreed to by the city in its case and the item was not questioned by the city until at the recent hearing. It is only fair to assume that the fact of the inclusion of the bond discount in the rate base formed part of the inducement for the making of the investment. Under the circumstances, therefore, the Board does not feel justified in adopting the City's contention in this regard.

This lays down a principle with which one heartily agrees, and which applies exactly to the city's application for reduction of the rate of return on capital fixed in the award

of 1922 at 10%. The Board fixed this rate with the assent of the city, and this rate, coupled with the suggestion by the Board that it might be increased, "formed part of the inducement for the making of the investment."

The altered condition of the money market, given as a reason for the reduction of the rate to 9%, seems to me to have no bearing on the matter. The representation to the investor in 1922 was, for the risk you take in placing your capital in a hazardous undertaking, you will be allowed as a basis in fixing rates to be charged for gas a return of 10%. What the regular money market might be three years later could have nothing to do with the decision to invest. The whole question was, viewing the risk, and the chances, as matters then stood, was the chance of 10% on the money worth the risk of a bad investment, with the possibility of the loss of all or part of the capital?

The Board then, in my opinion, laid down a proper principle, and applied it in other instances, but failed to apply it to this item, as to which I think it was particularly applicable. The question is, can this Court set aside the finding of the Board as to this item on the appeal? I agree with my brother Lamont that, whether or not under the Act the Board was entitled to reduce the rate to 9% without evidence, because of a change in money market conditions, is a question of law, and that there is therefore a right of appeal, and it is with some regret that I feel bound to agree with him that the Board had jurisdiction to make the change in rate without evidence, and without giving the company an opportunity to offer evidence. The question of a fair rate of return on a risky investment is largely a matter of opinion, and is hardly capable of being reduced to certainty by evidence, and appears to be one of the things entrusted by the statute to the judgment of the Board.

I am not entirely in accord with the observations of my brother Lamont in reference to the sending out of someone to gather evidence of the state of the money market and acting on that party's report without the knowledge of the company. The objection in such a case would not be the failure to set out in the award the fact of such evidence and its nature, but the failure to disclose it to the company with an opportunity to answer it. If it were a case where, evi-

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dence being necessary, it had been taken in the manner suggested, or otherwise, and a finding based on it without disclosure of it to the company and an opportunity to answer it, I would regard such a proceeding as contrary to elementary principles of justice, and as affording, under the statute, a ground for setting the award as to this item aside and referring it back for reconsideration. It does not, however, appear that any evidence was taken, and as stated, I have concluded that there was power to make the change without evidence.

I therefore concur with my brother Lamont in the disposal of this appeal.

Appeals dismissed with costs.

Solicitors for Northwestern Utilities, Limited: *Milner, Carr, Dafoe & Poirier.*

Solicitor for the City of Edmonton: *John C. F. Bown.*

Efficiency as a Discovery Process: Why Enhanced Incentives Outperform Regulatory Mandates

Opponents of incentive regulation claim explicit rewards are unnecessary because utilities already operate under a ''statutory obligation'' to be efficient. But that view ignores that incentives are generally superior to mandates for eliciting performance gains, and that a firm cannot knowingly disavow and strategically withhold efficiencies it has yet to discover.

Dennis L. Weisman and Johannes P. Pfeifenberger

Dennis L. Weisman *is Professor of Economics and a member of the graduate faculty at Kansas State University in Manhattan, Kansas, where he specializes in strategic behavior and government regulation, with an emphasis on incentive regulation. He is former Director of Strategic Marketing for SBC Communications Inc. and a research fellow with the Public Utility Research Center at the University of Florida.*

Johannes P. Pfeifenberger *is a Principal of The Brattle Group, an economic and management consulting firm in Cambridge, Massachusetts, where he provides strategic advice, litigation support, and expert testimony on industry restructuring, network access, and incentive regulation to clients in the utility industries.*

The authors thank Paul Carpenter, Peter Fox-Penner, and Alexis Maniatis for valuable comments. Opinions expressed in this article, as well as any errors or omissions, are the authors' alone. *The authors can be reached at weisman@ksu.edu and jpfeifen@brattle.com, respectively.*

I. Introduction

There has been a pervasive adoption of incentive regulation worldwide in both the electric power industry and the telecommunications industry.[1] In the U.S., at least 28 electric utility companies in 16 states operated under some form of broad-based incentive regulation in 2000–01.[2] Of the 28 identified electric utilities, 13 operate under some form of rate moratorium and 14 operate under price caps. Of the 28 incentive regulation plans, 21 contain earnings sharing provisions or simple dead bands.[3]

The adoption of incentive regulation in the telecommunications industry is even more dramatic. In the course of just over 15 years, at least 48 U.S. states have changed the method of regulating dominant local exchange telephone companies from traditional, cost-of-service regulation to some form of incentive regulation (price caps, rate moratoria, or earnings sharing). Similar changes

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in regulatory regime have occurred in Australia, Europe, and South America. Moreover, the trend in the U.S. has been clearly in the direction of pure price cap regulation—price cap plans without earnings sharing. In 1995, dominant local exchange carriers in the U.S. were subject to some form of earnings-based regulation (cost-of-service regulation or earnings-sharing regulation) in 35 states and pure price cap regulation in 9 states. In 2000, the corresponding values were 8 and 39, respectively.[4]

The speed with which incentive regulation has been adopted can be explained principally by the fact that it offers the prospect of superior performance gains that can benefit all key interest groups. Consumers can benefit from lower rates or slower rate increases; the regulated firm can benefit through enhanced profitability and pricing flexibility; the regulatory process can be streamlined; and competitors can enjoy more favorable terms of entry. In other words, incentive regulation represents a ''win–win'' proposition.[5]

Despite the widespread adoption of incentive regulation and increasing recognition of its attendant benefits, it is not uncommon in regulatory proceedings to encounter opposition to incentive regulation on grounds that utilities already have a ''statutory obligation'' to be efficient and, therefore, should not require additional rewards through incentive plans. At the crux of this argument are two key misconceptions. The first misconception is that a ''mandate'' to be efficient will produce the same long-term benefits as properly structured ''incentives'' to be efficient. The second misconception is the belief that regulated firms may knowingly and strategically disavow opportunities to increase operating efficiency under traditional regulation in order to profit from such innovation under incentive regulation.

One misconception: A ''mandate'' to be efficient will produce the same long-term benefits as properly structured ''incentives'' to be efficient.

The purpose of this article is to examine the basis for these misconceptions. There are two primary responses. First, motivating increased performance through incentives is generally superior to mandating desired performance levels. Second, the realization that efficiency is a ''discovery process'' necessarily implies that a regulated firm cannot knowingly disavow and strategically withhold what it has yet to discover. These two points—largely self-evident for those predisposed to favor incentive regulation—explain the important role that enhanced incentives play in generating dynamic efficiency gains and in enhancing the performance of regulated firms.

II. The Important Role of Incentives

The prominent role of incentives in a market economy is (i) to allocate scarce resources to their highest valued use; (ii) to elicit cost minimization and innovation; and (iii) to encourage firms to supply the products and services that consumers demand. Professor James Bonbright, a leading authority in the field of public utility regulation, explains the important role of market forces in fostering incentives to pursue such efficiency and overall performance:

> Under unregulated competition, the price system is supposed to function in two ways with respect to the relationship between the price of the product and the cost of production. In the first place, the rate of output of any commodity will so adjust itself to the demand that the market price will tend to come into accord with production costs. But in the second place, competition will impel rival producers to strive to reduce their own production costs in order to maximize profits and even in order to survive in the struggle for markets. This latter, dynamic effect of competition has been regarded by modern economists as far more important and far more beneficent than any tendency of ''atomistic'' forms of competition to bring costs and prices into close alignment at any given point of time.[6]

These performance incentives fostered by competitive markets derive from the profit motive. The

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quest for such profits ultimately benefits society as producers strive to supply the goods and services that consumers want at the lowest possible cost. In other words, the pursuit of enlightened self-interest by economic agents serves to benefit society in the aggregate as if their actions were guided by an ''invisible hand.''[7]

The collapse of many centrally planned economies vividly demonstrates that market economies and their strong reliance on incentives are superior to mandates for fostering innovation, efficiency, and overall performance. For example, in recounting the fundamental flaws in the Soviet economic system, Yergin and Stanislaw observe that:

> Already by the early 1970s, a fatal weakness was becoming clear in the system: It could not, for the most part, innovate. There was no reward, no reason to do anything new. In fact, there was a strong predisposition to avoid change of any kind, for change caused enormous bureaucratic headaches. The best thing was to keep doing what had been done before. In more advanced economies, innovation was essential to the promotion of economic growth. But in the Soviet system innovation was characterized mainly by its absence. And that applied to everything—whether it was small changes to make processes work better or the introduction of new products.[8]

While it is prudent to err on the side of caution in drawing wholesale comparisons between market economies and incentive regulation, there are clearly some noteworthy parallels. Prominent among these are the inability of government or regulatory agencies to mandate efficient outcomes, even with the most detailed planning and supervision, and the importance of tangible rewards for motivating superior long-term performance through enhanced efficiency and innovation. The ''five-year plans'' in the former Soviet Union were notorious for both their level of detail and their inability to elicit performance. These plans were characterized by a virtually complete absence of meaningful incentives and rewards as the government attempted, unsuccessfully, to mandate rather than motivate performance.

The ''five-year plans'' in the former Soviet Union were notorious for both their level of detail and their inability to elicit performance.

It is generally accepted that a primary objective of economic regulation is to emulate a competitive market outcome. Professor Alfred Kahn, for example, observes that ''the single most widely accepted rule for the governance of the regulated industries is regulate them in such a way as to produce the same results as would be produced by effective competition, if it were feasible.''[9]

The relevant model of competition to inform regulatory policy is not one of atomistic or perfect competition,[10] but rather one that evaluates and rewards the performance of regulated entities. While the task of evaluating the performance of the utility is inherently difficult in the absence of actual competition, the basic principle is straightforward: the utility's performance is measured and rewarded or penalized based on predetermined, broad-based performance targets, such as the timely provision of quality service at capped prices. The roots of these ideas trace back almost a half a century and form the essence of the modem theory of incentive regulation as commonly practiced today.[11]

A voluminous amount of theoretical and empirical research concludes that incentive regulation is generally superior to strict cost-of-service regulation in emulating such a competitive market outcome.[12] This superior performance derives from the fact that incentive regulation, given the greater emphasis on prices rather than earnings, operates more like a *fixed price contract* in the sense that the regulated firm is limited in its ability to pass cost increases on to consumers in the form of higher rates. This contrasts with strict cost-of-service regulation that operates like a *cost-plus contract*. The result is that incentive regulation (including some forms of modified cost-of-service regulation)[13] provides stronger incentives that lead to superior performance gains in

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numerous dimensions, including (i) use of least-cost technologies; (ii) efficient level of cost-reducing innovations; (iii) incentives to invest and operate efficiently; and (iv) efficient diversification into new markets.

The manner in which enhanced incentives lead to cost control and superior performance is illustrated by the following statement of a utility's chief financial officer concerning the merits of incentive regulation:

> There are a couple items I think are very critical to the issue at hand. The most important has been the use of this [earnings sharing plan] in helping to change the culture of the Company .... [I]t's my job to beat on people about cost .... [But employees] said, every time we reduce costs, the Commission comes and takes it away. [T]hat's the way the cost-of-service model rate base regulation works, ... that's a disincentive. And when we got this plan in place, I made speech after speech ... Here's your opportunity, folks. This is as close to competition I can get you right now, but you make a dollar and we get to keep half of it. It goes to the bottom line. And again, regardless of whether I'm talking to a vice president or a pipefitter in one of our power plants, that's had an effect, and I've seen that effect ... It's good for the shareholders and it's good for customers. I know that sounds trite, but that rings a bell when it comes to employees.[14]

This discussion of performance incentives should not be construed to imply that there is not an important role for mandates and obligations. To the contrary, in virtually every society and economic model it is necessary to impose certain mandates and obligations—be it contract laws, safety regulations, and other basic legal and regulatory constraints. In fact, some of these mandates and obligations, such as patent laws and other intellectual property rights, are specifically designed to create strong incentives and rewards for innovation and superior performance.[15] In general, the role of such mandates and obligations takes the form of setting minimum standards for what is acceptable behavior rather than as a means to solicit superior performance. While such mandates and obligations can help ensure that certain minimum standards are met, robust incentives are required to elicit superior performance. This is the case simply because there is generally a wide ''gap'' between superior performance and performance that is considered merely acceptable.

Not surprisingly, opposition is strongest when the earnings that the regulated firm reports under incentive regulation exceed the earnings that would be expected under cost-of-service regulation.

The important role of incentives in eliciting performance gains has been validated in numerous venues covering many aspects of human interactions not only in how firms and consumers interact in a market economy or how firms compensate their employees, but also how government can exact performance gains from its individual agencies and employees,[16] or even how sporting events motivate participating athletes.[17] This broad experience confirms that it is not the mandates or obligations, but the incentives created by the prospect of meaningful rewards and recognition, that are most effective in eliciting enhanced performance.

III. Efficiency as a Discovery Process

The opposition to incentive regulation is not typically based on a lack of recognition that incentives can elicit superior performance and dynamic efficiency gains. Rather, opposition to incentive regulation often focuses on whether such incentives are needed. Not surprisingly, this opposition is seemingly strongest when the earnings that the regulated firm reports under incentive regulation exceed the level of earnings that would normally be expected under cost-of-service regulation.[18] The frequently voiced concern is that these higher profits necessarily come at the cost of higher prices to consumers.[19] And yet, the broad appeal of incentive regulation is precisely that the realized efficiency gains can benefit regulated firms and consumers alike. In other words, because incentive regulation is not a zero-sum

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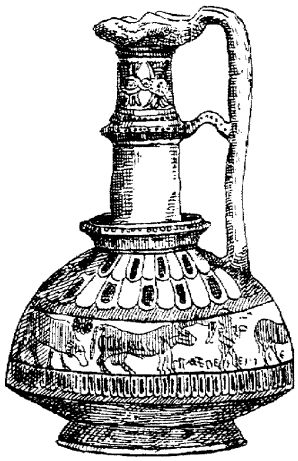
game, higher profits and lower prices need not be mutually exclusive.

In spite of the fact that incentive regulation can be a ''win–win'' proposition, some parties view incentive regulation as little more than a ''scheme'' used by utilities to increase their profits and earn windfall gains. These added profits may even be viewed as ''bribes'' to get utilities to do what they should be doing already. A common refrain is that because utilities have a ''statutory obligation'' to be efficient, any additional rewards for achieving efficient behavior through incentive regulation are unnecessary—and serve only to foster an inequitable distribution of efficiency gains between regulated firms and consumers. This line of argument would seem to suggest that any efficiencies realized by the regulated firm following the adoption of incentive regulation must imply that, under cost-of-service regulation, regulated entities either deliberately engaged in inefficient behavior or were able to ''conceal'' more efficient operating practices from regulators through their superior knowledge of operating conditions.[20]

While the possibility of such behavior cannot be ruled out *a priori*, this claim is incorrect as a general proposition. This is because the achievement of performance gains is first and foremost a ''discovery process'' in which more efficient operating practices and superior use of technology are learned over time.[21] It is the recognition of this discovery process that leads to the conclusion that the efficiency gains realized under incentive regulation need not imply that the firm was knowingly inefficient under cost-of-service regulation. To the contrary, it is quite plausible that the firm under cost-of-service regulation was as efficient as it knew how to be.



To understand the manner in which enhanced incentives can stimulate this discovery process, it is instructive to examine what innovation is and precisely how it comes about. Although the mechanics of innovation are complex and not well-understood, innovation is usually thought of as the creation of a better product or process. If there is a consensus of thought on the innovation process it is that innovation requires highly motivated individuals willing to go beyond doing what has been tried previously, beyond following standard operating procedures, beyond using time-tested methods and technology. Innovation and discovery of new ways of doing things, new technologies, or new applications based on existing technologies requires companies and individuals to question the *status quo*, to be creative, and to be willing to bear the significant risks associated with exploring new methods.[22] Of course, enhanced incentives in the form of meaningful rewards for successful discoveries are required to elicit such effort and risk-bearing.

In market economies, substantial rewards are provided for successful discoveries in the form of competitive advantage and the protection of intellectual property. For example, it is estimated that the overall rate of return for some 17 successful innovations in the 1970s averaged 56 percent.[23] In comparison, the average return on investment for all of American business over the last 30 years has been on the order of 16 percent. Despite these high rewards for innovators, however, there should be little doubt that innovation benefits the economy as a whole. In fact, today America enjoys more than half of its economic growth from industries that barely existed a decade ago.[24] This is consistent with recent findings of the White House Office of Science and Technology Policy estimating that more than half of U.S. economic growth since World War II was the result of innovation.[25]

These facts about the economic role of innovation clearly reinforce the aforementioned observations of Professor Bonbright, that economists generally view dynamic efficiency as being ''far

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more important'' to consumer welfare than static or allocative efficiency. Such dynamic efficiency is achieved through incentives that reward the perpetual discovery of new, innovative methods that increase efficiency and increase overall performance. Clearly, innovation does not happen because market forces ''bribe'' companies or individuals to ''reveal'' what they know already. Rather, it is strong incentives that motivate innovators to exert significant efforts, question the status quo, and assume the risks it takes to discover and implement more efficient procedures, applications, and technologies.

In traditionally rate-regulated industries, however, incentives for such innovation are truncated, if not absent altogether. In fact, the traditional regulatory model provides, at best, weak incentives to discover new efficiencies by: (1) discouraging risk-taking and the application of new technologies through the potential disallowance of costs and investments associated with unsuccessful attempts to innovate; and (2) providing only very limited rewards, if any, for even highly successful innovations. The benefits of new, cost-reducing operating practices simply decrease a utility's ''cost-of-service'' and, as a result, often are appropriated quickly and passed on to customers in the form of lower rates. Moreover, the traditional regulatory model commonly disallows the recovery of the performance incentive payments that regulated firms use in an attempt to motivate their employees.

With very limited potential rewards but significant disallowance risks, the traditional regulatory model strongly encourages the prudent use of tried-and-true operating practices and technologies. It thus provides

very limited incentives, if not explicit disincentives, to look beyond the status quo to discover and employ new, innovative operating practices and technologies. This is why the provision of enhanced incentives can stimulate a discovery process that enables regulated firms to become more efficient than they previously knew how to be. In the long term, this process can lead to dynamic efficiency gains and significant benefits for firms and their customers alike.

IV. Conclusions

Incentive regulation has supplanted traditional cost-of-service regulation in the telecommunications industry and the regulation of electric utilities appears to be following a similar trend. Despite these significant changes in the nature of regulatory regimes, a frequent claim from parties opposed to the adoption of incentive regulation is that the regulated firm should not be rewarded for efficient performance because it is already subject to the statutory obligation to operate efficiently. This view of the world implicitly rests on the premise that the regulated firm knowingly disavows superior methods by which to enhance efficiency. What this view fails to recognize, however, is that (1) the incentives requisite to the *discovery* of superior methods by which to augment efficiency are not sufficiently pronounced under cost-of-service regulation; and (2) the regulated firm cannot knowingly disavow what it has yet to discover.

It is the recognition of efficiencies as a ''discovery process'' that largely explains the long-term benefits that incentive regulation offers over traditional cost-of-service regulation. Indeed, the transition to restructured, more competitive markets now underway in many traditionally regulated industries will require a different mindset for all parties involved in the regulatory process—one that recognizes the importance of enhanced incentives in promoting efficiency and long-term investment in what are arguably some of the most critical of infrastructure industries. It is in

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this context that incentive regulation is poised to bridge the gap between fully integrated, regulated monopolies and a restructured, more competitive marketplace.■

Endnotes:

1. Incentive regulation can be defined as the implementation of rules that provide a regulated firm with strong incentives to achieve desired goals while granting significant, but not unlimited, discretion to the firm. In some sense, all types of regulation—including some forms of cost-of-service regulation—can constitute a form of incentive regulation. The common practice has been to limit the definition of incentive regulation to alternative forms of regulation that satisfy the above definition. These include price cap regulation, rate moratoria or rate freezes (which are also a form of price cap regulation), and various combinations that include earnings sharing. See DAVID E.M. SAPPINGTON AND DENNIS L. WEISMAN, DESIGNING INCENTIVE REGULATION FOR THE TELECOMMUNICATIONS INDUSTRY (Cambridge, MA: MIT Press, 1996), at 2. See also note 13 below.

2. David E.M. Sappington, Johannes P. Pfeifenberger, Philip Hanser and Gregory N. Basheda, *Status and Trends of Performance-Based Regulation in the U.S. Electric Utility Industry*, ELEC. J., Oct. 2001, at 71–79.

3. A dead-band is a range of earnings within which no action is taken by the regulator—either to modify rates or to appropriate earnings.

4. See David E.M. Sappington, *Price Regulation*, in Martin Cave, Sumit Majumdar, and Ingo Vogelsang (eds.), HANDBOOK OF TELECOMMUNICATIONS ECONOMIST (Amsterdam: North-Holland, 2002), Table 2, Chap. 7, at 225–293.

5. The empirical evidence to date appears to support this claim. See, for example, Jaison R. Abel, *The Performance of the State Telecommunications Industry under Price-Cap Regulation: An Assessment of the Empirical Evidence*, NRRI 00-14, National Regulatory Research Institute, Sept. 2000; and Chunrong Ai and David Sappington, *The Impact of State Incentive Regulation on the U.S. Telecommunications Industry*, J. REGUL. ECON., forthcoming. Note, however, that the overall benefits of incentive regulation are perhaps less controversial than the distribution of those benefits between consumers and regulated firms. The regulated firm under incentive regulation typically bears greater risk in exchange for the prospect of a higher return. The realization of this higher return depends upon the regulated firm's ability to improve efficiency. In contrast, the gains to consumers, which include rate reductions or freezes, bill credits and infrastructure upgrades, are typically guaranteed up-front and thus independent of the actual performance of the regulated firm. This is an important distinction because there may be a temptation by some parties to point to the greater profitability of the regulated firm under incentive regulation as evidence of an inequitable distribution of the gains from incentive regulation. What this perspective fails to realize is that in a different state of the world in which the regulated firm did not perform well, consumers are shielded under incentive regulation from the rate increases that may attend earnings deficiencies under the traditional regulatory model. In other words, incentive regulation provides a type of ''insurance'' for consumers that derives from a less direct linkage between the regulated firm's rates and its actual costs.

6. JAMES C. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES (New York: Columbia University Press, 1961), at 107.

7. ADAM SMITH, THE WEALTH OF NATIONS (New York: Modern Library, 1937) (originally published in 1776), at 423.

8. DANIEL YERGJN AND JOSEPH STANISLAW, COMMANDING HEIGHTS (New York: Simon & Schuster, 1998), at 273.

9. ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, vol. I (New York: John Wiley & Sons, 1970), at 17. See also, Bonbright, *supra* note 6, at 107.

10. As Professor Joseph Schumpeter observed:

> In this respect, perfect competition is not only impossible, but inferior, and has no title to being set up as a model of ideal efficiency. It is hence a mistake to base the theory of government regulation of industry on the principle that big business should be made to work as the respective industry would work in perfect competition.

See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (New York: Harper & Row, 1942), at 106.

11. See, for example, Sappington and Weisman, *supra* note 1, Chap. 5.

12. See, for example, Sappington, *supra* note 4.

13. Cost-of-service regulation that explicitly rewards superior performance or that specifically allows for extended regulatory lags can also provide strong performance incentives. Such modified cost-of-service regulation, for example, may also employ lengthened regulatory lags similar to rate moratoria. Also note that the traditional regulatory model is not inconsistent with providing rewards for superior performance. Regulatory agencies generally have some flexibility to consider superior company performance or management efficiency as a ''non-cost factor'' in determining whether a utility's rates are within a just and reasonable range. The Federal Energy Regulatory Commission, for example, stated in its Order 414-A (July 29, 1998) that ''the Commission will not lower a pipeline's ROE if its lower risk is the result of the pipeline's own efficiency . . . The record in this case makes it clear that Transco's positive market position is largely the result of the pipeline's relatively low rates in its market area . . . These are characteristics of a healthy company whose efficiency has enabled it to compete successfully in the market place and satisfy its customers.'' (*slip op.*, at 34–35).

14. Testimony of Donald E. Brandt before the Missouri Public Service

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Commission, Transcript of Proceeding, Case No. EO-96-14, June 2, 1999, at 266–267.

15. It is interesting to note that intellectual property laws may give temporary monopolies (e.g., patent rights) to firms in competitive markets in order to provide ''incentives and rewards'' to encourage innovation, efficiency gains, and superior performance. Yet some argue that ''incentives and rewards'' to encourage innovation, efficiency gains, and superior performance for regulated monopolies are unnecessary because regulated firms already have the ''obligation'' to be efficient.

16. The importance of performance-based compensation within government agencies is broadly recognized. For example, the U.S. General Accounting Office (GAO) notes that ''[i]f federal agencies hope to maximize their performance, ensure accountability, and achieve their strategic goals and objectives, they must, among other things, make effective use of incentives—whether monetary or nonmonetary—to motivate and reward their workforce . . .'' (*Human Capital: Using Incentives to Motivate and Reward High Performance*. Statement of Michael Brostek, GAO/T-GGD-00-118, May 2, 2000, at 11–12). The importance of incentives is also recognized with respect to government agencies as a whole. For example, a recent report of the Missouri Energy Policy Task Force ''recognizes that state agencies may be reluctant to become more efficient if those efficiencies result in a dollar-for-dollar reduction in their budgets.'' (*Final Report of the Missouri Energy Policy Task Force Presented to Governor Bob Holden*. Northwest Missouri State University, Maryville, Missouri, Oct. 16, 2001, at 19). The Task Force recommended that these agencies be given efficiency incentives in the form of a shared savings program.

17. For example, studies found that: the performance of race car drivers increases with the absolute spread of prizes (Brian E. Becker and Mark A. Huselid, *The Incentive Effects of Tournament Compensation Systems*, ADMIN. SCI. Q., 1992, 37, at 336–350); golfers' performance increases with higher prizes (Ronald G. Ehrenberg and Michael L. Bognanno, *The Incentive Effects of Tournaments Revisited: Evidence from the European PGA Tour*, IND'L & LABOR RELATIONS REV., 1990, 43, at 74–89); and an incentive pay scheme that shares part of the prize money in horse races with jockeys elicits much improved performance over giving jockeys a flat fee for riding (Sue Femie and David Metcalf, *It's Not What You Pay, It's the Way You Pay It: Jockey's Pay and Performance*, CENTREPIECE MAGAZINE, June 1996, 2).

18. Such a perception of ''excess earnings'' can make it very difficult for regulators to maintain the commitment to the terms of the incentive plan. However, as Professor David Sappington observes, the credibility of a regulator's commitment is critical to the performance of incentive plans:

> Absent credible rewards for superior performance and/or credible penalties for poor performance, the regulated firm will have little incentive to incur the effort costs that increase the likelihood of good performance.

See David E.M. Sappington, *Designing Incentive Regulation*, REV. IND'L ORG., 1994, 9, at 262–263.

19. A related concern is that regulators may face adverse political pressures should the regulated firm report higher earnings under incentive regulation. In other words, how does the regulator explain to part of his constituency that he is doing a ''good job'' as a regulator when the regulated firm reports a significant increase in earnings? See, for example, Dennis L. Weisman, *Superior Regulatory Regimes in Theory and Practice*, J. REGUL. ECON., Dec. 1993, 5 (4), at 364–365.

20. The formal economics literature may, in part, have contributed to this perception through its modeling of principal–agent relationships in which the ''agent'' has superior information to that of the ''principal.'' The inability of the principal to observe this information directly allows the agent to earn ''information rents.'' In other words, the agent must be ''bribed'' to reveal this information. However, it is unclear whether this structure is merely a convenient modeling technique or actually reflects institutional reality. The discussion herein emphasizes discovery rather than concealment by the agent, though they need not be mutually exclusive.

21. Incentive regulation can also facilitate implementation of known efficiency measures because implementation of such measures can be associated with significant direct and indirect costs that are difficult to recover under traditional regulation. Such cost recovery can be difficult under traditional regulation because the regulated entity often bears the full costs of the efficiency measure but may have only limited ability to benefit from the measures as efficiencies are appropriated quickly through the regulatory process. In addition, the regulatory process generally dose not consider indirect costs, such as the risks of using new technologies or the significant institutional strains associated with certain measures such as staff reductions.

22. As the great inventor Charles Franklin Kettering observed, the key to successful innovation is *intelligent failure*—failing in a manner that brings the innovator one step closer to the actual solution. For Kettering, failure was an indispensable part of the innovation process. See, for example, Mark Bernstein, *Charles Kettering: Automotive Genius*, SMITHSONIAN, July 1988.

23. *Industry Gets Religion*, ECONOMIST, Feb. 20, 1999 (Special Supplement on Innovation in Industry).

24. *Id.*

25. Richard M. Russell of the White House Office of Science and Technology Policy estimates that 52 percent of the nation's growth since World War II had come through inventions. His statement that ''unless we can protect intellectual property, we will not have invention'' serves to highlight the importance of incentives in achieving such performance. See Warren E. Leary, *The Inquiring Minds Behind 200 Years of Inventions*, N.Y. TIMES, Oct. 22, 2002, at D4.

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