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October 24, 2016

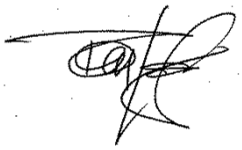
Ms. Laurel Ross
Acting Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Ms. Ross:

RE: Project No. 3698781
British Columbia Utilities Commission (BCUC or Commission)
British Columbia Hydro and Power Authority (BC Hydro)
2015 Rate Design Application (2015 RDA)
BC Hydro Reply Argument

BC Hydro writes in compliance with Exhibit A-39 to provide its Reply Argument.

Yours sincerely,



Tom Loski
Chief Regulatory Officer

gd/ma

Enclosure (1)

Copy to: BCUC Project No. 3698781 (BC Hydro 2015 RDA Registered Intervener Distribution List.

British Columbia Utilities Commission

BC Hydro 2015 Rate Design Application

BC Hydro

Reply Argument

October 24, 2016

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PART I: INTRODUCTION AND OVERVIEW

1. This is BC Hydro's Reply Argument[1] in regard to the orders it seeks from the Commission with respect to the proposals contained in its 2015 RDA.

Introduction

2. On September 26, 2016, BC Hydro submitted its Final Argument in regard to the proposals contained in its 2015 RDA and the Commission's jurisdiction to approve low-income rates. On September 26, 2016, BCOAPO also filed its final argument with respect to the orders it seeks from the Commission in this proceeding. On October 11, 2016, both BC Hydro and BCOAPO submitted arguments in response to each other and 11 interveners filed final arguments as follows:

   - AMPC;
   - BCSEA-SCBC;
   - CAPP;
   - CEBC;
   - CEC;
   - EPHG;
   - FortisBC;
   - MoveUP;
   - NIARG;
   - Sharon Noble; and
   - ZoneIIRPG.[2]

3. In the Intervener Arguments, almost all interveners commented on how constructive the extensive consultation BC Hydro undertook in preparation for its filing of the 2015 RDA was and some have asked that the Commission specifically comment on the engagement process.[3] BC Hydro submits that it is

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[1] BC Hydro uses and adopts all of the defined terms and acronyms used in its Application, Final Argument and October 11 Argument in Response to BCOAPO's Low-Income Rate Proposals (**Response to BCOAPO**) in this Reply Argument.
[2] Collectively and including the BCOAPO October 11 argument (**BCOAPO Response**) referred to as the **Intervener Arguments.**
[3] BCSEA-SCBC final argument, para 28 p 7/pdf 9, and NIARG final argument p 3.

because of this extensive pre-application consultation that most of the Intervener Arguments are either supportive of or take no position on BC Hydro's proposals contained in its 2015 RDA. As such, BC Hydro does not generally reply to those of the Intervener Arguments that support or take no position on BC Hydro's proposals.

4. BC Hydro has attempted to limit these submissions to reply to specific points raised in the Intervener Arguments that are opposed to BC Hydro's proposals and in doing so, not repeat or elaborate on submissions made in its Final Argument.

5. However, BC Hydro notes that some reply necessarily includes reference to its prior submissions. Where BC Hydro has not responded directly to an intervener submission, this should not be taken as agreement with the submission.

6. For convenience, this Reply Argument is organized in the same manner as the submissions in BC Hydro's Final Argument.

7. In its Final Argument, BC Hydro outlined the regulatory review of the 2015 RDA and identified the issues in scope for Module 1 and the expected issues to be addressed in Module 2.[4] In its final argument, NIARG makes a number of submissions regarding issues that it believes should be addressed in Module 2 of the 2015 RDA and also asks that, in its decision, the Commission "provide clear and express guidance as to whether specific Module 1 approvals or directions apply to Zone 1B and/or Zone II or remain subject to further consideration…"[5]

8. With respect, BC Hydro believes it has been clear throughout this process that both rate structures and terms and conditions applicable in non-integrated areas (**NIA**) will be within the scope of Module 2 of the 2015 RDA including the

[4] BC Hydro Final Argument, para 7 p 5/pdf 6, which states: "Module 2 of the 2015 RDA…is expected to address the following: voluntary General Service rate options including CEC's proposal for a non-firm interruptible rate pilot for MGS and LGS customers; Transmission extension policy; Distribution extension policy; rate structures and terms and conditions for non-integrated areas; the Commercial E-Plus rate, the Irrigation and Street Lighting rate structures; the possibility of an extra-large general service class; farm service issues; and optional Residential rates."
[5] NIARG final argument, p 2/pdf 6.

stakeholder engagement process.[6] As such, BC Hydro submits that no such guidance from the Commission is required.[7]

9. In its Final Argument, BC Hydro proposed that all orders it seeks be made effective April 1, 2017. That proposed implementation date was not opposed by any intervener.

PART II: CONTEXT

Legal Regime and Previous Commission Decisions

10. BC Hydro has no reply submissions under this heading.

Current BC Hydro Environment – Energy Long-Run Marginal Cost

11. BC Hydro has no reply submissions under this heading.

Rate Design Criteria

12. No intervener suggested in argument that BC Hydro's rate design criteria[8] are inappropriate. However, in their respective arguments each of MoveUP[9], BCOAPO[10] and BCSEA-SCBC[11] comment on the prioritization BC Hydro placed on specific rate design criteria, namely, customer understanding and acceptance, rate stability and fair apportionment of costs.

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[6] BC Hydro Final Argument, para 7 p 5/pdf 6 which confirms that "Module 2 of the 2015 RDA…is expected to address…rate structures and terms and conditions for NIAs"; see also Transcript v 6, p 1185 line 22 to p 1186 p 2; Transcript v 4, p 597 line 20 to p 598 line 1; Transcript v 4, p 598 lines 13-17; and Transcript v 4, p 600 line 25 to p 604 line 13 where counsel for BC Hydro specifically confirmed that: "it is BC Hydro's position that the possibility of some deviation from the standard charges, and terms and conditions more generally, and their applicability in Zone II is something that BC Hydro will consult on in Module 2, and it may result in a proposal in the Module 2 application." He further confirmed, "…in this proceeding right now, in Module 1, BC Hydro is making proposals to change certain elements of its terms and conditions. Those would apply to all zones. In Module 2 consultation, it will consider looking at the applicability of terms and conditions including standard charges to Zone II and consider whether there's a basis to differentiate between Zone II – Zone 1B and Zone I. And ultimately that will lead to an application, which at which time BC Hydro will set forth its proposals on that point."

[7] In its final argument, NIARG also asks for a number of express acknowledgments with respect to specific BC Hydro rate proposals. BC Hydro will address those requests within the relevant section of its Reply Argument below.

[8] BC Hydro Final Argument, para 25 p 13/pdf 14.

[9] MoveUP final argument, pp 2-6/pdf 2-6.

[10] BCOAPO Response, pp 4-5/pdf 5-6.

[11] BCSEA-SCBC final argument, paras 21-26 pp 5-6/pdf 7-8.

13. BCSEA-SCBC confirms that it does not object to BC Hydro's prioritization[12] but that it wishes to emphasize its understanding that BC Hydro's prioritization does not imply abandonment of the "efficiency" principle.[13] BCOAPO states that it is generally supportive of the "prioritization that BC Hydro has assigned to the rate setting objectives" but that "[it] is of the view that the efficiency objective cannot be entirely overlooked."[14] Finally, MoveUP states it would be "short-sighted to abandon efficiency as a top priority."[15]

14. To be clear, BC Hydro has not abandoned the efficiency criterion in its consideration of the proposals it has put forward. To the contrary, BC Hydro carefully considered each rate design criterion in the evaluation of its proposals and where conflicts arose, it prioritized the three identified rate design criteria over others. BC Hydro did this for a number of reasons: its circumstances have changed considerably since 2007; there was strong stakeholder support for BC Hydro's prioritization of the three identified criteria and, the B.C. government has placed a focus on rate impacts.[16] BC Hydro submits that its prioritization of rate design criteria for the 2015 RDA was and remains reasonable and appropriate.

Stakeholder Consultation

15. BC Hydro has no reply submissions to make under this heading but is pleased that its consultation efforts with respect to the 2015 RDA have been recognized by interveners as a helpful process that facilitated a more efficient hearing of its application.

[12] BCSEA-SCBC final argument, para 23 p 6/pdf 8.
[13] BCSEA-SCBC final argument, para 24 p 6/pdf 8.
[14] BCOAPO Response, p 4/pdf 5.
[15] MoveUP final argument, p 6/pdf 6.
[16] BC Hydro Final Argument, paras 30-33, pp 15-16/pdf 16-17.

PART III: THE RELIEF SOUGHT BY BC HYDRO OUGHT TO BE GRANTED

A. BC HYDRO RESIDENTIAL RATE PROPOSALS

RIB Rate - RS 1101/RS 1121

16. All interveners, with the exception of CEBC, either support or take no position on BC Hydro's proposal to maintain the *status quo* RIB rate structure and its RIB Pricing Principles proposal.

17. NIARG supports BC Hydro's proposal to maintain the *status quo* RIB rate but asks for an express acknowledgment from the Commission that the RIB rate does not apply in Zone 1B.[17] Further to its submissions above, BC Hydro does not believe that such acknowledgment is necessary – Zone 1B is exempt from the RIB, taking service on RS 1151 and RS 1161; BC Hydro has not sought an order with respect to Zone 1B in this proceeding; and, BC Hydro has confirmed that Zone 1B rates will be within the scope of Module 2 of the 2015 RDA, along with other NIA rates.[18]

18. Alone among the interveners in this proceeding, the CEBC advocates for the elimination of the RIB rate.[19] This is significant because, unlike questions of law, the Commission's rate orders reflect an exercise of discretion and therefore should be informed (although not determined) by the degree of intervener support they have. It follows that the Commission should give weight to the fact of general intervener support for BC Hydro's RIB proposals and in particular those interveners who represent customers taking service under the rate.

19. BC Hydro notes that the CEBC does not propose a timed phase-out of the RIB rate, and does not object to the Commission's rate orders arising from this proceeding being effective on April 1, 2017. Accordingly, BC Hydro takes the CEBC to be advocating for a one-time elimination of the RIB rate to be effective on April 1, 2017.

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[17] NIARG final argument, p 3/pdf 6.
[18] See footnotes 4 and 6 above.
[19] CEBC final argument, pp 2 and 3/pdf 2-3.

20. Consistent with BC Hydro's understanding of the relief the CEBC seeks regarding the RIB rate, the CEBC expressly notes that the elimination of the RIB rate would cause incremental bill impacts to low-usage and low-income customers of BC Hydro.[20] The CEBC's solution to this dilemma is the establishment of a low-income rate scheme as a necessary corollary to the elimination of the RIB rate.[21] On this point the CEBC refers primarily to the Province's alleged willingness to fund such a scheme.[22] With respect, the quoted testimony of Mr. Reimann regarding the manner in which Site C is financed (100% debt) is not an evidentiary basis to accept the CEBC's hypothesis regarding the government's willingness to fund a low-income rate scheme. Indeed the evidence is reasonably clear that the government prefers low-income DSM to a low-income rate scheme.[23] It follows that the Commission can only accept the CEBC position if it also accepts that the Commission has Basic LI Jurisdiction – a position that the CEBC does not itself endorse or provide any arguments in support of – and orders the implementation of BCOAPO's low-income rate proposals. Assuming the Commission does not accept BCOAPO's low-income rate proposals; BC Hydro submits that the CEBC proposal can and should be dismissed without regard to the two main arguments advanced by the CEBC for the elimination of the RIB rate.

21. At a summary level, those arguments are two-fold: (i) the RIB fails to advance the GHG reduction objectives of the *Clean Energy Act*; and (ii) the RIB hasn't been effective. Neither of those arguments should be accepted, for the following reasons.

GHG Reduction Objective of the *Clean Energy Act*

22. As discussed by BC Hydro in its Application, "British Columbia's energy objectives" as set out in the *Clean Energy Act* are not prescribed rate-making objectives, and nor is any one of the objectives prioritized over any of the other

[20] CEBC final argument, p 8/pdf 8.
[21] CEBC final argument, p 2/pdf 2.
[22] CEBC final argument, section 1.6, p 8/pdf 8.
[23] See BC Hydro's October 11 Response to BCOAPO, para 49 p 20/pdf 23.

16 objectives.[24] Under the current regulatory framework there simply is no basis to put GHG emission reductions at the top of a list of possible rate design objectives, particularly in light of the acknowledged bill impacts that would arise from the proposed elimination of the RIB rate. However, BC Hydro acknowledges that energy policy in Canada and B.C. has begun a shift towards a focus on GHG emission reductions,[25] and BC Hydro intends to consult with stakeholders on how rate design could, within the current regulatory framework, help effect that objective as part of its Module 2 consultation.[26]

Effectiveness of RIB

23. BC Hydro's Final Argument summarizes at paragraphs 48-49 the evidence regarding the effectiveness of the RIB rate. BC Hydro submits that the evidence is overwhelmingly positive, and that the CEBC's arguments fail to substantively address it. BC Hydro doesn't quibble with the CEBC's argument that there is no "definitive proof" of the RIB rate's effectiveness, but notes that it is not required to meet that standard, but only the lower standard of on a balance of probabilities.[27] BC Hydro also notes that Ms. Jubb's testimony in general and specifically regarding the RIB evaluations was particularly compelling and utterly untouched in cross-examination.[28] Indeed, none of the complaints the CEBC has with those evaluations were put to Ms. Jubb for her comment during her cross-examination.

Residential E-Plus Amendment – RS 1105

24. In its final argument, BCSEA-SCBC argues against BC Hydro's Residential E-Plus Amendments and instead asks that the Commission choose between

[24] Application, Exhibit B-1, section 2.2.1.2, pp 2-4 to 2-6/pdf 57-59.
[25] For example, the B.C. Government's recently released Climate Leadership Plan, August 2016 which states that in its efforts to advance efficient electrification, it is "working with BC Hydro to expand the mandate of its DSM programs to include investments that increase efficiency and reduce GHG emissions", p 28, copy available at: https://climate.gov.bc.ca/wp-content/uploads/sites/13/2016/06/4030_CLP_Booklet_web.pdf
[26] Consistent with Module 1 of the 2015 RDA, consideration of BC Hydro's current environment as well as government policy will inform the proposals BC Hydro develops and engages on in Module 2 of the 2015 RDA and beyond.
[27] The same burden borne by the BCOAPO with regard to its proposals.
[28] See for example Transcript v 5, p 923 line 7 to p 926 line 17.

ending the residential E-Plus rate by natural attrition or by scheduled phase-out.[29] BCSEA-SCBC states that it does not take a position on either option.[30] NIARG similarly supports phasing out the E-Plus service.[31] The EPHG continue to support maintaining the *status quo* terms and conditions.[32] BCOAPO takes no position on BC Hydro's Residential E-Plus Amendments[33] and CEC states that BC Hydro's Residential E-Plus Amendments are reasonable and should be approved as filed.[34]

Response to BCSEA-SCBC and NIARG

25. At page 36 of its argument BCSEA-SCBC bases its objection to BC Hydro's proposed E-Plus Amendments, in part, on the statement that "the E-Plus rate does not currently serve a useful function because its original purpose was to market surplus energy that would otherwise be spilled, at a time when BC Hydro did not have consistent access to the spot market."[35] NIARG makes a similar submission in its final argument and states that "any service interruption in the future appears highly unlikely as BC Hydro acknowledges that it is now operationally impractical to do so."[36]

26. With the qualifications that follow BC Hydro agrees with these statements, that is, the E-Plus rate as it is currently worded, does not provide BC Hydro with the benefits it could because the current wording of RS 1105 frustrates the interruptible nature of the E-Plus rate.[37] BC Hydro also agrees that without the proposed amendments to RS 1105, service interruption is unlikely. As such, the fact that the "E-plus rate does not currently serve a useful function" or that it is operationally impractical for BC Hydro to interrupt service are not reasons to

[29] BCSEA-SCBC final argument, para 139(d), p 36/pdf 38.
[30] BCSEA-SCBC final argument, para 139(g), p 37/pdf 38.
[31] NIARG final argument, p 5/pdf 8.
[32] EPHG final argument, p 2/pdf 2.
[33] BCOAPO Response, section 3.1.3 p 10/pdf 11.
[34] CEC final argument, paras 332-360 pp 81-88/pdf 82-89.
[35] BCSEA-SCBC final argument, para 139(a), p 36/pdf 38.
[36] NIARG final argument, p 4/pdf 7.
[37] See BC Hydro's Final Argument, paras 65-66, pp 31-32/pdf 32-33.

reject BC Hydro's E-Plus proposal but rather, are reasons that support the amendments BC Hydro has proposed.

27. BCSEA-SCBC also states that "turning the residential E-Plus rate into a fully interruptible rate would not result in a capacity resource that has value for BC Hydro."[38] None of the cited evidence BCSEA-SCBC relies on provides a substantive response to BC Hydro's evidence on this point which is clear - the 2013 IRP forecasts a need for capacity in F2019 even with the continuation of DSM initiatives.[39] Interruptible rates, like the E-Plus rate, are one way to address that capacity need.

Response to EPHG

28. Most of EPHGs submissions in its final argument are restatements of its previous evidence and BC Hydro provided a response to those submissions in its Final Argument. However, in an effort to clarify one point, BC Hydro has the following submission.

29. EPHG states that BC Hydro has not justified why it wants to modify the wording of RS 1105 to remove the clause stating that E-Plus service will only be interrupted "when the service cannot be provided economically from other energy sources."[40] BC Hydro has justified the need for this change. The language contained in this clause reflected the purpose of the E-Plus rate at the time of its introduction and those circumstances have changed.[41] In order to make the rate truly interruptible in a manner that reflects BC Hydro's current circumstances (i.e. when additional capacity is needed), the language must be modified so that BC Hydro has the ability to interrupt the E-Plus service. The proposed wording changes remove the constraints in the current language and will give BC Hydro the flexibility to interrupt E-Plus customers when system capacity is required.

[38] BCSEA-SCBC final argument, para 139(c) p 36/pdf 38.
[39] Application, Exhibit B-1, Appendix C-3B, p 343 of 609/pdf 2138.
[40] EPHG final argument, section 3.0 p 3/pdf 3.
[41] See BC Hydro's Final Argument, paras 65-66, pp 31-32/pdf 32-33.

30. BC Hydro considered the large bill impacts that would result should the E-Plus rate be phased out and customers transitioned to the RIB rate and concluded that amending the rate in such a way as to allow it to interrupt was a better and more fair response that balanced all customer needs.[42] BC Hydro still believes that its proposal strikes the right balance, while acknowledging the difficulty in developing a proposal on this topic.[43]

B. BC HYDRO GENERAL SERVICE RATE PROPOSALS

31. Only BCSEA-SCBC commented on BC Hydro's proposal to use the F2016 COS study rather than the F2016 COS (NSA) to effect the proposed MGS and LGS pricing effective April 1, 2017, and it stated that it considers the proposal reasonable.[44] As such, BC Hydro has no reply submissions under this heading.

SGS Rate Class – RS 1300/1301/1310/1311 (collectively, RS 13xx)

32. All interveners either support or take no position with respect to BC Hydro's SGS Proposal.

33. While NIARG supports BC Hydro's SGS Proposal it states that "there is insufficient evidence on the record in Module 1 to enable the Commission to approve BC Hydro's SGS rate design proposals on a permanent basis for Zone 1B or Zone II" and that the need for such changes should be considered in Module 2.[45] BC Hydro has not sought an order in this proceeding with respect to its SGS proposal on a permanent basis for Zone 1B or Zone II, or at all, and BC Hydro has confirmed that NIA rates will be within the scope of Module 2 of the 2015 RDA.[46]

[42] BC Hydro Final Argument, paras 67-69, pp 32-33/pdf 33-34.
[43] As Mr. Anderson stated, it was a "tough proposal to come up with, but again, in the end, given the history and everything that's gone on with E-Plus, we think it's fair": Transcript v 3, p 452 lines 1-14.
[44] BCSEA-SCBC final argument, para 140 p 37/pdf 39.
[45] NIARG final argument, p 5/pdf 8.
[46] See footnotes 4 and 6 above.

MGS Rate Class – RS 1500/1501/1510/1511 (collectively, RS 15xx)

34. All interveners either support or take no position with respect to BC Hydro's MGS Proposal.

35. While NIARG supports BC Hydro's MGS Proposal it states that "there is insufficient evidence on the record in Module 1 to enable the Commission to approve BC Hydro's MGS rate design proposals on a permanent basis for Zone 1B or Zone II" and that the need for such changes should be considered in Module 2.[47] BC Hydro has not sought an order in this proceeding with respect to its MGS Proposal on a permanent basis for Zone 1B or Zone II, or at all, and BC Hydro has confirmed that NIA rates will be within the scope of Module 2 of the 2015 RDA.[48]

LGS Rate Class – RS 1600/1601/1610/1611 (collectively, RS 16xx)

36. All interveners either support or take no position with respect to BC Hydro's LGS Proposal. However, at page 14 of its October 11 argument, while the BCOAPO support BC Hydro's LGS Proposal, it goes on to ask BC Hydro to describe the bill impacts of changing the LGS demand charge so that it would recover 59% of LGS demand-related costs instead of 65% as proposed, the 59% being consistent with the expected TSR stepped rate demand-cost recovery under the F2016 COS (NSA).[49] This requested information is not already on the record of this proceeding.

37. BC Hydro submits first that the evidentiary record in this proceeding is closed and so it would not be appropriate to now provide the requested information.

38. Second, the request seems to be premised on the notion that TSR stepped rate and LGS customers should contribute equal percentages of demand-related costs attributable to their rate class through their demand charges. Regardless of whether this notion has merit, it was not a basis for BC Hydro's LGS Proposal,

[47] NIARG final argument, p 6/pdf 9.
[48] See footnotes 4 and 6 above.
[49] BCOAPO Response, p 14/pdf 15.

which was more generally about improving fairness in cost allocation, offsetting bill impacts arising from the proposed flat energy rate, and dampening the range of bill impact variation among LGS customers.[50] No intervener has advocated (except the BCOAPO, implicitly through this submission perhaps) that the LGS demand-related cost recovery target should be aligned with the TSR stepped rate demand-cost recovery.

39. For these reasons BC Hydro declines to provide the requested information.

40. NIARG also supports BC Hydro's LGS Proposal but states that "there is insufficient evidence on the record in Module 1 to enable the Commission to approve BC Hydro's LGS rate design proposals on a permanent basis for Zone 1B or Zone II" and that the need for such changes should be considered in Module 2. BC Hydro has not sought an order in this proceeding with respect to its LGS Proposal on a permanent basis for Zone 1B or Zone II, or at all, and BC Hydro has confirmed that NIA rates will be within the scope of Module 2 of the 2015 RDA.[51]

MGS and LGS: Three Related Requests

41. BCOAPO, BCSEA-SCBC and the CEC commented on the three related orders that will be required should BC Hydro's MGS and LGS rate proposals be accepted, namely, the TS 82 Proposal, GS-Control Group Proposal and GS-Distribution Utilities Proposal. BCOAPO does not oppose the related orders[52] and both CEC[53] and BCSEA-SCBC agree that the orders will be required if BC Hydro's MGS and LGS rate proposals are accepted.[54] As such, BC Hydro has no reply submissions under this heading.

[50] Application, Exhibit B-1, p 6-62/pdf 341.
[51] See footnotes 4 and 6 above.
[52] BCOAPO Response, section 3.2.4 p 15/pdf 16.
[53] CEC final argument, para 536 p 124/pdf125.
[54] BCSEA-SCBC final argument, para 181 p 45/pdf 47.

C. BC HYDRO TRANSMISSION SERVICE RATE PROPOSALS

42. All interveners either support or take no position on BC Hydro's proposal to maintain the *status quo* as it relates to the stepped rate structure for RS 1823 customers and the RS 1823 F2017-F2019 Pricing Principles proposal. Importantly, both of the major customer groups directly affected by the rate, CAPP and AMPC, strongly support BC Hydro's Transmission Service rate proposals.

43. At page 9 of its final argument, CEBC states that work should begin to phase-out the Transmission Service Rate after reasonable consultation with the industrial customers.[55] For the reasons outlined in its Application and Final Argument[56], including strong stakeholder support for continuation of the current RS 1823 structure, and in consideration of the legislative directions that restrict options available with respect to RS 1823, BC Hydro says this idea should be rejected.

D. BC HYDRO ELECTRIC TARIFF TERMS AND CONDITIONS PROPOSALS

44. BCOAPO, CEC and ZONEIIRPG commented on BC Hydro's request for Commission endorsement of its proposed review of Standard Charges between rate design applications. BCOAPO stated that it supports BC Hydro's proposal.[57] CEC states that it "agrees with BC Hydro's assessment of the appropriate forums and recommends that the Commission provide its endorsement as requested by BC Hydro."[58]

45. At page 17 of its final argument, ZONEIIRPG disagreed with part of BC Hydro's request, namely, that RRAs are the appropriate forum for updating existing Standard Charges to reflect current costs.[59] ZONEIIRPG did not provide a basis for its objection but stated that "if allowed at all it must be done with supporting

[55] CEBC final argument, section 3, p 9/pdf 9.
[56] BC Hydro Final Argument, paras 135-150 pp 59-64/pdf 60-64. See also Application, Exhibit B-1, Chapter 7.
[57] BCOAPO Response, section 3.4.2 pp 20-21/pdf 21-22.
[58] CEC final argument, para 614 p 140/pdf 141.
[59] Pdf 20. BC Hydro also proposed that fundamental changes to standard charges, the introduction of new standard charges and/or major changes to the terms and conditions related to standard charges are preferably filed with and examined through RDAs, BC Hydro Final Argument, p 66/pdf 67.

costs and evidence."[60] With respect, any future proposal BC Hydro makes with respect to its Standard Charges would need to be justified and would be subject to information requests in the normal course. BC Hydro's request for Commission endorsement is with respect to process only, that is, BC Hydro is of the view that (1) RRAs are the appropriate forum for updating existing Standard Charges to reflect current costs, and, (2) fundamental changes to Standard Charges, the introduction of new Standard Charges and/or major changes to the terms and conditions related to standard charges are preferably filed with and examined through RDAs.[61]

Update to Standard Charges

46. With the exception of submissions related to the Late Payment Charge (**LPC**), [62] all interveners either support or take no position on BC Hydro's proposals with respect to its Standard Charges.[63]

<u>LPC at Weighted Average Cost of Debt</u>

47. BCSEA-SCBC[64] states that the appropriate cost-based charge for the LPC is 1.25% per month, rather than the current 1.5% per month that BC Hydro proposes to retain. In its argument, NIARG adopts the submissions of BCSEA-SCBC and supports "a reduction from the current LPC of 1.5% per month to the 1.25% per month advocated by BCSEA-SCBC."[65] BCOAPO argues for reduction of the LPC to the short-term cost of debt.[66] Finally, ZONEIIRPG

[60] ZONEIIRPG final argument, p 17/pdf 20.
[61] BC Hydro Final Argument paras 155-156 p 66/pdf 67.
[62] BC Hydro replied to a number of submissions made by the BCOAPO related to its LPC in its Response to BCOAPO. In the Intervener Arguments, numerous parties made submissions with respect to BC Hydro's implicit proposal to not change the LPC and offered their own proposals. As such, BC Hydro provides limited reply submissions which address these submissions.
[63] BC Hydro notes that BCOAPO supports or takes no position on BC Hydro's proposals with respect to its Standard Charges with the exception of the LPC (discussed below) and BC Hydro's proposed continuation of the Account Charge which BC Hydro responded to in its Response to BCOAPO and does not repeat those submissions here.
[64] BCSEA-SCBC final argument, para 198, p 48/pdf 50.
[65] NIARG final argument, p 6/pdf 9.
[66] BCOAPO Response, section 3.4.4.4 pp 25-26/pdf 26-27.

suggests a LPC based on BC Hydro's short term interest rate plus 0.5% rounded up to the nearest full percentage rate.[67]

48. The 1.5 per cent charge has been in place since 1977 and is consistent with the late payment charges of other Canadian electric utilities and with both FortisBC Utilities.[68] Additionally, and as confirmed by BC Hydro's evidence with respect to the cost basis for the 1.5 per cent LPC, it recovers costs not only associated with compensating BC Hydro for carrying costs but also includes costs incurred with respect to the recovery of collections costs.[69] BC Hydro addressed this issue at section 9 of its Rebuttal Evidence and paragraphs 90-91 of its Response to BCOAPO which concludes that if only the cost of debt was recovered then BC Hydro would under-collect for costs incurred with respect to its dunning communications and other related operational costs.

49. Both BCSEA-SCBC and NIARG suggest that the size of the LPC should be based on BC Hydro's short-term bank interest rate and not on its weighted average cost of debt (**WACD**) because "most instances in which a late payment charge is assessed involve a payment that is made within a short time of the due date."[70] For its part, BCSEA-SCBC references testimony by Mr. Sanders that it says confirms that if the LPC was based on the short-term interest rate the charge would be 1.25%/month[71] and concludes that, "on a cost basis, 1.25%/month is the appropriate LPC."[72] With respect, BCSEA-SCBC have misused the quoted testimony which, when read in its proper context, does not respond to the *appropriateness* of using WACD versus short-term interest rates but rather, confirms BC Hydro's view that <u>if</u> the interest on security deposits decreased to the short-term cost of borrowing then it might be appropriate to reduce the LPC to 1.25%

[67] ZONEIIRPG final argument, p 17/pdf 20.
[68] As outlined at Table 8-4 of the Application, p 8-12/pdf 422.
[69] Rebuttal Evidence, Exhibit B-31, section 9. See also Table 2 of the Workshop 9a/9b consideration memo at Appendix C-3B of the Application which outlines the revenue impacts of reducing the LPC to 1.25 per cent and 1 percent respectively.
[70] BCSEA-SCBC final argument, para 199, p 48/pdf 50.
[71] BCSEA-SCBC final argument, para 201, pp 48-49/pdf 50-51 citing Transcript v 6, p 1146 lines 8-16.
[72] BCSEA-SCBC final argument, para 202, p 49/pdf 51.

50. BC Hydro has stated that it is of the view that WACD is a more appropriate measure of borrowing costs related to late payments than short-term interest rates.[73] However and as previously stated, if the Commission were to determine that short-term interest rates should be applied when calculating the LPC, BC Hydro submits that the short-term interest rate should also be applied when calculating interest paid on security deposits as both are related to revenue collection.[74]

LPC Extension for Zones 1B and II Communities

51. At page 17 of its argument, ZONEIIRPG seeks an order that "for ZonesIB and II communities, due to mail and electronic access limitations, an extension of 10 business days to the date before Late Payment Charges are applied should be implemented."[75] With respect, BC Hydro submits that such an order would be inappropriate given that BC Hydro already accounts for possible mail delivery issues with respect to the application of the LPC specifically and receipt of bills more generally. In those cases where mail delivery issues have been identified, BC Hydro puts credit locks on accounts and gives customers additional time to pay without the application of the LPC.[76] BC Hydro also confirms that, as stated above, specific proposals related to terms and conditions for NIAs will be considered as part of the engagement process with respect to Module 2.[77] As such, BC Hydro submits that the requested order should be rejected.

[73] BC Hydro response to BCUC IR 1.126.2.
[74] BC Hydro response to BCUC IR 1.126.2
[75] ZONEIIRPG requests an order from the Commission in this respect at p 22 of its final argument.
[76] Transcript v 6, p 1180 lines 6-14 and p 1181 lines 1-11.
[77] See footnotes 4 and 6 above.

Security Deposits

52. All interveners either support or take no position on BC Hydro's proposed changes to the Electric Tariff language regarding the application and amount of security deposits.[78]

53. At page 17 of its final argument and in response to BC Hydro's proposed amendments to the Electric Tariff that would allow it to charge a new security deposit or increase an existing security deposit if actual consumption is higher than originally estimated, ZONEIIRPG states that "customers should also receive a decrease to an existing security deposit if actual consumption is significantly less than the consumption estimated when the account was created." BC Hydro confirms that the current tariff language already allows for this option and the proposed amendments will not impact the ability for a customer to make this request.

Miscellaneous Terms and Conditions Amendments

54. All interveners either support or take no position with respect to BC Hydro's proposed changes to the updated Electric Tariff language found in Exhibit B-1-1, Attachment 3.

55. All interveners also either support or take no position on BC Hydro's two additional changes to the Electric Tariff to provide that an application for service can be made in person and to correct the wording of section 2.10 to confirm with the intended meaning.

[78] Subject to BCOAPO's requests regarding waiver of security deposits as outlined in the BCOAPO Argument, which submission BC Hydro has already responded to in its Response to BCOAPO at paras 86-89, pp 33-34/pdf 36-37. BC Hydro does not respond to the submission made by NIARG that the Commission has Basic LI Jurisdiction on the basis of the BCOAPO Argument without offering its own analysis, pp 8-9/pdf 11-12.

PART IV: THE COMMISSION HAS NO JURISDICTION TO APPROVE LOW-INCOME RATES *PER SE*

56. In this part of its Reply Argument BC Hydro responds to Intervener Arguments made on October 11 in favour of Basic LI Jurisdiction.[79] It also responds to the BCOAPO's submissions on that topic in the BCOAPO Argument.

57. BC Hydro submits that the degree of support for the BCOAPO's position among interveners should not be given any consideration by the Commission. Unlike rate design issues generally, where the Commission exercises a discretion that is properly informed by the views of interveners, the Basic LI Jurisdiction issue is a question of law and must be considered on its merits regardless of intervener support.

Response to BCOAPO

58. The BCOAPO addresses the Commission's Basic LI Jurisdiction at pages 26-48 of the BCOAPO Argument, and at pages 29-41 of the BCOAPO Response.[80] Much of what BC Hydro would say in reply has already been said in Part IV of its Final Argument and is not repeated here. Instead, the following submissions elaborate on some of the key differences between BC Hydro's analysis and that of the BCOAPO, and point out the issues with the arguments they seem to rely on most heavily.

<u>BCOAPO re: Interpretative Approach</u>

59. In Section 4.1 of the BCOAPO Argument the BCOAPO provides submissions on the interpretive approach to be taken to the Basic LI Jurisdiction issue. It is apparent that on a number of points the submissions of BC Hydro and the BCOAPO are quite consistent. Indeed, the BCOAPO's Response does not take issue with the main points of BC Hydro's argument regarding the proper

[79] Basic LI Jurisdiction refers to the Commission's jurisdiction to establish low income rates without a cost-of-service basis i.e. in the absence of evidence showing that: i) low-income customers cost less to serve than other customers or ii) that preferential low-income rates will reduce BC Hydro's total cost of service.
[80] Pdf 30-42.

interpretive approach including, most particularly, the emphasis on determining the intent of the Legislature.[81]

60. Nevertheless, the main point of departure between the BCOAPO and BC Hydro is that the BCOAPO fails to offer any evidence or indeed much argument regarding a legislative intent in regard to Basic LI Jurisdiction. BC Hydro refers in this regard to the extensive extracts from Hansard included in its Final Argument that indicate clearly a legislative intent to not empower the Commission with such jurisdiction.[82] The BCOAPO offers nothing comparable, except a short reference to Hansard from 1980, which is addressed below.

61. Another point of departure between BC Hydro and the BCOAPO is that the BCOAPO makes a minimal effort to put the alleged low-income rate jurisdiction of the Commission within the context of either the UCA or the broader legislative scheme. In this regard BC Hydro refers to paragraph 220 of its Final Argument in which it is observed that:

- the UCA establishes the Commission primarily to "protect the public from monopolistic behaviour… while ensuring the continued quality of an essential service"; and
- there is already in place a social welfare scheme effected primarily through the *Employment and Assistance Act* and the regulations issued under it.

62. It is in this context that one properly assesses whether the Legislature intended the Commission to have low-income rate jurisdiction. BC Hydro submits that in light of the UCA's focus on economic regulation ("protect the public from monopolistic behaviour") and a social welfare framework already established through different enactments, the underlying and indeed motivating complaint of

[81] BCOAPO Response, pp 29-30/pdf 30-31.
[82] BC Hydro's Final Argument, paras 190-204, pp 82-86/pdf 83-87 and 240-248, pp 102-106/pdf 103/107.

the BCOAPO is that the Province has not taken sufficient steps to address affordability and/or poverty issues.

63. A further point of departure on the interpretive approach to be taken arises at page 28 of the BCOAPO Argument where the BCOAPO argues for a "dynamic interpretation of the legislation", and urges the Commission to "consider evidence of current circumstances."[83] BC Hydro understands this to be an argument for an interpretive approach that would see the Commission's jurisdiction evolve over time. However, the BCOAPO does not articulate what current circumstances would have caused the Commission's jurisdiction to evolve. BC Hydro suggests that this is at least in part because the evidence of Mr. Klein was clear that poverty rates in British Columbia are at "a low not seen since 1980"[84] (the year that the UCA was enacted).

64. In support of its "dynamic interpretation" argument the BCOAPO refers to the Supreme Court of Canada decision *R. v. 9746489*.[85] That case does not assist the BCOAPO because, as the provided quote from that case makes clear, the dynamic approach preserves the original intention of the legislature by accommodating changed circumstances: "*Preserving the original intention of Parliament or the legislatures requires a dynamic approach… sensitive to evolving social and material realities*".[86] Therefore, the "dynamic approach" can only assist the Commission if the original intent of the legislature was to effect a low-income rate jurisdiction that because of changed circumstances cannot be realized. That is not the situation before the Commission. For over 100 years courts and regulators have consistently held that rates which respond to the economic circumstances of individual customers do not meet the “fair, just and

[83] BCOAPO Argument, p 28/pdf 32.
[84] See Mr. Klein’s Direct Testimony, Exhibit C2-12, pdf 266.
[85] BCOAPO Argument, p 28/pdf 32.
[86] See quoted extract provided at p 28 of the BCOAPO Argument.

not unduly discriminatory standard" except where a specific and contrary legislative intent can be gleaned.[87]

65. At page 32 of the BCOAPO Response, the BCOAPO offers an additional interpretative approach argument, namely that section 37 of the *Interpretation Act* precludes consideration of the Legislature's repeated decisions to not empower the Commission with low-income rate jurisdiction.[88] BC Hydro submits that section 37 is not applicable on its face since it only applies where there has been the "repeal of all or part of an enactment"; "the repeal of an enactment and the substitution for it of another enactment"; "the amendment of an enactment"; the "consolidation" of an enactment; the "re-enactment" of an enactment; or the "revision" of an enactment. The decision by Legislature in each of 2008, 2014 and 2016 to not empower the Commission with Basic LI Jurisdiction is none of those things.

66. Assuming for the sake of argument that section 37 of the *Interpretation Act* is applicable, the BCOAPO's interpretation and application of it would preclude reliance on evidence of proceedings in the Legislature as a means to discern legislative intent. That would be inconsistent with what the Supreme Court of Canada has said about such evidence in the context of statutory interpretation,[89] and the BCOAPO's own reliance on Hansard.[90]

67. BC Hydro reconciles the words of section 37 of the *Interpretation Act* and the accepted use of Hansard by suggesting that section 37 means, generally, that the mere fact of a change in legislation, by itself and without any further evidence

[87] BC Hydro's Final Argument, paras 205-209, pp 86-89/pdf 87-90. These paragraphs and the cited decisions serve to high-lite the exceptional nature of the two judicial decisions in Canada that have found a legislative intent to empower utility regulators with low-income rate jurisdiction. They are not offered, as the BCOAPO asserts at pages 32 – 35/pdf 33-36 of the BCOAPO Response, as precedent-binding decisions.
[88] As discussed at paras 190-204, pp 82-86/pdf 83-87 of BC Hydro's Final Argument.
[89] See *Rizzo*, para 21 at Tab 4 of BC Hydro's Book of Authorities and *Stores Block*, para 37 at Tab 3 of BC Hydro's Book of Authorities. It would also be inconsistent with the leading authority on statutory interpretation principles, see *Sullivan*, p 277 at Tab 2 of BC Hydro's Book of Authorities.
[90] That is, to the extent section 37 of the *Interpretation Act* is applicable at all to the Basic LI Jurisdiction question before the Commission, and to the extent it means what the BCOAPO says it means, it precludes the BCOAPO's argument that the enactment of section 60(1)(b.1) in 2003 and the circumstances of that enactment should be given any interpretive weight.

regarding legislative intent, cannot be used to infer a particular legislative intent.[91] BC Hydro's position regarding the Commission's Basic LI Jurisdiction does not rely on any bare and unsupported change in legislation, while BCOAPO's plainly does.[92]

BCOAPO re: Scope of Commission Jurisdiction

68. In section 4.1.1 of the BCOAPO Argument a number of provisions from Part 3 of the UCA are quoted. The submission concludes with a summary statement on page 32 that BC Hydro takes issue with only insofar as it is said to support the argument for Basic LI Jurisdiction in the Commission.

BCOAPO re: Sections 23 and 28 of the UCA

69. Section 4.1.2.1.1 of the BCOAPO Argument refers to section 23 and 38 of the UCA as support for its Basic LI Jurisdiction argument. The BCOAPO also refers to Hansard extracts from 1980 when the UCA was first enacted.

70. Regarding sections 23 and 38 of the UCA and the submission at the bottom of page 32 that BCOAPO says "expressly" confirm a Commission low-income jurisdiction, BC Hydro submits that the words "low-income" or "economic circumstances of its customers" do not appear in those sections. Regardless of whatever else those sections provide for, they do not expressly provide for Basic LI Jurisdiction in the Commission. If they did, the attempts to expressly empower the Commission with that jurisdiction in each of 2008, 2014 and 2016 would have been unnecessary.[93] Moreover, those failed attempts to amend the UCA demonstrate how an express jurisdiction would be effected if that was the intent of the Legislature.

[91] BC Hydro is unaware of any applicable judicial consideration of section 37 of the *Interpretation Act*, consistent with the fact that the BCOAPO does not cite any authorities in support of its proposed application of it in its Argument or Response.
[92] See BCOAPO Response, pp 40-41/pdf 42-43.
[93] BC Hydro Final Argument paras 195-203, pp 83-85/pdf 84-86. See also para 226, p 97/pdf 98 of the BC Hydro Final Argument which cited the Commission's view that in a rate-setting context, "decisions about income distribution are best left to elected representatives."

71. BC Hydro also refers to the words of the Supreme Court of Canada in the *Stores Block* case, made in the context of an argument that open-ended and general provisions in a utility-regulation statute can expressly empower a regulatory body:

> *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.*[94]

72. As the Supreme Court suggests, BC Hydro submits that it would be "absurd" to read into section 23 or 38 of the UCA a power in the Commission to establish low-income rates.

73. In regard to the 1980 Hansard extract, at page 33 of the BCOAPO Argument, the quoted words make it clear that the UCA was expressly enacted to be consistent with government energy policy. However, there is no evidence or indeed reference in the BCOAPO Argument to government energy policy in 1980, and nothing to suggest that energy policy in 1980 had anything to do with effecting Basic LI Jurisdiction in the Commission.

74. BC Hydro has attached to this Reply Argument at Attachment 2 the entirety of (then) Minister McClelland's speech to the Legislature when he introduced what became the UCA for second reading. There is nothing in the speech that would indicate that the Legislature had an intention to empower the Commission with low-income rate jurisdiction. Instead, the identified purposes of the legislation were to:[95]

- establish the Commission as a successor to the BC Energy Commission;

[94] See *Stores Block*, para 46, extracts at Attachment 1 to this Reply Argument. BC Hydro provided extracts of *Stores Block* at Tab 3 of BC Hydro's Book of Authorities however para 46 was not included.
[95] At the bottom of page 2 of the speech, attached at Attachment 2 to this Reply Argument (**Hansard Debates 1980**).

- bring BC Hydro within the regulatory purview of the Commission;
- create a major projects review process;
- establish the government as the decision-making body with respect to removal (export) of energy surpluses; and
- vest Cabinet with responsibility for energy policy in British Columbia.

BCOAPO re: Sections 59 and 60 of the UCA

75. Section 4.1.2.1.2 of the BCOAPO Argument[96] focuses on sections 59 and 60 of the UCA as the source of an alleged low-income rate jurisdiction and, in particular, section 60(1)(b.1). Paragraphs 238 to 248 of BC Hydro's Final Argument provide extensive submissions in regard to section 60(1)(b.1), explaining by reference to the legislative debates that the provision was enacted for the purpose of encouraging performance-based regulation (**PBR**), and not to endow the Commission with low-income rate jurisdiction. BC Hydro does not repeat those submissions here.

76. Page 34 the BCOAPO Argument refers to sections 5(c) and 5(d) of Direction No. 7 regarding the Commission's authority over BC Hydro rates. Those provisions in turn refer to section 60(1)(b.1) of the UCA. The point the BCOAPO makes is that the provision (section 5 of Direction No. 7) expressly contemplates a departure from cost-of-service rate-making. BC Hydro agrees with the submission to this extent: section 5 of Direction No. 7 is plainly concerned with the establishment of BC Hydro rates in a revenue requirements context, not a rate design context, [97] consistent with the express legislative purpose of section 60(1)(b.1) of encouraging PBR. That's because in a PBR environment a utility is expressly allowed to earn more than its cost of service as an incentive to create

[96] BCOAPO Argument, pp 33-38/pdf 37-42.
[97] The heading of the provision is called "determining the cost of energy", section 5(a) refers to the Heritage Contract, and section 5(b) refers to the determination of the cost of non-heritage energy. Each of these concepts relate to revenue requirements and not rate design.

efficiencies. In other words, the legislative intent concerning section 60(1)(b.1) (encourage PBR) is perfectly consistent with the use of it in a revenue requirement section of Direction No. 7 (use cost-of-service rate-making unless PBR is being employed). Conversely, there is no logical basis for supposing that the reference to section 60(1)(b.1) of the UCA in section 5 of Direction No. 7 is connected in any way with the establishment of Basic LI Jurisdiction in the Commission.

77. At pages 34-35 of the BCOAPO Argument it is asserted that section 60(1)(b) of the UCA establishes limits on the Commission's rate-setting powers, but that the limits are not absolute. BCOAPO says, “the Commission is only required to “have due regard” to the limits [on the Commission's rate-setting powers in section 60(1)(b) and those provisions] do not constitute absolute prohibitions on the Commission's rate setting jurisdiction."[98] This submission is incorrect, as the phrase "have due regard" as it is used in the UCA has expressly been held by the BC Court of Appeal to require the Commission to give a paramount consideration to the rate-setting considerations enumerated thereunder.[99] One of those limits that must be given paramount consideration is the just and reasonableness standard in section 60(1)(b)(i). BC Hydro's Final Argument at paragraphs 205-209 explains why low-income rates are and have consistently been held to be inconsistent with that standard.

78. At page 35 of the BCOAPO Argument it is asserted that the statutory prohibition in the UCA is against "undue" discrimination, rather than discrimination *per se.* BC Hydro accepts this submission, but not the implicit submission which follows, namely that the Commission has no restrictions on what it might consider to be "undue". BC Hydro refers to paragraph 208 of its Final Argument where it quotes the BC Court of Appeal to the effect that rate-making for a discriminatory purpose (e.g. to create a subsidy) is unlawful, and rate-making which might inadvertently or necessarily result in discrimination is not. Similarly, the word "undue" serves

[98] BCOAPO Argument, p 35/pdf 39.
[99] *Hemlock Valley Electrical Services Ltd v British Columbia (Utilities Commission)* 1992 CanLII 5959 (BC CA) at paras 51 and 61(***Hemlock***) attached at Attachment 3 to this Reply Argument.

to avoid narrowing the Commission's rate-setting powers to an absurd level where even inadvertent discrimination would render the associated rates unlawful, while maintaining the restriction on rates intended to be preferential for reasons unrelated to the nature and quality of the associated service.

79. At page 36 of the BCOAPO Argument reference is made to the utility textbook by Charles F. Phillips, *The Regulation of Public Utilities*. FortisBC responds to these submissions at paragraphs 22-23 of its October 11 final argument, and BC Hydro adopts them in reply to the BCOAPO.

80. At pages 36-37 of the BCOAPO Argument reference is made to the Commission's decision regarding the rate that Fortis Energy Vancouver Island charged to Doman Forest Products Ltd.[100] Based on the extract from the Commission's decision quoted by the BCOAPO, it seems that the rate was found to be unduly discriminatory because it was based on the personal characteristics of the customer: "the ability to combine loads at disparate geographical locations".[101] BC Hydro submits that the Commission's decision in the Doman case supports BC Hydro's position that rates based on the personal characteristics of customers, as opposed to being based on the nature and quality of service would be unduly discriminatory.

81. At pages 37-38 of the BCOAPO Argument the assertion is made that a rate that is "inadequate or inaccessible to low income customers" can be interpreted as "unjust or unreasonable". BC Hydro submits that the BCOAPO is incorrect on this point in the absence of a clear legislative intent regarding low-income rates.

82. At page 38 of the BCOAPO Argument it is asserted that section 59(2)(b) of the UCA is in regard to the particular circumstances of customers rather than service. This is clearly not the case, as is made plain by the Nova Scotia Court

[100] Order G-133-12, Final Order in FEVI Application for an Industrial Sales Agreement between FEVI and Western Forest Products Inc.
[101] Cited by BCOAPO in the BCOAPO Response, p 37/pdf 38.

of Appeal in the *Dalhousie* case described at paragraphs 227 to 233 of BC Hydro's Final Argument and at paragraph 92 below.

BCOAPO re: Legislature's Rejection in 2008, 2014 and 2016 of Basic LI Jurisdiction

83. At pages 30-31 of the BCOAPO Response the BCOAPO submits that the Commission cannot glean legislative intent from the "political posturing of the Official Opposition".[102] BC Hydro offers two reply submissions.

84. First, the argument that MLA J. Horgan was engaged in "political posturing" in his repeated attempts to have the UCA amended cannot be accepted in the absence of any evidence of bad faith. Under section 24 of the *Constitution Act*,[103] MLAs are obliged to swear or affirm "faithful and true allegiance to Her Majesty Queen Elizabeth II… according to law…" In the absence of any evidence to the contrary, the Commission is obliged to accept that MLA J. Horgan was offering his proposed amendments to the Legislature in accordance with his commitment to the sovereign or, in practical terms, the people of British Columbia.

85. The second and related point is that it doesn't matter whether a person proposing a statute, or an amendment to a statute, does so as a member of government, as a member of the opposition, or as a private member. What matters is the reason advanced for the enactment, and the Legislature's response. Three times - in 2008, 2014 and 2016 - it was proposed to vest the Commission with jurisdiction it did not have - Basic LI Jurisdiction - and three times the Legislature declined.

BCOAPO's Reliance on Case Law

86. Section 4.1.3 of the BCOAPO Argument refers to the *Dalhousie*, *ACTO/OEB* and *Manitoba Hydro* decisions. It does not attempt to distinguish the New Brunswick and Alberta decisions rejecting low-income rates referred to at paragraph 222 of BC Hydro's Final Argument. However, at page 38 of the BCOAPO Response the arguments are made that the currency of the Alberta and New Brunswick decisions affords them less precedential value than the subsequent Ontario and

[102] Pdf 31-32.
[103] RSBC 1996, c. 66.

Manitoba decisions.[104] As with its submissions regarding BC Hydro's reliance on judicial decisions going back to the 19th century regarding the fair, just and not unduly discriminatory standard,[105] the BCOAPO misconstrues the reliance BC Hydro places on those cases. They are not offered as binding precedents, but to illustrate the exceptional nature of the Ontario and Manitoba decisions, and to high-light the lack of evidence of a legislative intent to empower the Commission with a Basic LI Jurisdiction.

87. The BCOAPO Argument in regard to the *ACTO/OEB* decision correctly focuses on section 36(3) of the *Ontario Energy Board Act* as the distinguishing feature between it and the *Dalhousie* circumstances. However, the BCOAPO Argument ignores that the Court of Appeal in *ACTO/OEB* was able to discern a legislative intent in the history of section 36(3), namely to align the rate-setting powers of the Board in respect of natural gas utilities with the open-ended (non-prescriptive) rate-setting authority that Ontario Hydro had previously enjoyed in regard to electricity distribution utilities.[106] As set out in BC Hydro's Final Argument and above, a similar focus on legislative intent in a British Columbia context does not reveal any legislative intent, at any time from 1980 to the present day, to endow the Commission with such open-ended rate-setting authority let alone low-income rate jurisdiction.

88. The BCOAPO Response in regard to the *ACTO/OEB* decision attempts to move the focus away from section 36(3) of the *Ontario Energy Board Act,* and reiterates some of the subsidiary factors referred to by the court and noted in the BCOAPO Argument. These subsidiary factors are dealt with in the following paragraphs.

89. At the bottom of page 39 and at page 42 of the BCOAPO Argument reference is made to the modest reliance by the Court in *ACTO/OEB* on the fact that the Ontario Energy Board had authorized low-income DSM. In the B.C. context

[104] Pdf 39.
[105] See footnote 87 above.
[106] Paragraph 22 of *ACTO/OEB*, Tab 19 of BC Hydro's Book of Authorities.

however, there is a clear distinction between the Commission's rate-setting authority under the UCA (the Commission sets rates within prescribed parameters);[107] the Commission's role in DSM generally (the Commission can approve or reject DSM expenditure schedules);[108] and low-income DSM (expressly contemplated by the *Demand-Side Measures Regulation).*[109] In these unique circumstances, the fact of BC Hydro incurring low-income DSM expenditures is irrelevant to the Basic LI Jurisdiction question.

90. At page 40 of the BCOAPO Argument it refers to the reliance of the Court in *ACTO/OEB* on the notion that "rate shock" is a lawful basis for departing from cost-based rates, and that by extension income[110] is similarly a lawful basis for departing from cost-based rates. As acknowledged at footnote 155 of the BCOAPO Response[111], the application of this principle in B.C. has been found unlawful under the UCA.

91. Also at page 40 of the BCOAPO Argument, reference is made to section 79 of the Ontario statute which expressly provides for subsidies between customer classes to benefit rural or remote customers. The BCOAPO goes on to say at page 42 that postage stamp rate-making effects similar subsidies. While postage-stamp rate-making may undoubtedly effect subsidies insofar as every customer causes a utility to incur a slightly different cost-of-service, it reflects to a fair degree the impossibility of creating customer-specific rates. In any event, <u>if</u> the BCOAPO is correct that postage-stamp rate-making is <u>intended</u> to effect unlawful cross-subsidies then the appropriate solution is to discontinue postage-stamp rates, and not create a further cross-subsidized class of customers. No one in this proceeding has advocated for an end to postage-stamp rate-making.

[107] Sections 58-61 of the UCA.
[108] Section 44.2 of the UCA.
[109] B.C. Reg. 326/2008, section 3(a), for example.
[110] BC Hydro purposefully refers to "income" here rather than “low-income" because it seems that any Commission jurisdiction to set preferential rates for low-income customers would include a corollary jurisdiction to set disadvantageous rates for high-income customers.
[111] BCOAPO Response, p 29/pdf 30.

92. In regard to the *Dalhousie* case, the BCOAPO argues that the critical language in the Nova Scotia statute materially differs from the UCA because the former refers to "*substantially similar circumstances and conditions in respect of service of the same description*", while the latter refers to "*substantially similar circumstances and conditions for service of the same description".* The BCOAPO does not explain how that trivial difference in language evidences a legislative intent to afford the Commission with low-income rate jurisdiction. BC Hydro stands by the submissions made in its Final Argument at paragraph 232 that the provisions are materially identical. BC Hydro also adopts the submissions made by FortisBC on this point at paragraph 26 of its October 11 final argument.

93. In regard to the *Manitoba Hydro* case, neither the BCOAPO Argument nor the BCOAPO Response give any attention to, and do not distinguish, the single most significant reason the Manitoba PUB concluded it had jurisdiction to establish low-income rates, namely section 26(4) of the *Crown Corporations Public Review and Accountability Act.* That provision expressly gives the Manitoba PUB a policy-setting role. The Commission simply does not have that role, as is clear from an examination of the statutory framework,[112] the BC Court of Appeal's *IRP Decision*,[113] and even the Minister's remarks to the Legislature when the UCA was introduced for second reading in 1980.[114]

94. BC Hydro has one final reply submission to the BCOAPO's reliance on the *ACTO/OEB* and *Manitoba Hydro* case: a number of the passages from those decisions referred to by the BCOAPO state the regulators' reasons for *exercising* their low-income jurisdiction, as opposed to stating the regulators' reasons for *having* the jurisdiction. BC Hydro addressed the reasons the Commission should not exercise such jurisdiction in this case, even if it has it, in its October 11 Response to BCOAPO.

[112] BC Hydro's Final Argument, paras 210-220, pp 89-95/pdf 90-96 and 238-248, pp 101-106/pdf 102/107.
[113] BC Hydro's Final Argument, paras 217-218, pp 93-94/pdf 94-95 , extract of the *IRP Decision* at Tab 12 of BC Hydro's Book of Authorities.
[114] See paras 73-74 above and Hansard Debates 1980, Attachment 2 to this Reply Argument.

BCOAPO re: Section 60(1)(b.1)

95. At pages 40-41 the BCOAPO Response addresses BC Hydro's submissions regarding the reasons for the 2003 amendments to the UCA, including the addition of section 60(1)(b.1).[115] The argument does not refute BC Hydro's submission that the clear legislative intent of those amendments, and section 60(1)(b.1), was to enact the 2002 Energy Plan and to empower the Commission to engage in PBR (revenue requirement) rate-making, respectively. The high-level comments of MLA J. Horgan made at first reading that are quoted by the BCOAPO are completely consistent with the specific section-by-section explanation for the reasons for the amendments provided by Minister Neufeld on second reading, but on their own do not indicate a desire to empower the Commission with Basic LI Jurisdiction.

Response to MoveUP

96. MoveUP's low-income jurisdiction argument raises largely the same points as that of the BCOAPO. As such, BC Hydro does not repeat its reply submissions here. Instead, BC Hydro notes the differences between the BCOAPO argument and the MoveUP argument, and cross-references to the appropriate section of its arguments in reply to duplicative submissions.

97. Unlike the BCOAPO, MoveUP does not offer any submissions on interpretive approach, declining to even acknowledge what the Supreme Court of Canada has called the modern approach to statutory interpretation.[116] Thus it is not surprising that MoveUP says nothing about the intention of the Legislature, and cannot assist the Commission in understanding the scope of the rate-setting powers it was intended to be granted by the Legislature.

98. A good example of this is at pages 14-15 of MoveUP's submission where it attempts to distinguish the Nova Scotia statute that underpins the *Dalhousie* case from the UCA. MoveUP asserts that the "differences in the wording between [the

[115] Pdf 41-42.
[116] See *Rizzo*, para 21 at Tab 4 of BC Hydro's Book of Authorities.

two statutes] are telling"[117] and then asserts that the UCA is less restrictive than the Nova Scotia statute. However, the MoveUP argument fails to say what those differences are, fails to put them into the context of their respective statutory regimes, and fails to identify a legislative intent associated with the alleged differences. In particular, the MoveUP submissions regarding the *Dalhousie* case fail to identify how the alleged differences in the statutes evidence a focus on customer characteristics rather than service characteristics, the latter difference being the determinative issue in the *Dalhousie* case.

99. MoveUP's submissions regarding the *ACTO/OEB* case[118] suffer from the same deficiency: the similarities between the underlying statute and the UCA are pointed out but they are not placed in any context that might allow an inference of a similar legislative intent consistent with the modern approach to statutory interpretation.

100. The only time the MoveUP submission addresses legislative intent is at pages 16-17 of its argument where a response is provided to BC Hydro regarding the three failed attempts to empower the Commission with low-income jurisdiction. In this submission MoveUP incorrectly attributes the modern approach to statutory interpretation to "the *Sullivan* case", and then says it fails to account for section 37 of the *Interpretation Act*. In regard to section 37 of the *Interpretation Act*, BC Hydro refers to paragraphs 65 to 67 above.

101. MoveUP's submissions at pages 17-19 regarding the meaning of the "fair, just and not unduly discriminatory" standard rely on dictionary definitions that ignore the modern approach to statutory interpretation. That approach relies on a contextual review of the enactment that is sensitive to the entire statute, the over-all scheme of regulation, and the legislative history, all with a view to gleaning the

[117] MoveUP final argument, p 14/pdf 14.
[118] MoveUP final argument, pp 15-16/pdf 15-16.

legislative intent.[119] None of those factors or analysis appears in the MoveUP submissions in regard to the standard.

102. At pages 19-20 of its submissions MoveUP relies on the same quotation from the Charles Phillips textbook *Regulation of Public Utilities* that BCOAPO relies on.[120] FortisBC responds to these submissions at paragraphs 22-23 of its October 11 final argument, and BC Hydro adopts those submissions in reply to MoveUP.

103. At pages 21-23 of its argument MoveUP refers to the BC Court of Appeal's 2004 decision in the *BC Hydro v Terasen* case (attached to the MoveUP submission, and referred to as the *Centra* case). It relies on that case for the proposition that the Commission can lawfully set rates to expressly and purposefully subsidize some customers at the expense of others. As the subsequent paragraph demonstrates, the case cannot stand for that general proposition because it is in reference to a specific statutory regime established for the recovery of costs associated with the extension of natural gas service to Vancouver Island in the late 1980s.

104. The background facts are set out by the Court at paragraphs 2 to 14 of the *Centra* case. The keys facts, and related submissions, are as follows:

- A unique regulatory framework was established for the purpose of establishing natural gas rates on Vancouver Island, reflected in the *Vancouver Island Natural Gas Pipeline Act*, and a special direction issued to the Commission pursuant to that statute which directed the Commission with regard to Vancouver Island natural gas rate-setting (**Centra Special Direction**): paragraph 9 of the *Centra* case.

- The Centra Special Direction expressly provided that any inconsistencies between the UCA (and the *Gas Utility Act*) were to be decided in favour of the Centra Special Direction: paragraph 9 of the *Centra* case.

[119] See *Rizzo*, para 21 at Tab 4 of BC Hydro's Book of Authorities and *Stores Block*, para 48 at Tab 3 of BC Hydro's Book of Authorities.
[120] BCOAPO Argument, p 36/pdf 40.

- The Centra Special Direction is not a high-level instrument outlining basic principles but a complex and extremely detailed regulatory regime that was applicable only to the parties involved in natural gas service to Vancouver Island: a copy of the 32 page enactment is attached at Attachment 4.

- The Centra Special Direction expressly contemplated that the annual costs of natural gas service on Vancouver Island would exceed the annual revenues from the three customer groups, namely distribution customers, transmission customers (constituting the "Joint Venture"), and BC Hydro: paragraph 12 of the *Centra* case.

- Nevertheless, the Commission was unable to attribute the resulting revenue deficiency solely to the distribution customers, and the Court did not set aside this conclusion: paragraph 33 of the *Centra* case. It follows that whatever else it stands for, the *Centra* case is not about the express and purposeful subsidization of some customers by others.

- None of the arguments made against the higher tolls charged to BC Hydro to reduce the revenue deficiency were based on the Commission's rate-setting jurisdiction as set out in the UCA. Instead, each and every argument canvassed by the Court of Appeal was based on an interpretation of the Centra Special Direction: paragraphs 26-51 of the *Centra* case.

105. At page 22 of the MoveUP argument it is alleged that the *Centra* case included a consideration of sections 59(4) and 59(5) of the UCA. Those words are set out by the Court in paragraph 22 of the *Centra* case, where the Court referred to these provisions in its analysis of the degree of deference it owed to the BCUC.[121] MoveUP incorrectly suggests the Court referred to these provisions in considering the merits of the case, i.e. whether the Commission properly

[121] Degree of deference analysis is a necessary element of any judicial review or appeal of a tribunal decision, but wholly unrelated to the analysis of the Commission's powers.

exercised its statutory jurisdiction. Those provisions played no part in the Commission's analysis of its rate-setting powers nor the Court's consideration of the Commission's rate-setting powers. Instead, as noted, the Court and all parties before it focussed their attention to the Centra Special Direction.

106. In BC Hydro's submission the *Centra* case offers no assistance to this Commission in considering its Basic LI Jurisdiction. It is not about low-income rates specifically, nor about purposeful and express subsidization of some customers by others through rate-setting more generally. It is about an entirely separate and unique rate-setting scheme that offers nothing on the question of whether the Legislature has intended the Commission to have Basic LI Jurisdiction.

Response to BCSEA-SCBC

107. Like MoveUP, BCSEA-SCBC does not argue for Basic LI Jurisdiction in accordance with the modern approach to statutory interpretation. That is, its submissions do not reference anywhere the proper interpretive approach of reading a statute in its entire context with a view to determining the intention of the legislature.

108. With one exception, BC Hydro has substantively responded above to the specific BCSEA-SCBC submissions. On page 54 the BCSEA-SCBC argues that the Commission should take into account that the alleviation of poverty is a charitable purpose in the common law.[122] With respect, that submission cannot assist the Commission as it says nothing about the meaning in law of a charitable purpose (it is a concept that has meaning primarily in trust or tax law contexts) and it does not say anything about how that purpose would inform the Commission's analysis of the provisions of the UCA that empower it to set rates.

[122] BCSEA-SCBC final argument, para 228, p 54/pdf 56.

PART V: BC HYDRO'S COMMENTS ON OTHER ISSUES THAT HAVE ARISEN

DSM-Related Issues

109. Both NIARG and ZONEIIRPG make submissions in their arguments with respect to BC Hydro's DSM expenditures and programs. For its part, ZONEIIRPG acknowledges the "scope limitation in the RDA process for DSM"[123] and states that it "will also be addressing DSM in the RRA proceeding"[124] but then goes on to seek specific directions from the Commission in this proceeding with respect to DSM programs and expenditures.[125]

110. Similarly, at page 14 of its final argument, NIARG states that it "supports Commission directions that may encourage BC Hydro to expand its low income DSM initiatives for low income customers beyond the current offerings of the ESK and ECAP."[126] It further states that "evidence regarding very limited uptake of ECAP in First Nations communities in Zone 1B and Zone II suggests that DSM in the Non-Integrated Areas is not well understood and will need to be explored in the Module 2 proceeding and consultation preceding it."[127]

111. BC Hydro addressed similar submissions from the BCOAPO in its Response to BCOAPO at paragraphs 106-110. BC Hydro reiterates its view that it does not think it is appropriate for the Commission to issue any orders or directions to BC Hydro in this proceeding regarding its DSM expenditures or programs. BC Hydro has recently filed its F2017-F2019 RRA which seeks acceptance of BC Hydro's

[123] ZONEIIRPG final argument, p 12/pdf 15.
[124] ZONEIIRPG final argument, p 12/pdf 15.
[125] Specifically, ZONEIIRPG seeks an order from the Commission that BC Hydro be directed to: (1) review its incentives for DSM as there might be a better incentive model for remote communities that provides multi-year funding based on total lifespan electricity savings such as the Transmission Project Incentives that BC Hydro provides its Transmission Rate customers; (2) work with organizations to coordinate flexible housing upgrade funding on a priority basis in order to improve home energy efficiency and to be able to implement DSM measures fully, and, (3) fund and allow First Nation bands to administer their own DSM programs in the community on a multi-year basis to provide the ability to plan and carry out necessary energy efficiency and home upgrade programs. Given the higher generation costs for customers in Zone II, implementing DSM measures must be done on a priority basis and funding should reflect those higher costs as well as the unique remote conditions. All as described at ZONEIIRPG final argument, pp 21-22/pdf 24-25.
[126] NIARG final argument, p 14/pdf 17.
[127] NIARG final argument, p 14/pdf 17.

proposed F2017-F2019 DSM expenditure schedule. Therefore, any DSM-related issues are more appropriately addressed in that proceeding.[128]

ZONEIIRPG – Other Measures

112. At pages 21-22 ZONEIIRPG outlines a number of orders it would like the Commission to make in this proceeding with respect to measures directed at addressing remote NIA and First Nation communities.[129] BC Hydro's response to these submissions is as follows:

- **Improved Internet Service**: ZONEIIRPG seeks an order that BC Hydro pursue improved internet service with the Province and provide internet stations, free of charge, for BC Hydro customers to access their billing and account. It further asks that BC Hydro be directed to place a priority on implementing these arrangements as soon as possible and prior to the 2016-17 heating season.[130] With respect, BC Hydro is not an internet service provider and the Commission has no jurisdiction to order BC Hydro to provide internet service or stations to its customers. As such, the requested order should be rejected.

- **Adjust bill collection process and LPC for remote communities**: ZONEIIRPG seeks an order that BC Hydro be directed to adjust its bill collection process and LPC for remote communities to account for delays in mail delivery for customer bills and bill payments to BC Hydro.[131] BC

[128] See paragraph 110, p 40/pdf 43 of BC Hydro's Response to BCOAPO.
[129] ZONEIIRPG final argument, pp 21-22/pdf 24-25. In support of its requested orders ZONEIIRPG makes a number of statements and cites evidence and exhibits that it says BC Hydro either agreed with or did not dispute when in fact BC Hydro objected to most of the documents put to it. Furthermore, as identified by Commission Counsel, many of the documents put to BC Hydro's witness panels by counsel for ZONEIIRPG were not verified by BC Hydro witnesses as accurate; see Transcript v 6, p 1162 line 23 to p 1163 line 5. For example, see p 7/pdf 10 of ZONEIIRPG's argument which states that Exhibit C36-19 (entered at the oral hearing) is "an accurate representation of the availability of internet service." In BC Hydro's view, the accuracy of this and numerous other documents were not confirmed. These mischaracterizations of the evidence, misrepresentations of BC Hydro's obligations under the Act and misuse of BC Hydro's testimony by ZONEIIRPG are generally not responded to in this Reply Argument, rather, BC Hydro replies to the specific orders sought by ZONEIIRPG. However, in no way should BC Hydro's silence on these matters be taken as agreement with ZONEIIRPG.
[130] ZONEIIRPG final argument, p 21/pdf 24.
[131] ZONEIIRPG final argument, p 21/pdf 24.

Hydro responded to this concern at paragraph 51 above with respect to a similar request from ZONEIIRPG for an extension to BC Hydro's LPC by 10 days and those submissions apply equally to ZONEIIRPG's request to adjust bill collection processes. Finally, BC Hydro reiterates that, as stated above, specific proposals related to terms and conditions for NIAs will be considered as part of the engagement process with respect to Module 2.[132] As such, BC Hydro submits that the requested order should be rejected.

- **Instalment Plans**: ZONEIIRPG seeks an order that BC Hydro allow for repayment periods of up to 12 months.[133] BC Hydro responded to a similar submission made by the BCOAPO in its Response to BCOAPO at paragraphs 78 to 82 and does not repeat those submissions here.

- **Billing and Payment Arrangements for First Nations Receiving Income Assistance Funded by INAC**: ZONEIIRPG seeks an order from the Commission that BC Hydro implement the billing and payment arrangements BC Hydro already has with MSDSI for First Nations.[134] BC Hydro submits that such an order would be inappropriate[135] and should be rejected. However, BC Hydro notes that it has already begun investigating the potential to expand current billing and payment arrangements to First Nations receiving INAC-funded assistance[136] and that this would be a possible topic for discussion in the to-be established Low-Income Advisory Group.[137]

- **Customer Service Group for Remote Customers**: ZONEIIRPG seeks an order from the Commission that BC Hydro develop a customer service group for its remote customers in Zones 1B and II and further, that it be

[132] See footnotes 4 and 6 above.
[133] ZONEIIRPG final argument, p 21/pdf 24.
[134] ZONEIIRPG final argument, p 21/pdf 24.
[135] The Commission cannot compel an agreement between BC Hydro and a third-party. See BC Hydro's submissions on this topic in its Response to BCOAPO at paras 47-52 and specifically para 50.
[136] Transcript v 6, p 1158 line 17 to 1159 line 6.
[137] Transcript v 6, p 1159 line 22 to 1160 line 1.

directed to develop options for face to face assistance (such as Skype) on a priority basis.[138] BC Hydro submits that such an order would be inappropriate in light of the commitment BC Hydro has made to engage with its remote customers through the to-be established Low-Income Advisory Group[139] and generally as part of the NIA engagement in Module 2.[140]

- **Monthly Billing Option**: ZONEIIRPG seeks an order from the Commission that BC Hydro develop a monthly billing option for its customers with an in-service date prior to the approaching heating season.[141] With respect, BC Hydro already provides this service to its customers[142] and BC Hydro has additionally made a commitment to, on request, looking at this option where appropriate.[143] As such, BC Hydro submits that such an order would be inappropriate.

- **Single Point of Contact**: ZONEIIRPG seeks an order from the Commission that BC Hydro provide a single point of contact for all First Nations issues.[144] BC Hydro submits that such an order would be inappropriate in light of the fact that BC Hydro already has focused units devoted to specific First Nations bands for billing and account inquiries.[145]

[138] ZONEIIRPG final argument, p 22/pdf 25.
[139] Transcript v 4, p 607 lines 20-26 and p 608 lines 19 to p 609 line 1. See also BC Hydro Response to ZONEIIRPG IR 2.11.6, Exhibit B-23 pdf 903.
[140] See footnotes 4 and 6 above.
[141] ZONEIIRPG final argument, p 22/pdf 25.
[142] Through BC Hydro's equal payment plan options.
[143] See Transcript v 6, p 1166 line 20 to 1167 line 4.
[144] ZONEIIRPG final argument, p 22/pdf 25.
[145] See Transcript v 6, p 1172 line 17 to 1173 line 1.

Mrs. Noble

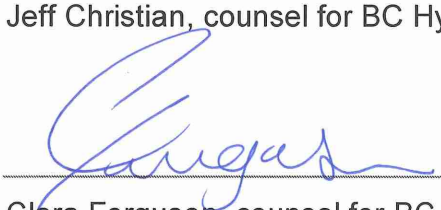
113. BC Hydro notes that in her final argument Mrs. Noble has largely reiterated comments and questions previously asked of BC Hydro in IRs and during the oral hearing. BC Hydro has responded to those questions in the IR process and its Final Argument and does not repeat those submissions here, with one exception.

114. Mrs. Noble has requested that BC Hydro amend the Electric Tariff definition of "Radio-off Meter" to acknowledge that it neither transmits nor receives data.[146] As stated in its Final Argument, BC Hydro understands that Mrs. Noble seeks assurance that Radio-off meters do not receive data through wireless means.[147] BC Hydro has re-considered this request and is willing to amend the Electric Tariff definition of "Radio-off Meter" to confirm that a Radio-off meter's components that transmit and receive data are deactivated. BC Hydro will file this proposed change to the Electric Tariff definitions section in a separate filing and as such, submits that an order in this proceeding with respect to Mrs. Noble's request is unnecessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
This 24th day of October, 2016

LAWSON LUNDELL LLP

Jeff Christian, counsel for BC Hydro



Clara Ferguson, counsel for BC Hydro

[146] Mrs. Noble final argument, pp 2-3/pdf 2-3.
[147] BC Hydro Final Argument, para 257, p 109/pdf 110.

ATTACHMENT 1 - *STORES BLOCK* EXTRACT

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

v.

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

and

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

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

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

et

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

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

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

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

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

Référence neutre : 2006 CSC 4.

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

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).

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

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

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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BASTARACHE J. —

1. Introduction

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

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

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

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

LE JUGE BASTARACHE —

1. Introduction

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

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

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

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.

ATTACHMENT 2 - HANSARD DEBATES 1980

Utilities Commission Act (Hansard Debates, August 8-22, 1980)

Utilities Commission Act

(Bill 52) (Minister of Energy, Mines and Petroleum Resources) 1R, 3815; 2R, 4062-9, 4075-91; C, 4182-7; 3R, 4187; RA, 4192

FIRST READING, AUGUST 8, 1980:

Hon. Mr. McClelland presented a message from His Honour the Administrator: a bill intituled Utilities Commission Act.

HON. MR. McCLELLAND: I ask leave to move first reading.

Leave not granted.

HON. MR. McCLELLAND: Mr. Speaker, I move said message and the bill accompanying the same be referred to a Committee of the Whole House forthwith.

Motion approved.

The House in committee on Bill 52; Mr. Strachan in the chair.

HON. MR. McCLELLAND: Mr. Chairman, I move the committee rise and recommend the introduction of the bill.

Motion approved.

The House resumed; Mr. Davidson in the chair.

[Page 3815]

Bill 52 introduced, read a first time and ordered to be placed on orders of the day for second reading at the next sitting of the House after today.

SECOND READING, August 20, 1980:

HON. MR. GARDOM: Second reading of Bill 52, Mr. Speaker.

UTILITIES COMMISSION ACT

HON. MR. McCLELLAND: Mr. Speaker, at the outset in introducing second reading of this bill, the Utilities Commission Act, I would say that in preparing it for presentation to the Legislature we had a choice of putting in amendments to the Energy Act or coming forward with a new act. It was the advice of various officials in my ministry and in the Ministry of the Attorney-General that, since there were such major principles involved, it would probably be appropriate to bring forth a new bill. In so doing the large majority of the sections included in this rather large bill are simply sections which have

been moved over from the Energy Act to the Utilities Commission Act. Changes to some of those sections may be necessary sometime in the future, but at this point the urgency was to get a new commission in place and make the opportunity for full regulation of B.C. Hydro and the review of major energy projects in the province as quickly as we possibly could. We felt it had to be done this session, so many of the questions which may be raised on other sections of this bill, which are being left intact, have not been addressed at this time. That may happen sometime in the future.

Mr. Speaker, I'd like to point out that last February the government put forward in its energy policy statement a framework within which this province might build an energy-secure province. We identified the government's role of energy stewardship and we outlined some of the directions we would take in fulfilling our energy mandate. Since that time we have taken a number of steps to implement various elements of this energy policy — steps, in fact, towards energy security.

Energy-demand forecasts are now prepared annually by the ministry to allow energy policy to be based on up-to-date and accurate information. The Energy Development Agency has been formed, with $10 million budgeted for this year, to initiate research and development of the energy technology of the future. Studies to develop electrical generation from thermal coal, coal and wood waste, geothermal activity, the sun and the wind have been started.

Proposals to establish a secure supply of energy at a fair price to all British Columbians have been put forward. An example is the Vancouver Island natural gas pipeline. We hope the rural gasification program — a matter which I mentioned during debate on my estimates — will come forward soon. There is active encouragement of coal development in various parts of the province. A review of natural gas pricing, both in the field and at the wholesale level, has been ordered and will be started by the Utilities Commission next month. A pricing policy for industrial and processing applications of natural gas has been developed a pricing policy, I might say, which ensures that British Columbians get the best value for the use of a depleting resource.

Programs to encourage energy conservation in all sectors have been continued and developed — the B.C. Energy Bus Program and Operation Tune-up, to name a couple. A joint energy resources strategy committee has been formed with the province of Alberta to ensure that our two provinces may participate in the orderly development and marketing of our energy resources.

The energy field is very broad and multifaceted. There are many areas still to be addressed, many initiatives yet to be undertaken, and many issues of ongoing concern. The legislation we have introduced today, Bill 52, provides some of the tools with which the government, in consultation with the people of this province, may attend to these matters and manage our energy future in an effective and responsible manner.

[Ms. Sanford in the chair.]

The highlights of the legislation are as follows: the British Columbia Utilities Commission is created and replaces the B.C. Energy Commission in its regulatory functions. The B.C. Hydro and Power Authority is brought under public regulatory control for the first time in its history since it was established in 1964. The major projects review process, promised in the government's energy policy statement, is created. Public hearings under the review process will be administered by the Utilities Commission, but will be separate from its regulatory function. The government is given authority to issue energy-removal certificates for energy supplies deemed surplus to provincial needs. The cabinet is vested with the clear responsibility for energy policy in British Columbia.

I'll just take a moment to expand on a couple of these points. As I've said, the B.C. Utilities Commission will take over from the Energy Commission the role of rate regulation. This role will be expanded to include the regulation of B.C. Hydro rates. Proposed rate increases will be subject to hearings before the Utilities Commission. These hearings will ensure a rate structure for energy that is fair to all and consistent with overall government energy policy. In addition, the Utilities Commission will take on the regulation of services and additions to facilities of all energy utilities in the

[Page 4063]

province, including B.C. Hydro. In this role the commission can help to ensure secure and continuous supplies of energy to all British Columbians.

Apart from that, the key feature of the new legislation is the establishment of the streamlined review process for major energy generation and use projects in B.C. The legislation requires that all major energy projects be submitted for review. The term "major energy projects" is carefully defined in the bill to include all new projects, as well as all additions to current facilities which will generate or use a significant amount of energy. The legislation also provides that any energy undertaking, of whatever size, if it is deemed by the minister or by cabinet to be of significant impact. may also, despite that it does not reach the size requirements in the act, be made subject to the review process.

Madam Speaker, the Minister of Environment will play a major role in developing both the criteria and the terms of reference for review projects. It will only be on the joint recommendation of the Minister of Environment and the Minister of Energy, Mines and Petroleum Resources that projects will be considered for review.

In addition to one or more permanent utilities commissioners on the panels for review, it may also include a number of temporary commissioners selected, we believe. for their particular expertise or interest in the matter at hand, or perhaps for the particular region of the province which they may represent, because we feel it's important that these review panels be representative not only of Victoria or Vancouver but of the area in which the project itself will have the most general impact. The manner of setting up separate review project panels will allow us the utmost flexibility in dealing with these matters to the best benefit of the local community. The public hearings will canvass as wide a range of public opinion as possible in each case. Using the base of information gained through the hearings, the commission can then provide its report and recommendations to cabinet on the merits of the project application. Ultimately the decision to issue energy project and operation certificates will rest with the government.

The utilities commission legislation also provides for the regulation or review of energy removals from this province for the first time. Energy removal certificates issued through procedures similar to those I have described for the project and operation certificates will be required for all energy leaving this province. Exemptions are provided for contracts already in force — export licences and other things like that — which have been issued by the National Energy Board prior to this legislation, and anything else which is already in place.

The significance of the legislation's provision for the energy review process is that it gives the general public direct access to energy decisions for the first time ever. It allows all the arguments for or against a given project to be brought forward in public for full consideration. Conversely, it gives the government a means of consulting the people of this province and other interested parties on energy generation and use projects, so that in developing our energy resources we do not compromise other less tangible resources such as the quality of life in British Columbia — the integrity of our environment.

Perhaps most important, it gives the government the means to ensure that energy development and use is addressed in a comprehensive manner, taking into account all the costs and benefits of any project and making sure that it meets both the short- and longer-term needs of British

Columbia. We have realized that energy development and use cannot be separated in what we intend to be a truly comprehensive energy policy. Since the export of energy may also be considered an energy use. the provision that I've spoken of earlier bears a similar significance in any kind of comprehensive policy.

In summation, the Utilities Commission Act will provide a mechanism of streamlined public review of energy projects which gives both industry and the general public their full opportunity for participation, sets up a panel of experts who will assimilate that information, compile reports and make recommendations. and provides the government with the means to make informed policy decisions on energy development and use.

The final responsibility for such far-reaching decisions must lie with the government. which is accountable to this Legislature and. ultimately, through this Legislature to the people of British Columbia. We are indeed entering a new era of energy management in British Columbia. The government has an energy policy now in place and is bringing that policy into effect as quickly as possible. With this new legislation, we will be better able to fulfil our mandate of energy stewardship, fully aware of the responsibilities of that role, and work with the people of British Columbia towards our ultimate goal of energy security.

With those remarks. Madam Speaker. I move second reading of Bill 52.

MR. SKELLY: The opposition intends to oppose Bill 52 for a number of reasons which I'd like to outline for the Legislature. Unfortunately, for personal reasons our energy critic cannot be here, but he has asked me to deal with some of these issues as the bill comes on the floor.

In response to the minister. Madam Speaker. the first thing about this bill that struck us when our research staff and our critics took a look at it was that it lacked any originality whatsoever; it lacked any justification for the fanfare that was given it by the Social Credit government — as in the so-called energy policy that was brought down in February. There is really nothing new in this legislation to justify the fanfare that brought it in in the first place. We checked through the bill section by section, of course, as we always do, and out of the 159 sections we found roughly a dozen new ones. Those dozen new sections give to the government roughly the same powers they already had under existing legislation which gives cabinet authority to do the things that this bill gives cabinet the authority to do.

The only people who lose in this legislation — as far as we can determine — are those citizens of the province of British Columbia who are concerned about energy project developments. concerned about the operation of energy projects, and who, having looked at this legislation, find no additional vehicle for the expression of public concern into government circles. They have another hoop that they have to jump through- that is, through the Utilities Commission. As everybody can see both from the wording of this bill and from the interpretation of this bill by lawyers throughout the country who are expert in regulatory law, there is no additional, effective voice for the public in this critical area of energy project approval.

Prior to the passage of this bill and the time that this bill is implemented. anyone who was concerned, for example, about a hydroelectric dam, could have contacted the comptroller of water rights, appeal to the comptroller of water

ATTACHMENT 3 - *HEMLOCK*

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.

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.

ATTACHMENT 4 - CENTRA SPECIAL DIRECTION

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 1510 , *Approved and Ordered* DEC. 13.1995

I hereby certify that the following is a true copy of a Minute of the Honourable the Executive Council of the Province of British Columbia approved by His Honour the Lieutenant-Governor.

Order-in-Council Custodian

Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the attached Vancouver Island Natural Gas Pipeline Special Direction is issued to the British Columbia Utilities Commission.

Minister of Energy, Mines and Petroleum Resources

Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order.)

Authority under which Order is made:

Act and section:- Vancouver Island Natural Gas Pipeline Act, s. 7 (4)

Other (specify):-

December 8, 1995

/970/95/11/aaa

SPECIAL DIRECTION
TO THE
BRITISH COLUMBIA UTILITIES COMMISSION

PART 1
PRELIMINARY & GENERAL MATTERS

1.1 Definitions

"Annual CPI" means the percentage increase in the CPI over the most recent twelve month period for which information is available at any particular time when New Customer rates are approved pursuant to Section 2.7;

"Annual Revenue Deficiency" and "Revenue Deficiency Deferral Account" shall have the meanings given to these terms in Section 2.10;

"BCUC" means the British Columbia Utilities Commission;

"Canada Repayable Contribution" and "British Columbia Repayable Contribution" shall each have the meanings given to these terms in an agreement entered into among Her Majesty the Queen in Right of Canada, the Province, and PCEC substantially in the form of the Pacific Coast Energy Pipeline Agreement attached as Schedule 3 to the Vancouver Island Natural Gas Pipeline Agreement Approval Order.

"CPI" means the monthly consumer price index for Victoria, British Columbia for all items, as published by Statistics Canada;

"Centra" means, at the effective date of this Special Direction, collectively, Centra Gas British Columbia Inc., Centra Gas Vancouver Island Inc. and Centra Gas Victoria Inc., and thereafter means such other company or companies that may from time to time own and operate all or any part of the Centra Distribution System;

"**Centra Distribution System**" means the gas distribution systems of Centra that were connected to the Pipeline as of the effective date of this Special Direction, together with any extensions thereof;

"**Class "A" Instruments**" means cumulative redeemable preferred shares issued by Centra, having attached the right to receive dividends at an annual rate determined by Centra, based on the issue price of such shares, not exceeding 58% of the Current 5 Year Canada Rate at the date of issuance, plus 275 basis points and having such other terms (including provision for a dividend reset date) as are set out in the form of Class "A" Instrument attached as Schedule "A" to this Special Direction, or as may be otherwise determined by Centra and approved by the BCUC;

"**Class "B" Instruments**" means promissory notes or other debt instruments issued by Centra bearing interest at an annual rate determined by Centra, not exceeding the Current 5 Year Canada Rate at the date of issuance, plus 275 basis points and having such other terms (including provision for an interest reset date) as are set out in the form of Class "B" Instrument attached as Schedule "B" to this Special Direction, or as may be otherwise determined by Centra and approved by the BCUC;

"**Current 5 Year Canada Rate**" means, on any particular date, the most recent monthly rate published by the Bank of Canada as the benchmark yield on 5 year Government of Canada Bonds, as set out in column B14069 of the most recent release of the Bank of Canada Review;

"**Interruptible Incentive Payments**" means those payments to be made by the Province to PCEC in accordance with Sections 2.06, 2.07, and 2.08 of the Vancouver Island Natural Gas Pipeline Agreement;

"**Joint Venture**" means those corporations or other entities which, from time to time, own and operate the seven pulp mills that were being served by the Pipeline at the effective date of this Special Direction (the "**Mills**"), and which are operating as a joint venture for the purpose of obtaining gas transportation service from PCEC for the Mills;

"**Long Canada Rate**" means for any particular year, the Government of Canada long term bond reference rate used by the BCUC to determine return on equity for public utilities for that year and, in the event that such a reference rate does not exist for any particular year, then Long Canada Rate shall mean the rate implied by an independent consensus forecast of Government of Canada long term bond yields for that year that is approved by the BCUC;

"**PCEC**" means Pacific Coast Energy Corporation, or such other company that may from time to time own and operate the Pipeline;

"**Pipeline**" means the Vancouver Island natural gas pipeline, as described in the Energy Project Certificate issued to PCEC;

"**Province**" means Her Majesty the Queen in Right of the Province of British Columbia;

"**Rate Stabilization Facility**" means the financial facility continued in respect of Squamish Gas under the Rate Stabilization Facility Continuation Agreement;

"**Rate Stabilization Facility Continuation Agreement**" means an agreement between the Province and PCEC substantially in the form of the agreement attached as Schedule 2 to the Vancouver Island Natural Gas Pipeline Agreement Approval Order;

"**Royalty Revenue Payments**" means those payments to be made by the Province to Centra in accordance with Sections 2.03 and 2.04 of the Vancouver Island Natural Gas Pipeline Agreement and, in the event that the Pipeline and the Centra Distribution System are owned and operated by a single legal entity, "Royalty Revenue Payments" shall also include the Interruptible Incentive Payments;

"**Single Entity**" means a single legal entity which owns and operates both the Centra Distribution System and the Pipeline;

"**Squamish Gas**" means, at the effective date of this Special Direction, Squamish Gas Co. Ltd., and thereafter means such other

company or companies that may, from time to time, own and operate the Squamish Gas Distribution System;

"**Squamish Gas Distribution System**" means the gas distribution system of Squamish Gas that was in existence as of the effective date of this Special Direction, together with any extensions thereof;

"**Squamish Gas Transportation Service Agreement**" means that Agreement between PCEC and Squamish Gas dated April 1, 1990;

"**Squamish Rate Stabilization Agreement**" means that Agreement between the Province and Squamish Gas dated July 9, 1992;

"**Utilities**" means, collectively, PCEC, Centra, and Squamish Gas, and "**Utility**" means any one of them;

"**Vancouver Island Natural Gas Pipeline Agreement**" means an agreement among the Province, Westcoast Energy Inc., PCEC and Centra substantially in the form of the agreement attached as Schedule 1 to the Vancouver Island Natural Gas Pipeline Agreement Approval Order.

1.2 Schedules

The following Schedules are a part of this Special Direction:

Schedule "A" - FORM OF CLASS "A" INSTRUMENT

Schedule "B" - FORM OF CLASS "B" INSTRUMENT

Schedule "C" - INITIAL NEW CUSTOMER RATE SCHEDULE

Schedule "D" - DESIGNATED ROYALTY ADJUSTED COST OF GAS

Schedule "E" - EXAMPLES OF CALCULATION OF REVENUE DEFICIENCY DEFERRAL ACCOUNT BALANCE

Schedule "F" - JOINT VENTURE TRANSPORTATION SERVICE AGREEMENT

Schedule "G" - CENTRA TRANSPORTATION SERVICE AGREEMENT

Schedule "H" - PACIFIC COAST ENERGY CORPORATION GENERAL TERMS AND CONDITIONS

1.3 Effective Date, Special Direction No. 5 and Duration

This Special Direction shall become effective and supersede and replace Special Direction No. 5 (established pursuant to Order in Council No. 990, July 11, 1991) when the Secretary of the BCUC receives a written notice from each of the parties to the Vancouver Island Natural Gas Pipeline Agreement confirming that such Agreement has been executed and delivered. This Special Direction shall cease to have any application after the latest of:

(a) the time when the balance of the Revenue Deficiency Deferral Account has been reduced to zero; and

(b) the date of the expiration or earlier termination of the Joint Venture Transportation Service Agreement appended as Schedule "F", which date shall in no event be later than January 1, 2011; and

(c) the date of the termination of the Squamish Gas Transportation Service Agreement.

1.4 General

The BCUC shall regulate the Utilities and fix the rates charged by the Utilities in accordance with the requirements of this Special Direction , and in accordance with the requirements of the Utilities Commission Act and such regulatory principles that are otherwise applicable to the Utilities from time to time that are not inconsistent with this Special Direction. In the event of any inconsistency between this Special Direction and any requirement of the Utilities Commission Act or any regulatory principles that

would otherwise be applicable to the Utilities, the BCUC shall follow the provisions of this Special Direction. For greater certainty, the BCUC shall not apply any provisions of the Utilities Commission Act (including, without limitation, Sections 64, 65, 66, and 67) in any manner which has the effect, directly or indirectly, of eliminating or varying any rates that have been specified in, or determined in accordance with, this Special Direction, or eliminating or varying any other determination or matter provided for herein.

PART 2
DIRECTION RESPECTING CENTRA

2.1 General Direction With Respect to Rates

Rates, changes in rates, changes in customer classifications or other rate design matters, shall be filed with and approved by the BCUC on an annual basis or such other periodic basis as the BCUC may determine.

2.2 Pioneer and New Customers

All customers of Centra (other than customers who have entered into long term commercial gas supply contracts that have been individually approved by the BCUC) shall be categorized as either a "Pioneer Customer" or a "New Customer" based upon the criteria set out below. Such categories shall be for the purpose of fixing rates for the period from the effective date of this Special Direction to December 31, 2003, in the case of Pioneer Customers within the ACR-2 customer rate class, and for the period from the effective date of this Special Direction to December 31, 2002, in the case of all other Pioneer and New Customers.

(a) Pioneer Customer

Any customer of Centra:

(i) who applies for service as a Pioneer Customer prior to February 13, 1996, and whose application is accepted by Centra; and

(ii) to whom gas has been delivered within 60 days after a service line has been provided to that customer by Centra,

shall be a Pioneer Customer for the purpose of service to that customer at the location applied for. A customer shall cease to be classified as a Pioneer Customer:

(iii) if the customer enters into an agreement with Centra, releasing its entitlement to be classified as a Pioneer Customer; or,

(iv) if the customer enters in a gas supply contract with a party other than Centra, the other party provides gas for the customer, and Centra is subsequently required to provide the customer's gas supply.

(b) New Customer

Any customer of Centra who does not satisfy the requirements for classification as a Pioneer Customer, or any customer who has released its entitlement to be classified as a Pioneer Customer, shall be classified as a New Customer. The BCUC may require Centra to develop policies for approval by the BCUC for the purpose of determining whether there has been a change that would result in any particular customer not being entitled to service as a Pioneer Customer.

2.3 Closing of Pioneer Customer Rate Classes

The customer rate classes for Pioneer Customers shall be the SGS-1, SGS-2, ACR-1, ACR-2, LGS-1, LGS-2, and LGS-3 customer rate classes as defined in the rate schedule filed by Centra with the BCUC and in effect as of January 1, 1995. Entry into the Pioneer

Customer rate classes shall be closed in accordance with the definitions in paragraph 2.2, however, a customer within a particular Pioneer Customer rate class may move from one Pioneer Customer rate class to another, in accordance with the applicable terms and conditions of service, so long as the customer is continuing to receive service at the same location.

2.4 Rates for Pioneer Customers Within the ACR-2 Customer Rate Class 1995 - 2003

The BCUC shall fix the rates charged by Centra to Pioneer Customers within the ACR-2 rate class for the period from the effective date of this Special Direction to December 31, 2003, independently from Centra's cost of service and in accordance with the applicable provisions of the rate schedule filed by Centra with the BCUC and in effect as of January 1, 1995. In order to apply such provisions, the BCUC shall require Centra to determine the Vancouver rack price for No. 2 fuel oil for such period, and employing such methods, as may be approved by the BCUC from time to time.

2.5 Other Pioneer Customer Rates 1995 - 2001

The BCUC shall fix the rates charged by Centra to Pioneer Customers (other than those within the ACR-2 customer rate class) for the period from the effective date of this Special Direction to December 31, 2001, in accordance with the following directions.

(a) Market Monitoring and Determination of Competitive Energy Prices

The BCUC shall require Centra to monitor the competitive fuel oil markets within its service area for such period, and employing such methods, as may be approved by the BCUC from time to time, and Centra shall be required to provide the results of its market monitoring to the BCUC and, based thereon, the BCUC shall determine the market price at which fuel oil would be available to a Pioneer Customer within each applicable rate class and the price or prices so determined

shall be the "Competitive Fuel Price" for the applicable period and customer class. The BCUC shall also determine the price equal to 67% of the B.C. Hydro Trailing Block Rate for residential service available to Pioneer Customers and the price or prices so determined (expressed in dollars per gigajoule equivalent) shall be the "Discounted Electricity Price" for the applicable period.

(b) SGS-1, SGS-2, ACR-1, LGS-1, LGS-2 and LGS-3 Rates

Rates for Pioneer Customers within the SGS-1, SGS-2, ACR-1, LGS-1, LGS-2 and LGS-3 rate classes shall be determined independently from Centra's cost of service and shall be equal to the lesser of:

(i) the applicable Competitive Fuel Price, less the applicable Fuel Oil Discount as set out in Table 1 below; or

(ii) the applicable Discounted Electricity Price.

Table 1

FUEL OIL DISCOUNT

Year	Discount
1995	13%
1996	12%
1997	11%
1998 - 2001	10%

2.6 Other Pioneer Customer Rates 2002

The BCUC shall fix the rates charged by Centra to Pioneer Customers (other than those within the ACR-2 customer rate class) during 2002 independently from Centra's cost of service at the lesser of the rate that would be determined under Section 2.5(b)(i) (given a Fuel

Oil Discount of zero) and the rate for New Customers set in accordance with Section 2.7.

2.7 New Customer Rates 1995 - 2002

The BCUC shall fix the rates charged by Centra to New Customers for the period from the effective date of this Special Direction to December 31, 2002, in accordance with the following directions.

(a) General Principles

Rates should, to the greatest extent reasonably possible, be consistent with the goals of simplicity, equity between the various New Customer rate classes and the optimization of revenue to Centra. Centra is to be allowed flexibility in structuring its rates and, where it is determined by the BCUC to be appropriate, rates may be structured to include demand charges and commodity charges. The foregoing general principles shall be subject to the more specific directions set out below.

(b) Initial New Customer Rate Schedule

Rates charged to New Customers for the period from the effective date of this Special Direction to December 31, 1996, shall be those rates set out in the Initial New Customer Rate Schedule that is attached as Schedule "C" to this Special Direction.

(c) Rate Ceilings

Subject only to paragraph (d) below, the rates that are approved for each year from January 1, 1997, to December 31, 2002, shall be subject to rate ceilings determined in accordance with the following directions:

(i) A rate shall not be approved if it would result in an average customer (as described by reference to volume in Table 2 below) in any

particular customer rate class being charged an effective unit price that would be greater than the effective unit price (determined as set out in subparagraph (iii) below) charged to that average customer in the immediately preceding year, increased by the allowable percentage increase set out in Table 3 below.

Table 2

AVERAGE ANNUAL CUSTOMER CONSUMPTION

SGS 11	70 GJ
SGS 12	270 GJ
LGS 11	945 GJ
LGS 12	2844 GJ
LGS 13	18793 GJ

Table 3

ANNUAL ALLOWABLE PERCENTAGE POINT INCREASE

1997	8%	2000	Annual CPI + 1%
1998	6%	2001	Annual CPI + 1%
1999	Annual CPI + 1%	2002	Annual CPI + 1%

(ii) If the increase in the effective unit price for an average customer in any particular customer rate class in any particular year described above is less than the allowable increase, then the difference may be carried forward to the next year so that the allowable percentage point increase for that customer rate class in the next year is increased accordingly. To the extent that the increased allowable percentage point increase is not utilized it may be carried

forward in a similar fashion to subsequent years.

(iii) For the purpose of determining the rate ceilings, effective unit prices shall be calculated by taking into account all relevant demand and commodity charges, but shall not include any increase or decrease in charges which resulted from Passthrough Costs in accordance with paragraph (d) below and shall not include the charge described in Rider A as set out in Schedule "C" or any special service rates in the nature of those approved by the BCUC as of the effective date of this Special Direction. For greater certainty, it is intended that the rate ceilings be calculated so that any decrease or increase in Centra rates resulting from a Passthrough Cost in any particular year does not increase or decrease the rate ceiling applicable to a subsequent year.

(iv) Because the limitations on rate increases are governed by the effective unit price payable by average customers for each of the various customer rate classes, the effective unit prices actually payable by some New Customers may be subject to greater increases than described in this paragraph (c).

(v) If the BCUC approves a change to Centra's customer rate classes, then any resulting changed or additional customer rate class shall be subject to the limitations on rate increases described in this paragraph (c). The BCUC shall make any determination of average customer volumes, or any other matter that is necessary in order to calculate the effective unit price

for an average customer of any changed or additional customer rate class.

(d) Passthrough Costs and the New Customer Rate Balancing Account

If, in any particular year, "Passthrough Costs" (meaning only those costs described below) have either increased or decreased, then notwithstanding the limitation on rate increases set out in paragraph (c) the rates charged by Centra to New Customers may be varied in accordance with Section 67(4) of the Utilities Commission Act and the following directions.

(i) Passthrough Costs for any particular year shall be determined by the BCUC as the aggregate of the following amounts:

(A) the change in the cost of service to New Customers in a particular year as a result of a change in Federal, Provincial, or Municipal tax rates;

(B) a change in the cost of service to New Customers as a result of a material and uncontrollable change in costs associated with a program established by any governmental or regulatory authority;

(C) the change in the cost of service to New Customers as a result of a difference between the "Actual Royalty Adjusted Cost of Gas" for a particular year, and the Designated Royalty Adjusted Cost of Gas for that year as set out in Schedule "D". The "Actual Royalty Adjusted Cost of Gas" for a particular year shall be determined as follows. Firstly, the BCUC shall determine Centra's cost of gas for the

year being all of the costs incurred by Centra, and approved by the BCUC, to obtain gas for customer use and system use (including line losses, unaccounted for gas, and fuel requirements), including, without limitation:

(1) the purchase price of gas;

(2) gathering, processing, transportation, and storage costs; and

(3) costs of any arbitration relating to Centra's gas supply arrangements;

but excluding:

(4) commissions and gas management fees paid in connection with the purchase of gas;

(5) any toll paid by Centra to PCEC or any other cost associated with the transportation of gas through the Pipeline; and

(6) any cost associated with the transportation of gas from the point of interconnection of the pipeline systems of Westcoast Energy Inc. and BC Gas Utility Ltd. near Huntingdon (the "Huntingdon Point of Interconnection"), to the point of interconnection of the pipeline systems of BC Gas Utility Ltd. and PCEC in Coquitlam.

Secondly, the cost of gas for the year shall be reduced by the total of all

Royalty Revenue Payments for that year. Thirdly, the resulting number shall be divided by the total volume of gas delivered to Centra at the Huntingdon Point of Interconnection. For greater certainty, a change to the cost of service to New Customers as a result of a variation in the cost of gas as described herein may be either a negative or a positive amount.

(ii) Passthrough Costs shall include only that portion of increased costs that can be reasonably allocated to New Customers. Any portion of an increased cost that is allocated to the cost of service to other customers of Centra, together with other costs that would be allowed by the BCUC under Section 67(4) of the Utilities Commission Act, but which do not otherwise satisfy the definition of Passthrough Costs, shall be taken into account in determining whether Centra has incurred an Annual Revenue Deficiency, but shall not affect the rate ceilings applicable to Centra's New Customers.

(iii) Passthrough Costs for a particular year shall be recorded in a "New Customer Rate Balancing Account", which is a notional account for the purpose of determining adjustments to New Customer rates. The BCUC shall determine the manner in which positive or negative balances affect rates by taking into account the following objectives. Firstly, the impact of the variable nature of gas costs on New Customer rates should be minimized. Secondly, Centra, to the extent possible, should be able to increase its rates to New Customers by such amounts as are commensurate with any positive balance

within the New Customer Rate Balancing Account that may exist from time to time.

(iv) The BCUC may require Centra to reduce the rates charged to New Customers in the event that the BCUC determines that there is a significant negative balance accumulating within the New Customer Rate Balancing Account that is not likely to be offset within a reasonable period of time.

2.8 Customer Rates 2003 and After

The BCUC shall fix the rates charged by Centra to its customers for the period beginning January 1, 2003, in the case of all customers other than those within the ACR-2 customer rate class, and January 1, 2004, in the case of customers formerly within the ACR-2 customer rate class, so that Centra is able to recover its cost of service in accordance with the regulatory principles that are generally applied by the BCUC from time to time to gas distribution utilities operating within British Columbia.

2.9 Gas Supply Hedging Arrangements and Transportation and Sales Service

Centra may use gas supply hedging arrangements, the terms and conditions of which have been approved by the BCUC, in order to manage the risk associated with the Revenue Deficiency Deferral Account. Centra shall file with the BCUC, in accordance with the requirements specified by the BCUC from time to time, transportation rates that shall be generally available for Centra's large commercial customers. Such rates shall be available in accordance with such terms and conditions as are from time to time determined by Centra and approved by the BCUC. If requested by Centra, such terms and conditions shall include a requirement that any customer who is purchasing gas from Centra at the time the terms and conditions are approved or who thereafter enters into a gas purchase agreement with Centra, shall not be permitted to switch to transportation service prior to December 31, 2002.

2.10 Cost of Service and Revenue Deficiencies

Subject to Part 4 of this Special Direction, the BCUC shall determine Centra's cost of service and shall make the various associated determinations, all as described in, and in accordance with, the following directions.

(a) General Principles

For each year in the period beginning January 1, 1996, Centra shall be regulated on a forecast test year basis and shall be required to apply to the BCUC for approval of its:

(i) cost of service for each year and in conjunction therewith the BCUC shall determine the allowable capital additions to be made during such year and such other matters as the BCUC may deem appropriate for the determination of Centra's cost of service; and

(ii) projected revenue for such year inclusive of all Royalty Revenue Payments payable by the Province in respect of that year.

(b) Rate Base, Revenue Deficiency Deferral Account Balance and Cost of Service 1991 - 1995

The following amounts shall be determined in accordance with the Vancouver Island Natural Gas Pipeline Agreement and shall be set forth in notices delivered by the Province to the BCUC pursuant to Article 9 thereof:

(i) net plant in service as of December 31, 1995, determined as the aggregate of:

(A) net plant in service as of December 31, 1994, of $211,474,000, less $90,000,000; and

(B) additions to net plant in service during 1995 which shall be determined by taking gross additions made during 1995 and adjusting for disposals and depreciation in 1995;

(ii) the Annual Revenue Deficiency for 1995;

(iii) the balance of the Revenue Deficiency Deferral Account as of December 31, 1995;

(iv) Centra's cost of service for the period October 1, 1991, to December 31, 1991 and each year from January 1, 1992 to December 31, 1995; and

(v) work in progress as of December 31, 1995.

Centra's rate base as of December 31, 1995, or any time thereafter, shall be:

(vi) the amount specified in paragraph (i) above; plus

(vii) an allowance for working capital as determined and approved by the BCUC from time to time; plus

(viii) the capital cost of any additions to Centra's Distribution System made after December 31, 1995 as determined and approved by the BCUC from time to time; plus

(ix) deferred charges and other miscellaneous rate base items (which shall in no event include any amount of the Revenue Deficiency Deferral Account or any amount that would change the amount for the net plant in service as of December 31, 1995) as determined and approved by the BCUC from time to time; less

(x) accumulated depreciation and disposals for the period after December 31, 1995, as determined and approved by the BCUC from time to time.

(c) Deemed Equity

Subject to paragraph (e), the equity component of Centra's rate base:

(i) shall be deemed to be 35% for each year from January 1, 1996, to December 31, 2002, and for greater certainty the balance of Centra's rate base shall be deemed to be financed by debt; and

(ii) for the period after December 31, 2002, shall be such percentage of Centra's rate base that is determined to be appropriate in accordance with the regulatory principles that are generally applied by the BCUC from time to time to gas distribution utilities operating within British Columbia.

(d) Return on Equity

The return on the equity component of Centra's rate base shall be the Long Canada Rate plus 375 basis points for each year from January 1, 1996, to December 31, 2002, and thereafter shall be such return that is determined to be appropriate in accordance with the regulatory principles that are generally applied by the BCUC from time to time to gas distribution utilities operating within British Columbia.

(e) Debt Financing of Rate Base

The level of deemed equity and the return allowed thereon that are stipulated in paragraphs (c) and (d) may be varied by the BCUC for any year from January 1, 1996, to December 31, 2002, if:

(i) the actual level of debt financing of Centra (excluding Class "B" Instruments that are actually issued to finance all or any portion of the Revenue Deficiency Deferral Account balance) exceeds 65% of the rate base that the BCUC has determined for Centra; and

(ii) the BCUC determines that this level of debt financing is adversely affecting the cost of debt for the purpose of determining cost of service.

(f) Determination of Revenue Deficiency Deferral Account Balance

The BCUC shall determine the amount recorded in Centra's Revenue Deficiency Deferral Account, which amount shall equal, at any particular time:

(i) the total of all Annual Revenue Deficiencies incurred on or before that time; plus

(ii) the total amount of Class "A" Instruments and Class "B" Instruments that are deemed to have been issued pursuant to paragraph 2.10(h)(v)B(2) on or before that time; less

(iii) the total amount of Class "A" Instruments and Class "B" Instruments that are deemed to have been redeemed or repaid pursuant to paragraph 2.10(i) on or before that time.

"Annual Revenue Deficiency" for the 1995 year is the amount described in paragraph 2.10(b)(ii) and for any particular year after December 31, 1995 is the amount, if any, by which Centra's "Adjusted Cost of Service" exceeds Centra's actual revenues relating to the Centra Distribution System (including Royalty Revenue Payments) for that year.

"**Adjusted Cost of Service**" means Centra's cost of service as approved by the BCUC on a forecast test year basis, excluding any amount for the amortization of Class "A" Instruments or Class "B" Instruments pursuant to paragraph 2.10(j) and subject to adjustments for variations as described below. BCUC approved variations (which may be either an increase or a decrease) between actual and forecast costs shall be taken into account in the determination of Adjusted Cost of Service, however, the BCUC shall not:

(iv) approve a variation between Centra's actual and forecast operating and maintenance expenses unless the variation was caused by a factor over which Centra had no effective control; and

(v) make any adjustment after the end of a particular year to the Long Canada Rate used to determine return on equity for that year.

For the purpose of illustration only, examples of the determination of Annual Revenue Deficiency and Adjusted Cost of Service for the purpose of determining the balance of the Revenue Deficiency Deferral Account are attached as Schedule "E" to this Special Direction.

(g) <u>Effect of Annual Revenue Deficiencies on Rate Base and Cost of Service</u>

The balance of the Revenue Deficiency Deferral Account, or any amount relating to the Annual Revenue Deficiency for any particular year, shall not at any time be included within Centra's rate base. Except as specifically allowed by paragraphs 2.10(h) and 2.10(j), Centra's cost of service for the purpose of determining the rates to be charged to Centra's customers shall not include any cost of financing the Revenue Deficiency Deferral Account balance, and shall not include any amount for the amortization, reduction, or recovery of the Revenue Deficiency Deferral Account balance.

(h) Deemed Financing Costs That Are To Be Included Within the Cost of Service

The amount recorded in the Revenue Deficiency Deferral Account shall be deemed to be financed by Class "A" Instruments, or, in the circumstances provided below, by Class "B" Instruments. Centra's cost of service for any particular year shall include the interest and dividends, as the case may be, that are payable in respect of that year on the Class "A" Instruments and the Class "B" Instruments that are deemed to be outstanding during that year. The amount of such interest and dividends shall be determined in accordance with the following directions.

(i) Unless a determination is made under paragraph (ii), the amount recorded in the Revenue Deficiency Deferral Account shall be deemed to be financed by Class "A" Instruments.

(ii) When the BCUC approves Centra's forecast cost of service the BCUC shall determine whether it would be appropriate to deem the amount recorded in the Revenue Deficiency Deferral Account, or any particular portion thereof, to be financed by Class "B" Instruments.

(iii) A determination under paragraph (ii) may only be made if the BCUC determines that the financing by Class "B" Instruments will not have an impact on Centra's cost of service for the forecast test year and subsequent years that would, on a cumulative basis, result in an adverse impact on the Revenue Deficiency Deferral Account that would have to be recovered through rates charged to customers.

(iv) To the extent that the BCUC deems any portion of the balance of the Revenue Deficiency Deferral Account to be financed by Class "B" Instruments

which has previously been deemed to be financed by Class "A" Instruments, the Class "B" Instruments shall be deemed to have been converted from Class "A" Instruments in accordance with the terms and conditions contained in the form of Class "A" Instrument attached as Schedule "A". To the extent that the BCUC deems any portion of the balance of the Revenue Deficiency Deferral Account to be financed by Class "A" Instruments which has previously been deemed to be financed by Class "B" Instruments, the Class "A" Instruments shall be deemed to have been converted from Class "B" Instruments in accordance with the terms and conditions contained in the form of Class "B" Instrument attached as Schedule "B".

(v) The instruments that are deemed to be issued to finance any particular year's Annual Revenue Deficiency shall be deemed:

(A) to be issued on June 30th of the year following the year in which the Annual Revenue Deficiency was incurred for the purpose of determining the dividend or interest rate payable pursuant to such instruments;

(B) to be issued in an aggregate amount equal to the sum of:

(1) the Annual Revenue Deficiency for the year; and

(2) an additional amount to take into account Centra's cost of financing the Annual Revenue Deficiency during the year in which it arose. This additional amount shall equal the

interest or dividends, as the case may be, payable for a 6 month period, under the instruments deemed to be issued in respect of the amount in subparagraph (1) above; and

(C) to be issued on January 1 of the year following the year in which the Annual Revenue Deficiency was incurred, for the purpose of determining when interest or dividends begin to accrue and become payable pursuant to such instruments.

(i) Deemed Redemption or Repayment of Instruments for the Determination of the Balance of the Revenue Deficiency Deferral Account

If Centra's actual revenues relating to the Centra Distribution System for any particular year would exceed what would otherwise be Centra's Adjusted Cost of Service for that year, the BCUC shall deem Centra to redeem Class "A" Instruments or repay Class "B" Instruments at the midpoint of that year to the extent necessary to cause Centra's Adjusted Cost of Service to equal such revenues. The instruments that are deemed to be redeemed or repaid shall be those instruments which have a dividend or interest reset date, as defined in the terms and conditions applicable to the instrument, which is closest to the date of deemed redemption or repayment.

(j) Deemed Redemption or Repayment of Instruments for the Determination of Cost of Service and Setting of Rates

For each year beginning January 1, 2003, the cost of service of Centra that is approved by the BCUC for the purpose of determining the rates to be charged to Centra's customers shall include an amount for the deemed redemption of Class "A" Instruments or repayment of Class "B" Instruments that

the BCUC determines to be appropriate in order to amortize the balance of the Revenue Deficiency Deferral Account over the shortest period reasonably possible, having regard for Centra's competitive position relative to alternative energy sources and the desirability of reasonable rates.

2.11 Assistance for Financing Requirements

The BCUC shall not apply Paragraph 3 of BCUC Order G-16-90 (the "Order") in any way that would require Centra to obtain assistance in regard to its debt/equity financing requirements from Westcoast Energy Inc., or from any corporation that is a parent, grandparent or successor, as these terms are used in Paragraph 3 of the Order, other than what is provided for in the Vancouver Island Natural Gas Pipeline Agreement.

PART 3
DIRECTION RESPECTING PCEC

3.1 Cost of Service

Subject to Part 4 of this Special Direction, the BCUC shall determine PCEC's cost of service in accordance with the following directions:

(a) Rate Base and Cost of Service 1991 - 1995

The following amounts shall be determined in accordance with the Vancouver Island Natural Gas Pipeline Agreement and shall be set forth in notices delivered by the Province to the BCUC pursuant to Article 9 thereof:

(i) PCEC's net plant in service as of December 31, 1995, determined as the aggregate of:

(A) PCEC's net plant in service as of December 31, 1994, of $192,120,673, less $30,000,000; and

(B) PCEC's additions to net plant in service during 1995 which shall be determined by taking gross additions made during 1995 and adjusting for disposals and depreciation in 1995;

(ii) PCEC's cost of service for each year from 1991 to December 31, 1995; and

(iii) work in progress as of December 31, 1995.

PCEC's rate base as of December 31, 1995, or any time thereafter, shall be:

(iv) the amount set out in paragraph (i); plus

(v) an allowance for working capital as determined and approved by the BCUC from time to time; plus

(vi) the capital cost of any additions to the Pipeline made after December 31, 1995 as determined and approved by the BCUC from time to time; plus

(vii) any amounts of the Canada Repayable Contribution or the British Columbia Repayable Contribution which have been repaid by PCEC; plus

(viii) deferred charges and other miscellaneous rate base items (which shall in no event include any amount that would change the amount for the net plant in service as of December 31, 1995) as determined and approved by the BCUC from time to time; less

(ix) accumulated depreciation and disposals for the period after December 31, 1995, as determined and approved by the BCUC from time to time.

(b) Adjustment to Cost of Service

For each year from January 1, 1996, to December 31, 2011, the return on the equity component of PCEC's rate base that would have been otherwise approved by the BCUC shall be reduced by the amount of $1,867,000. Such reduction shall not be recovered in whole or in part, directly or indirectly, through rates or tolls in any manner whatsoever.

(c) Effect of Interruptible Incentive Payments

Interruptible Incentive Payments that are payable to PCEC in respect of any particular year shall be taken into account as revenues received by PCEC in partial recovery of its cost of service for that year.

(d) Effect of Monthly Toll Revenue - Squamish Gas

During the term of the Rate Stabilization Facility Continuation Agreement, the Monthly Toll Revenues determined pursuant to that agreement shall be taken into account as the only revenues received by PCEC in recovery of its cost of service with respect to the transportation and delivery of gas pursuant to the Squamish Gas Transportation Service Agreement.

3.2 Joint Venture Transportation Service Agreement

The BCUC shall approve the transportation service agreement between PCEC and the Joint Venture, including the transportation tolls provided for therein, that is attached as Schedule "F" to this Special Direction.

3.3 Squamish Gas Transportation Service Agreement

In regulating the transportation tolls charged by PCEC to Squamish Gas for service provided pursuant to the Squamish Gas Transportation Service Agreement, the BCUC shall apply the service rate provisions of that agreement for the period contemplated by the Squamish Rate Stabilization Agreement.

3.4 Centra Transportation Service Agreement

The BCUC shall approve the transportation service agreement between PCEC and Centra, including the transportation tolls provided for therein, that is attached as Schedule "G" to this Special Direction.

3.5 General Terms and Conditions

The "General Terms and Conditions" attached as Schedule "H" to this Special Direction shall be approved by the BCUC as the general contractual terms and conditions applicable to the transportation service agreements referred to in Sections 3.2 and 3.4 and to the other transportation service agreements that PCEC may enter into from time to time after the effective date of this Special Direction.

3.6 Variations of General Terms and Conditions and Joint Venture Transportation Service Agreement

The BCUC shall not amend, change, alter, or vary the transportation service agreement referred to in Section 3.2 or the General Terms and Conditions referred to in Section 3.5, if such amendment, change, alteration, or variation would have the effect of either:

(a) varying the transportation tolls or other amounts payable to PCEC for the services provided to the Joint Venture pursuant to that transportation service agreement; or

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(b) increasing or decreasing the Contract Demand for Firm Transportation Service determined in accordance with that transportation service agreement, or the quantities of Interruptible Offset Gas which the Joint Venture is entitled to receive pursuant to that transportation service agreement.

3.7 Rates and Transportation Tolls Otherwise Applicable to the Joint Venture, Squamish Gas, and Centra

For the purpose of fixing transportation tolls to be charged by PCEC other than as directed in Sections 3.2, 3.3 and 3.4, the BCUC shall, subject to the exception set out below, apply such regulatory principles that are generally applied by the BCUC from time to time to gas utilities operating within British Columbia. In no event whatsoever shall the rates or transportation tolls that are approved for the Joint Venture or Squamish Gas pursuant to this Section 3.7 include any amount for the recovery in whole or in part, directly or indirectly, of dividends or interest as described in paragraph 2.10(h), or for the amortization, reduction, or recovery of the Revenue Deficiency Deferral Account balance.

3.8 Allocation of PCEC's Cost of Service to Service Squamish Gas

The BCUC shall, upon receipt of a written request from the Province, determine that portion of PCEC's annual cost of service for any particular year that relates to providing transportation service to Squamish Gas during that year.

PART 4

DETERMINATION OF ANNUAL REVENUE DEFICIENCY, RATE BASE, CAPITAL STRUCTURE AND RETURN ON EQUITY WHERE THE PIPELINE AND THE CENTRA DISTRIBUTION SYSTEM ARE OWNED BY A SINGLE ENTITY

4.1 Annual Revenue Deficiencies

The BCUC shall determine Annual Revenue Deficiencies and the balance of the Revenue Deficiency Deferral Account for a Single

Entity in the manner set out in Section 2.10 based upon the actual revenue and the cost of service associated with both the Centra Distribution System and the Pipeline but without taking into account any revenue or costs that relate to any other business conducted, or assets owned, by the Single Entity.

4.2 Rate Base, Capital Structure and Return on Equity

A single rate base shall be determined for the Single Entity in accordance with the directions in paragraphs 2.10(b) and 3.1(a). Subject to Sections 4.3 and 4.4, for any particular year from January 1, 1996, to December 31, 2002:

(a) the equity component of the Single Entity's rate base shall be deemed to be 35% and, for greater certainty, the balance of the Single Entity's rate base shall be deemed to be financed by debt; and

(b) the return on the equity component of the Single Entity's rate base shall be the Long Canada Rate plus 362.5 basis points.

Subject to Section 4.3, after December 31, 2002, the capital structure and return on equity for the Single Entity shall be determined in accordance with the regulatory principles that are generally applied by the BCUC from time to time to gas transportation and distribution utilities operating within British Columbia.

4.3 Adjustment to Return on Equity

The reduction to the return on the equity component of PCEC's rate base that is described in paragraph 3.1(b) shall continue to be made to the return on the equity component of the rate base of the Single Entity.

4.4 Debt Financing of Rate Base

The level of deemed equity and the return allowed thereon that are stipulated in Section 4.2 may be varied by the BCUC for any year from January 1, 1996, to December 31, 2002, if:

(a) the actual level of debt financing of the Single Entity (excluding Class "B" Instruments that are actually issued to finance all or any portion of the Revenue Deficiency Deferral Account balance) exceeds 65% of the rate base that the BCUC has determined for the Single Entity; and

(b) the BCUC determines that this level of debt financing is adversely affecting the cost of debt for the purpose of determining cost of service.

4.5 Separate Records

The BCUC shall require that the Single Entity keep separate records relating to the Pipeline and the Centra Distribution System sufficient at all times to differentiate, where appropriate, between all activities related to the construction and operation of the Pipeline and the Centra Distribution System.

PART 5
DIRECTION RESPECTING SQUAMISH GAS

5.1 Customer Rates

The BCUC shall fix the rates charged by Squamish Gas to its customers in accordance with the Squamish Rate Stabilization Agreement during the period for which that agreement remains in effect and, thereafter, in accordance with the regulatory principles that are generally applied by the BCUC from time to time to gas distribution utilities operating within British Columbia. In this regard, the BCUC shall have regard, during the period when the Squamish Rate Stabilization Agreement remains in effect, to the

provisions in the "Binding Agreement", as that term is defined in the Squamish Rate Stabilization Agreement, notwithstanding any amendment or termination of the Binding Agreement subsequent to July 9, 1992.

5.2 Regulation and Other Determinations Pursuant to the Squamish Rate Stabilization Agreement

The BCUC shall regulate Squamish Gas, determine the cost of service of Squamish Gas, and make the various determinations required in order to implement the Squamish Rate Stabilization Agreement, all in accordance with the Squamish Rate Stabilization Agreement during the period for which that agreement is in effect.