

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF THE UTILITIES COMMISSION ACT, R.S.B.C. 1996, c. 473

AND

FORTISBC INC. APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY FOR THE PURCHASE OF THE UTILITY ASSETS OF
THE CITY OF KELOWNA – PROJECT NO. 3698696

BOOK OF AUTHORITIES OF FORTISBC INC.

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16. *British Columbia Electric Railway Co. v. Public Utilities Commission*, [1960] S.C.R. 837
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34. Princeton Light and Power Company, Limited application for approval of the disposition of shares to Fortis Inc. - Order G-47-05
35. *Re British Columbia Electric Railway Company Limited et al.* (1943), 53 P.U.R. (N.S.) 438
36. *Trustee Co. of Winnipeg v. Manitoba Bridge and Ironworks Ltd.*, [1922] 1 W.W.R. 178; 70 D.L.R. 178; 31 Man. R. 398 (C.A.)

TAB 1

(e) a legal proceeding being prosecuted or pending by or against the special Act corporation may be prosecuted, or its prosecution may be continued, as the case may be, by or against the converted company, and

(f) a conviction against, or a ruling, order or judgment in favour of or against, the special Act corporation may be enforced by or against the converted company.

(2) Whether or not the requirements precedent and incidental to conversion have been complied with, a notation in the corporate register that a special Act corporation has been converted into a company is conclusive evidence for the purposes of this Act and for all other purposes that the special Act corporation has been duly converted into a company on the date shown and the time, if any, shown in the corporate register.

Division 3 — Amalgamation

Amalgamation permitted

269 The following corporations may amalgamate and continue as one company:

- (a) a company with one or more other companies;
- (b) one or more companies with one or more foreign corporations.

Amalgamation agreements

270 (1) In order for a company to amalgamate with one or more other corporations under section 269 (a) or (b), it must, unless the proposed amalgamation is to be effected under section 273 or 274,

- (a) enter into an amalgamation agreement with the other amalgamating corporations, and
- (b) have the amalgamation agreement adopted by the company's shareholders under section 271.

(2) An amalgamation agreement referred to in subsection (1) of this section must set out the terms and conditions of the amalgamation and must, in particular,

- (a) set out the full name of each of the individuals who are to be the directors of the amalgamated company, and the prescribed address for each of those individuals,

(b) set out the manner in which the issued shares of each amalgamating corporation will be exchanged for one or more of the following:

- (i) securities of the amalgamated company;
- (ii) securities of any other corporation;
- (iii) money,

(c) set out any other details necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated company, and

(d) have attached to it

- (i) a copy of the articles that the amalgamated company will have after the amalgamation, which articles must comply with section 12 (1) and (2) and be signed by one or more of the individuals referred to in paragraph (a) of this subsection, and
- (ii) a form of amalgamation application that contains the information that is to be included in the amalgamation application that will be filed with the registrar under section 275 (1) (a).

(3) Despite subsection (2) of this section, if shares of one of the amalgamating corporations are held by or on behalf of another of the amalgamating corporations,

(a) the amalgamation agreement must provide for the cancellation of those shares at the time that the amalgamation takes effect, without any repayment of capital in respect of those shares, and

(b) no provision may be made in the agreement for the exchange of those shares for securities of the amalgamated company or of any other corporation, or for money.

Shareholder adoption of amalgamation agreements

271 (1) An amalgamation agreement is adopted by the shareholders of an amalgamating company if

(a) all of the shareholders, whether or not their shares otherwise carry the right to vote, adopt the amalgamation agreement by a unanimous resolution, or

(b) the amalgamation agreement is adopted by the shareholders in accordance with subsection (6).

(2) If the amalgamation agreement is to be submitted for adoption at a meeting under subsection (6), the amalgamating company must send a notice of the meeting to each shareholder of the amalgamating company at least the prescribed number of days before the date of the proposed meeting.

(3) A notice of meeting sent under subsection (2) must be accompanied by

(a) a copy of the amalgamation agreement,

(b) a summary of the amalgamation agreement in sufficient detail to permit the shareholders to form a reasoned judgment concerning the matter, or

(c) a notification that each shareholder may, on request, obtain a copy of the amalgamation agreement before the meeting.

(4) A company that has included in a notice of meeting referred to in subsection (3) a notification referred to in subsection (3) (c) must, unless the court orders otherwise, send, promptly and without charge, a copy of the amalgamation agreement to each shareholder who requests a copy.

(5) Section 50 applies if a person does not receive the copy of the amalgamation agreement to which the person is entitled.

(6) An amalgamation agreement is adopted by the shareholders of an amalgamating company for the purposes of subsection (1) (b) of this section when

(a) the shareholders approve adoption of the amalgamation agreement

(i) by a special resolution, or

(ii) if any of the shares held by the shareholders who under subsection (7) are entitled to vote on the resolution to approve the adoption do not otherwise carry the right to vote, by a resolution of the company's shareholders passed by at least a special majority of the votes cast by the company's shareholders, and

(b) the shareholders holding shares of each class or series of shares to which are attached rights or special rights or restrictions that would be prejudiced or interfered with by the adoption of the amalgamation agreement approve adoption of the amalgamation agreement by a special separate resolution of those shareholders.

(7) Each share of an amalgamating company carries the right to vote in respect of a resolution referred to in subsection (6) (a) (ii) whether or not that share otherwise carries the right to vote.

(8) Section 61 does not apply to an amalgamation under this Division.

Shareholders may dissent

272 Any shareholder of an amalgamating company may send a notice of dissent, under Division 2 of Part 8, in respect of a resolution under section 271 (6) to adopt an amalgamation agreement, to the amalgamating company of which the person is a shareholder or, if the amalgamation has taken effect, to the amalgamated company.

Vertical short form amalgamations

273 (1) A holding corporation that is a company and one or more of its subsidiary corporations may amalgamate and continue as one company without complying with sections 270 and 271 if

(a) the holding corporation, if a pre-existing company, has complied with section 370 (1) or 436 (1),

(b) all of the issued shares of each amalgamating subsidiary corporation are held by one or more of the other amalgamating corporations,

(c) the amalgamation is approved by a special resolution of the holding corporation or by a resolution of its directors, and

(d) the resolution requires that

(i) the shares of each amalgamating subsidiary corporation be cancelled on the amalgamation without any repayment of capital in respect of those shares,

(ii) the amalgamated company have, as its notice of articles and articles, the notice of articles and articles of the holding corporation, and

(iii) the amalgamated company refrain from issuing any securities in connection with the amalgamation.

(2) On an amalgamation under this section, the capital of the amalgamated company is the same as the capital of the amalgamating holding corporation.

Horizontal short form amalgamations

TAB 2

Canada Business Corporations Act, RSC 1985, c C-44

Current version: in force since Nov 29, 2011

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Canada Business Corporations Act

R.S.C., 1985, c. C-44

An Act respecting Canadian business corporations

SHORT TITLE

Short title

1. This Act may be cited as the *Canada Business Corporations Act*.
R.S., 1985, c. C-44, s. 1; 1994, c. 24, s. 1(F).

PART I

INTERPRETATION AND APPLICATION

INTERPRETATION

Definitions

2. (1) In this Act,

"affairs"
« *affaires internes* »

"affairs" means the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate;

"affiliate"
« *groupe* »

"affiliate" means an affiliated body corporate within the meaning of subsection (2);

"corporation"
« *société par actions* » ou « *société* »

"corporation" means a body corporate incorporated or continued under this Act and not discontinued under this Act;

"court"
« *tribunal* »

"court" means

(a) in the Provinces of Newfoundland and Prince Edward Island, the trial division of the Supreme Court of the Province,

(a.1) in the Province of Ontario, the Superior Court of Justice,

(b) in the Provinces of Nova Scotia and British Columbia, the Supreme Court of the Province,

(c) in the Provinces of Manitoba, Saskatchewan, Alberta and New Brunswick, the Court of Queen's Bench for the Province,

(d) in the Province of Quebec, the Superior Court of the Province, and

(e) the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice;

"court of appeal"
« *Cour d'appel* »

"court of appeal" means the court to which an appeal lies from an order of a court;

"debt obligation"
« *titre de créance* »

"debt obligation" means a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured;

"Director"
« *directeur* »

"Director" means the Director appointed under section 260;

"director", "directors" and "board of directors"
« *administrateur* » et « *conseil d'administration* »

"director" means a person occupying the position of director by whatever name called and "directors" and "board of directors" includes a single director;

"distributing corporation"
« *société ayant fait appel au public* »

"distributing corporation" means, subject to subsections (6) and (7), a distributing corporation as defined in the regulations;

"entity"
« *entité* »

"entity" means a body corporate, a partnership, a trust, a joint venture or an unincorporated association or organization;

"going-private transaction"
« *opération de fermeture* »

"going-private transaction" means a going-private transaction as defined in the regulations;

177. (1) Subject to any revocation under subsection 173(2) or 174(5), after an amendment has been adopted under section 173, 174 or 176 articles of amendment in the form that the Director fixes shall be sent to the Director.

Reduction of stated capital

(2) If an amendment effects or requires a reduction of stated capital, subsections 38 (3) and (4) apply.

R.S., 1985, c. C-44, s. 177; 2001, c. 14, s. 85.

Certificate of amendment

178. On receipt of articles of amendment, the Director shall issue a certificate of amendment in accordance with section 262.

1974-75-76, c. 33, s. 172; 1978-79, c. 9, s. 1(F).

Effect of certificate

179. (1) An amendment becomes effective on the date shown in the certificate of amendment and the articles are amended accordingly.

Rights preserved

(2) No amendment to the articles affects an existing cause of action or claim or liability to prosecution in favour of or against the corporation or its directors or officers, or any civil, criminal or administrative action or proceeding to which a corporation or its directors or officers is a party.

1974-75-76, c. 33, s. 173; 1978-79, c. 9, s. 1(F).

Restated articles

180. (1) The directors may at any time, and shall when reasonably so directed by the Director, restate the articles of incorporation.

Delivery of articles

(2) Restated articles of incorporation in the form that the Director fixes shall be sent to the Director.

Restated certificate

(3) On receipt of restated articles of incorporation, the Director shall issue a restated certificate of incorporation in accordance with section 262.

Effect of certificate

(4) Restated articles of incorporation are effective on the date shown in the restated certificate of incorporation and supersede the original articles of incorporation and all amendments thereto.

R.S., 1985, c. C-44, s. 180; 2001, c. 14, s. 86.

Amalgamation

181. Two or more corporations, including holding and subsidiary corporations, may amalgamate and continue as one corporation.

1974-75-76, c. 33, s. 175; 1978-79, c. 9, s. 1(F).

Amalgamation agreement

182. (1) Each corporation proposing to amalgamate shall enter into an agreement setting out the terms and means of effecting the amalgamation and, in particular, setting out

(a) the provisions that are required to be included in articles of incorporation under section 6;

- (b) the name and address of each proposed director of the amalgamated corporation;
- (c) the manner in which the shares of each amalgamating corporation are to be converted into shares or other securities of the amalgamated corporation;
- (d) if any shares of an amalgamating corporation are not to be converted into securities of the amalgamated corporation, the amount of money or securities of any body corporate that the holders of such shares are to receive in addition to or instead of securities of the amalgamated corporation;
- (e) the manner of payment of money instead of the issue of fractional shares of the amalgamated corporation or of any other body corporate the securities of which are to be received in the amalgamation;
- (f) whether the by-laws of the amalgamated corporation are to be those of one of the amalgamating corporations and, if not, a copy of the proposed by-laws; and
- (g) details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated corporation.

Cancellation

(2) If shares of one of the amalgamating corporations are held by or on behalf of another of the amalgamating corporations, the amalgamation agreement shall provide for the cancellation of such shares when the amalgamation becomes effective without any repayment of capital in respect thereof, and no provision shall be made in the agreement for the conversion of such shares into shares of the amalgamated corporation.

1974-75-76, c. 33, s. 176; 1978-79, c. 9, s. 1(F).

Shareholder approval

183. (1) The directors of each amalgamating corporation shall submit the amalgamation agreement for approval to a meeting of the holders of shares of the amalgamating corporation of which they are directors and, subject to subsection (4), to the holders of each class or series of such shares.

Notice of meeting

(2) A notice of a meeting of shareholders complying with section 135 shall be sent in accordance with that section to each shareholder of each amalgamating corporation, and shall

- (a) include or be accompanied by a copy or summary of the amalgamation agreement; and
- (b) state that a dissenting shareholder is entitled to be paid the fair value of their shares in accordance with section 190, but failure to make that statement does not invalidate an amalgamation.

Right to vote

(3) Each share of an amalgamating corporation carries the right to vote in respect of an amalgamation agreement whether or not it otherwise carries the right to vote.

Class vote

(4) The holders of shares of a class or series of shares of each amalgamating corporation are entitled to vote separately as a class or series in respect of an amalgamation agreement if the amalgamation agreement contains a provision that, if contained in a proposed amendment to the articles, would entitle such holders to vote as a class or series under section 176.

Shareholder approval

(5) Subject to subsection (4), an amalgamation agreement is adopted when the shareholders of each amalgamating corporation have approved of the amalgamation by special resolutions.

Termination

(6) An amalgamation agreement may provide that at any time before the issue of a certificate of amalgamation the agreement may be terminated by the directors of an amalgamating corporation, notwithstanding approval of the agreement by the shareholders of all or any of the amalgamating corporations.

R.S., 1985, c. C-44, s. 183; 2001, c. 14, ss. 87, 135(E).

Vertical short-form amalgamation

184. (1) A holding corporation and one or more of its subsidiary corporations may amalgamate and continue as one corporation without complying with sections 182 and 183 if

(a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation;

(a.1) all of the issued shares of each amalgamating subsidiary corporation are held by one or more of the other amalgamating corporations; and

(b) the resolutions provide that

(i) the shares of each amalgamating subsidiary corporation shall be cancelled without any repayment of capital in respect thereof,

(ii) except as may be prescribed, the articles of amalgamation shall be the same as the articles of the amalgamating holding corporation, and

(iii) no securities shall be issued by the amalgamated corporation in connection with the amalgamation and the stated capital of the amalgamated corporation shall be the same as the stated capital of the amalgamating holding corporation.

Horizontal short-form amalgamation

(2) Two or more wholly-owned subsidiary corporations of the same holding body corporate may amalgamate and continue as one corporation without complying with sections 182 and 183 if

(a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation; and

(b) the resolutions provide that

(i) the shares of all but one of the amalgamating subsidiary corporations shall be cancelled without any repayment of capital in respect thereof,

(ii) except as may be prescribed, the articles of amalgamation shall be the same as the articles of the amalgamating subsidiary corporation whose shares are not cancelled, and

(iii) the stated capital of the amalgamating subsidiary corporations whose shares are cancelled shall be added to the stated capital of the amalgamating subsidiary corporation whose shares are not cancelled.

R.S., 1985, c. C-44, s. 184; 1994, c. 24, s. 20; 2001, c. 14, s. 88.

TAB 3



This Act is Current to February 6, 2013

COMMUNITY CHARTER

[SBC 2003] CHAPTER 26

Schedule

Definitions and Rules of Interpretation

Definitions

1 In this Act and in a bylaw or resolution under this Act:

"alternative approval process" means the process for obtaining approval of the electors established by section 86 [*alternative approval process*];

"animal" means any member of the animal kingdom, other than a human being;

"annual property tax bylaw" means a bylaw under section 197 [*annual property tax bylaw*];

"approval of the electors" means approval in accordance with section 84 [*approval of the electors*];

"assent of the electors" means assent in accordance with section 85 [*assent of the electors*];

"assessed value" means assessed value determined under the *Assessment Act*;

"assessment roll" means an assessment roll within the meaning of the *Assessment Act*;

"assessor" means an assessor appointed under the *Assessment Authority Act*;

(iii) mines or minerals for which title in fee simple has been registered in the land title office;

"land title office" means the applicable land title office under the *Land Title Act*;

"loan authorization bylaw" means a bylaw under section 179 [*loan authorization bylaws for long term borrowing*];

"local area service" means a service referred to in section 210 (1) [*authority for local area services*];

"local authority" means

- (a) a municipality, including the City of Vancouver,
- (b) a regional district,
- (c) the trust council, a local trust committee and the trust fund board within the meaning of the *Islands Trust Act*,
- (d) a greater board,
- (e) an improvement district, and
- (f) any other local body prescribed by regulation as a local authority for the purposes of one or more provisions of this Act or the *Local Government Act*;

"local service area" means the area in which a local service tax is imposed;

"local service tax" means a tax imposed under section 216 [*local service taxes*];

"minister responsible" means the minister responsible in relation to the applicable matter;

"municipality" means, as applicable,

- (a) the corporation into which the residents of an area are incorporated as a municipality under Part 2 [*Incorporation of Municipalities*] of the *Local Government Act* or under any other Act, or
- (b) the geographic area of the municipal corporation,

but does not include the City of Vancouver unless otherwise provided;

"net taxable value", in relation to land or improvements or both, means

(3) In the case of property that is not available to the public for acquisition, notice under this section must include the following:

- (a) a description of the land or improvements;
- (b) the person or public authority who is to acquire the property under the proposed disposition;
- (c) the nature and, if applicable, the term of the proposed disposition;
- (d) the consideration to be received by the municipality for the disposition.

Exchange or other disposal of park land

27 (1) This section applies to land vested in a municipality under

- (a) section 29 [*subdivision park land*] of this Act,
- (b) section 936 (5) (a) [*park land in place of development cost charges*] of the *Local Government Act*, or
- (c) section 941 (14) [*park land in relation to subdivision*] of the *Local Government Act*.

(2) A council may, by bylaw adopted with the approval of the electors,

- (a) dispose of all or part of the land in exchange for other land suitable for a park or public square, or
- (b) dispose of the land, provided that the proceeds of the disposal are to be placed to the credit of a reserve fund under section 188 (2) (b) [*park land acquisition reserve fund*].

(3) Land taken in exchange by a municipality under this section is dedicated for the purpose of a park or public square and the title to it vests in the municipality.

(4) A transfer of land by a municipality under this section has effect free of any dedication to the public for the purpose of a park or a public square and section 30 (3) [*removal of park dedication*] does not apply.

Disposal of water systems, sewage systems and other utilities

28 (1) This section applies to works for one or more of the following:

- (a) the supply, treatment, conveyance, storage and distribution of water;
- (b) the collection, conveyance, treatment and disposal of sewage;

- (c) the supply and distribution of gas or electrical energy;
- (d) a transportation system;
- (e) a telephone system, closed circuit television system or television rebroadcasting system.

(2) A council has unrestricted authority to dispose of works referred to in subsection (1) if

- (a) the works are no longer required for the purpose described in subsection (1), or
- (b) the works are disposed of to another municipality in the same regional district or to the regional district.

(3) In the case of works referred to in subsection (1) (a) or (b) that are used by a municipality to provide a water or sewer service, the council may only dispose of the works if

- (a) an agreement under which the water or sewer service will continue for a period specified in the agreement is in effect, and
- (b) the intended disposition and agreement receives the assent of the electors.

(4) In the case of works other than those referred to in subsections (2) and (3), the council may only dispose of the works with the approval of the electors.

Municipal ownership of subdivision park land

29 (1) Land in a municipality that is dedicated to the public for the purpose of a park or a public square by a subdivision plan, explanatory plan or reference plan deposited in the land title office is vested in the municipality for that purpose.

(2) The vesting under subsection (1) is subject to the exceptions described in section 107 (1) (d) of the *Land Title Act* as if the vesting were under that section.

Reservation and dedication of municipal property

30 (1) A council may, by bylaw, reserve or dedicate for a particular municipal or other public purpose real property owned by the municipality.

(2) As a restriction, a bylaw under subsection (1) that reserves or dedicates property

- (a) as a park or public square, or
- (b) for purposes related to heritage or heritage conservation,

Division 2 — Approval of the Electors

Approval of the electors

- 84** If approval of the electors is required under this Act or the *Local Government Act* in relation to a proposed bylaw, agreement or other matter, that approval may be obtained either by
- (a) assent of the electors in accordance with section 85, or
 - (b) approval of the electors by alternative approval process in accordance with section 86.

Assent of the electors

- 85** (1) If assent of the electors is required or authorized under this Act or the *Local Government Act* in relation to a proposed bylaw, agreement or other matter, that assent is obtained only if a majority of the votes counted as valid are in favour of the bylaw or question.
- (2) Part 4 [*Other Voting*] of the *Local Government Act* applies to obtaining the assent of the electors.

Alternative approval process

- 86** (1) Approval of the electors by alternative approval process under this section is obtained if
- (a) notice of the approval process is published in accordance with subsection (2),
 - (b) through elector response forms established under subsection (3), electors are provided with an opportunity to indicate that council may not proceed with the bylaw, agreement or other matter unless it is approved by assent of the electors, and
 - (c) at the end of the time for receiving elector responses, as established under subsection (3), the number of elector responses received is less than 10% of the number of electors of the area to which the approval process applies.
- (2) Notice of an alternative approval process must be published in accordance with section 94 [*public notice*] and must include the following:
- (a) a general description of the proposed bylaw, agreement or other matter to which the approval process relates;

- (b) a description of the area to which the approval process applies;
- (c) the deadline for elector responses in relation to the approval process;
- (d) a statement that the council may proceed with the matter unless, by the deadline, at least 10% of the electors of the area indicate that the council must obtain the assent of the electors before proceeding;
- (e) a statement that
 - (i) elector responses must be given in the form established by the council,
 - (ii) elector response forms are available at the municipal hall, and
 - (iii) the only persons entitled to sign the forms are the electors of the area to which the approval process applies;
- (f) the number of elector responses required to prevent the council from proceeding without the assent of the electors, determined in accordance with subsection (3);
- (g) other information required by regulation to be included.

(3) For each alternative approval process, the council must

- (a) establish the deadline for receiving elector responses, which must be at least 30 days after the second publication of the notice under subsection (2),
- (b) establish elector response forms, which
 - (i) may be designed to allow for only a single elector response on each form or for multiple elector responses, and
 - (ii) must be available to the public at the municipal hall from the time of first publication until the deadline, and
- (c) make a fair determination of the total number of electors of the area to which the approval process applies.

(4) The council must make available to the public, on request, a report respecting the basis on which the determination under subsection (3) (c) was made.

(5) For the purposes of this section, the electors of the area to which an alternative approval process applies are the persons who would meet the qualifications referred to in section 161 (1) (a) [*who may vote at other*

voting] of the *Local Government Act* if assent of the electors were sought in respect of the matter.

(6) Elector responses may be made on an elector response form obtained under subsection (3) or on an accurate copy of the form.

(7) For an elector's response to be considered for the purposes of this section, the elector must

(a) sign an elector response form that includes

(i) the person's full name and residential address, and

(ii) if applicable, the address of the property in relation to which the person is entitled to register as a non-resident property elector, and

(b) submit the elector response form to the corporate officer before the deadline established for the alternative approval process.

(8) After the deadline for an alternative approval process has passed, the corporate officer must determine and certify, on the basis of the elector response forms received before that deadline, whether elector approval in accordance with this section has been obtained.

(9) A determination under subsection (8) is final and conclusive.

(10) A person must not sign more than one elector response form in relation to the same alternative approval process, and a person who is not an elector for the area of the approval process must not sign an elector response form.

Matters requiring approval or assent may be combined

87 (1) If two or more related matters require approval of the electors or assent of the electors, instead of seeking that approval or assent in relation to each matter, the council may seek the approval or assent in relation to the related matters as if they were a single matter.

(2) As a restriction, if any of the related matters referred to in subsection (1) requires the assent of the electors, approval of the electors under that subsection may only be obtained by assent of the electors.

Agreements requiring approval or assent

88 (1) If an agreement is in relation to a matter that requires approval of the electors or assent of the electors, the requirement also applies to an amendment to the agreement in relation to that matter.

TAB 4

ENERGY ACT
[Part to be proclaimed]

CHAPTER 108

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Interpretation

1. In this Act

- “certificate” means a certificate of public convenience and necessity granted by the commission;
- “commence business” means commence business at a place where the person commencing business has not theretofore been carrying on that business;
- “commission” means the British Columbia Energy Commission constituted under this Act;
- “compensation” means a rate, remuneration, gain or reward of any kind paid, payable, promised, demanded, received or expected, directly or indirectly, and includes a promise or undertaking by an energy utility to provide service as consideration for, or as part of, a proposal or contract to sell land;
- “costs” includes fees, counsel fees and expenses;
- “energy resources” includes natural gas and oil, and all other natural forms of petroleum and hydrocarbon, both gaseous and in liquid form, coal and all other natural bituminous fuels, electrical power and all means of generation of electrical power, and all means by which energy is, or may be, generated;
- “energy utility” means a person, including his lessee, trustee, receiver or liquidator, who owns or operates in the Province equipment or facilities for the production, generation, storage, transmission, sale, delivery or furnishing of gas, electricity, steam or any other agency for the production of light, heat, cold or power to or for the public or any corporation for compensation; but
- “energy utility” does not include a
- (a) municipality in respect of services furnished by the municipality within its own boundaries;
 - (b) person not otherwise an energy utility who furnishes the service or commodity only to himself, his employees or tenants, when the service or commodity is not resold to, or used by, others;
 - (c) person not otherwise an energy utility who is engaged in the petroleum industry as herein defined or in the wellhead production of oil, natural gas or other natural petroleum substances;
 - [(d) surplus energy producer;]
- “expenses” includes expenses of the commission;

Cancellation of franchises and permits

34. Where, after a hearing, the commission determines that an energy utility, holding a franchise, licence or permit has failed to exercise or has not continued to exercise or use the right and privilege granted by the franchise, licence or permit, the commission may cancel the franchise, licence or permit, or may suspend for a time the commission considers advisable the rights, or any of them, under the franchise, licence or permit. Where a franchise, licence or permit is cancelled, the utility shall cease to operate, and where a right under a franchise, licence or permit is suspended the energy utility shall cease to exercise the suspended right during the period of suspension.

1973-29-33.

Rates

35. (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 26;
- (c) where the energy 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 the rate fixed for each unit shall be that as is considered not to be unjust or unreasonable for that unit, without regard to the rates fixed for any other unit.

(2) Where the Lieutenant Governor in Council considers that the rate so determined by the commission is inequitable or contrary to the general public interest, he may direct that 2 or more classes of service be considered as one unit in fixing the rate.

(3) In fixing a rate under this Act or regulations, the commission may take into account a distinct or special area served by an energy utility with a view to ensuring, so far as the commission considers it advisable, that the rate applicable in each area is adequate to yield a fair and reasonable return on the appraised value of the plant or system of the energy utility used, or prudently and reasonably acquired, for the purpose of furnishing the service in that special area; but, where the commission takes a special area into account, it shall have regard to the special considerations applicable to an area that is sparsely settled or has other distinctive characteristics.

(4) For this section, the commission shall exclude from the appraised value of the property of the energy utility any franchise, licence, permit or concession obtained or held by the utility from a municipal or other public authority beyond the money, if any, paid to the municipality or public authority as consideration for that franchise, licence, permit or concession, together with necessary and reasonable expenses in procuring the franchise, licence, permit or concession.

1973-29-34.

Rate schedules to be filed

36. (1) An energy utility shall file with the commission, under the rules the commission may prescribe and within the time and in the form required by the

Order to extend service

57. On the complaint of a municipality that an energy utility doing business in the municipality fails to extend its service to a part of the municipality, and after any hearing the commission considers advisable, the commission may order extension by the energy utility of its service as the commission considers reasonable and proper. The order may, in the commission's discretion, impose terms for the extension, including the expenditure to be incurred for all necessary works, and may apportion the cost between the energy utility and the municipality.

1973-29-56.

Other orders to extend service

58. Where the commission, after a hearing, finds that in its opinion an extension by an energy utility of its existing service would furnish sufficient business to justify the construction and maintenance of the extension, and the financial condition of the energy utility reasonably warrants the capital expenditure required, the commission may order the utility to make the extension of its service believed reasonable and proper by the commission.

1973-29-57.

Use of municipal structures

59. Subject to the terms of an agreement between an energy utility and a municipality and of the franchise or rights of the energy utility, and after any hearing the commission considers advisable, the commission may, by order, prescribe the terms on which the energy utility may, for any purpose of its service, use a highway in the municipality, or a public bridge, viaduct or subway constructed or to be constructed by the municipality alone or jointly with another municipality, corporation or government.

1973-29-58.

Appraisal of energy utility property

60. (1) The commission may ascertain by appraisal the value of the property of an energy utility and may inquire into every fact which, in its judgment, has a bearing on that value, including the amount of money actually and reasonably expended in the undertaking to furnish service reasonably adequate to the requirements of the community served by the utility as that community exists at the time of the appraisal.

(2) In making its appraisal the commission shall have access to all records in the possession of a municipality or any ministry or board of the government.

(3) The commission, in making its appraisal under this section, may order that all or part of the costs and expenses of the commission in making the appraisal shall be paid by the energy utility. The commission may, by order, require the utility to pay an amount as the work of appraisal proceeds. The certificate of the chairman of the commission is conclusive evidence of the amounts so payable.

(4) Expenses approved by the commission in connection with an appraisal, including expenses incurred by the energy utility whose property is the subject of appraisal, shall be charged by the utility to the cost of operating the property as a current item of expense. The commission may, by order, authorize or require the utility to amortize this charge over a period of time and in the manner the commission prescribes.

1973-29-59; 1977-75-1.

TAB 5

["chartered bank", see "bank"]

["civil engineer", see "professional engineer"]

"commencement", with reference to an enactment, means the date on which the enactment comes into force;

"commercial paper" includes a bill of exchange, cheque, promissory note, negotiable instrument, conditional sale agreement, lien note, hire purchase agreement, chattel mortgage, bill of lading, bill of sale, warehouse receipt, guarantee, instrument of assignment, things in action and any document of title that passes ownership or possession and on which credit can be raised;

"consolidated revenue fund", "consolidated revenue" or "consolidated revenue fund of the Province" means the consolidated revenue fund of British Columbia;

"corporation" means an incorporated association, company, society, municipality or other incorporated body, where and however incorporated, and includes a corporation sole other than Her Majesty or the Lieutenant Governor;

"correctional centre" means a correctional centre under the *Correction Act*;

"county" means a county constituted and defined in the *County Boundary Act*;

"Court of Appeal" means the court continued by the *Court of Appeal Act*;

"credit union" means a credit union or extraprovincial credit union authorized to carry on business under the *Financial Institutions Act*;

"Criminal Code" means the *Criminal Code (Canada)*;

["Crown, the", see "Her Majesty"]

"deliver", with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person's mail box or receptacle at the person's residence or place of business;

"Deputy Provincial Secretary" includes the Deputy Provincial Secretary and Deputy Minister of Government Services;

"dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

"electoral district" means an electoral district referred to in section 18 of the *Constitution Act*;

"Executive Council" means the Executive Council appointed under the *Constitution Act*;

"Gazette" means The British Columbia Gazette published by the Queen's Printer of British Columbia;

"government" or **"government of British Columbia"** means Her Majesty in right of British Columbia;

"government agent" means a person appointed under the *Public Service Act* as a government agent;

"government of Canada" or **"Canada"** means Her Majesty in right of Canada or Canada, as the context requires;

"Governor", **"Governor of Canada"** or **"Governor General"** means the Governor General of Canada and includes the Administrator of Canada;

"Governor in Council" or **"Governor General in Council"** means the Governor General acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada;

"Great Seal" means the Great Seal of the Province;

"herein" used in a section or part of an enactment must be construed as referring to the whole enactment and not to that section or part only;

"Her Majesty", **"His Majesty"**, **"the Queen"**, **"the King"**, **"the Crown"** or **"the Sovereign"** means the Sovereign of the United Kingdom, Canada, and Her other realms and territories, and Head of the Commonwealth;

"holiday" includes

- (a) Sunday, Christmas Day, Good Friday and Easter Monday,
- (b) Canada Day, Victoria Day, British Columbia Day, Labour Day, Remembrance Day, Family Day and New Year's Day,
- (c) December 26, and
- (d) a day set by the Parliament of Canada or by the Legislature, or appointed by proclamation of the Governor General or the Lieutenant Governor, to be observed as a day of general prayer

TAB 6



This Act is Current to February 6, 2013

LAND TITLE ACT

[RSBC 1996] CHAPTER 250

Part 1 – Definitions, Interpretation and Application

Definitions

1 In this Act:

"absolute certificate of title" means a certificate of title issued on the registration of an absolute fee and includes such a certificate issued before October 31, 1979;

"approving officer" means, as applicable,

- (a) the municipal approving officer under section 77,
- (b) the regional district approving officer under section 77.1,
- (c) the islands trust approving officer under section 77.1,
- (d) the Provincial approving officer under section 77.2,
- (e) the Nisga'a approving officer under section 77.3;, or
- (f) the treaty first nation approving officer appointed under section 77.21;

"apt descriptive words" means a metes and bounds description and includes an abbreviated description;

"Board of Directors" means the board of directors of the Land Title and Survey Authority;

"book" includes a file, index and an electronic data bank;

"building scheme" means a scheme of development that comes into existence where defined land is laid out in parcels and intended to be

sold to different purchasers or leased or subleased to different lessees, each of whom enters into a restrictive covenant with the common vendor or lessor agreeing that his or her particular parcel is subject to certain restrictions as to use, the restrictive covenants constituting a special local law applicable to the defined land and the benefit and burden of the covenants passing to, as the case may be, the purchaser, lessee or sublessee of the parcel and his or her successors in title;

"Category A Lands" has the same meaning as in the Nisga'a Final Agreement;

"Category B Lands" has the same meaning as in the Nisga'a Final Agreement;

"charge" means an estate or interest in land less than the fee simple and includes

- (a) an estate or interest registered as a charge under section 179, and
- (b) an encumbrance;

"chief executive officer" means the chief executive officer of the Land Title and Survey Authority;

"designated highways official" means an employee of the Ministry of Transportation designated, by name or by title, by the minister responsible for that ministry as a designated highways official for the purposes of the applicable provision of this Act;

"director" means the Director of Land Titles appointed under section 9 and a registrar instructed under section 10 to perform the duties and exercise the powers of the director;

"distinguishing letter" includes a distinguishing number;

"duplicate indefeasible title" means a certificate issued under section 176 (1) or a duplicate certificate of indefeasible title issued before August 1, 1983;

"electronic" includes created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means;

"encumbrance" includes

- (a) a judgment, mortgage, lien, Crown debt or other claim to or on land created or given for any purpose, whether by the act of

the parties or any Act or law, and whether voluntary or involuntary,

(b) in respect of Nisga'a Lands, a judgment, mortgage, lien, debt owed to the Nisga'a Nation or a Nisga'a Village or other claim to or on Nisga'a Lands created or given for any purpose by any Nisga'a law, and whether voluntary or involuntary, and

(c) in respect of treaty lands, a judgment, mortgage, lien, debt owed to the treaty first nation or other claim to or on those treaty lands created or given for any purpose by a law of the treaty first nation, and whether voluntary or involuntary;

"endorse", "enter" or "note" means to store information in the records, including information respecting a cancellation;

"enduring power of attorney" means an enduring power of attorney made under Part 2 of the *Power of Attorney Act*;

"explanatory plan" means a plan that

(a) is not based on a survey but on existing descriptions, plans or records of the land title office, and

(b) is certified correct in accordance with the records of the land title office by a British Columbia land surveyor or by

(i) a person designated under section 121 (7) of the *Forest Act* for the purpose of that section, or

(ii) the minister charged with the administration of the *Transportation Act*;

"former Act" means the *Land Registry Act*, R.S.B.C. 1960, c. 208;

"highway" includes a public street, path, walkway, trail, lane, bridge, road, thoroughfare and any other public way;

"indefeasible title" means

(a) a certificate of indefeasible title issued by the registrar under this Act or the former Act, at any time before August 1, 1983, and

(b) that part of the information stored in the register respecting one title number, that is required under section 176 (2) to be contained in a duplicate indefeasible title;

"instrument" means

(a) a Crown grant or other transfer of Crown land, and

TAB 7



CHAPTER 47.

An Act to provide for the Regulation of
Public Utilities.

[Assented to 9th December, 1938.]

HIS MAJESTY, by and with the advice and consent of the
Legislative Assembly of the Province of British Columbia,
enacts as follows:—

Short Title.

1. This Act may be cited as the "Public Utilities Act."

Short title.

Interpretation.

2. In this Act:—

Interpretation.

- "Appraisal" means appraisal by the Commission:
 "Commission" means the Public Utilities Commission constituted under this Act:
 "Company" includes a public utility:
 "Corporation" includes municipal and other corporations, whether incorporated under a general or special Act of the Legislature or otherwise:
 "Costs" includes fees, counsel fees, and expenses:
 "Municipality" includes every municipal area known as a city, town, township, district, or village heretofore incorporated and subsisting as a municipality under any general or special Act of the Legislature, or that may hereafter be incorporated, and, unless inconsistent with the context, includes the Corporation and the Council of a municipality and the Corporation and Board of Commissioners of a village:
 "Municipal Council" means the Mayor and Aldermen or the Reeve and Councillors of a municipality, or the Chairman of the Board of Commissioners and the Commissioners of a village, and in the case of a municipality having a Board of Control includes the Con-

the Commission shall thereupon issue a certificate pursuant to section 12. Whenever a public utility is engaged or is about to engage in construction or operation without having secured a certificate of public convenience or necessity as required by the provisions of section 12, any interested person may file a complaint with the Commission. The Commission may, with or without notice, make an order requiring the public utility complained of to cease and desist from the construction or operation until the Commission makes and files its decision on said complaint or until the further order of the Commission. The Commission may, after a hearing, make such order and prescribe such terms and conditions in harmony with this Act as are just and reasonable.

14. Where, after a hearing, the Commission determines that a public utility holding a franchise, licence, or permit has failed to exercise or make use of, or has not continued to exercise or make use of, the rights and privileges granted the said public utility by the franchise, licence, or permit, the Commission may cancel the franchise, licence, or permit, or may suspend for such time as the Commission thinks fit the rights or any of the rights under the franchise, licence, or permit; and, where a franchise, licence, or permit is cancelled, the public utility shall cease to operate, and where any rights under a franchise, licence, or permit are suspended the public utility shall cease to operate in respect of the suspended rights during the period of suspension.

Cancellation of franchises and permits.

PART III.

RATES.

15. (1.) In fixing any rate:—

- (a.) The Commission shall consider all matters proper to be considered 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

Matters for consideration in fixing rates.

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:

- (d.) The Commission may, to such extent as it thinks proper, take into account distinct areas served by a public utility with a view to ensuring, so far as the Commission thinks it proper so to ensure, that the rates applicable in each area are adequate in that they yield a fair and reasonable return on the appraised value of the property of the public utility used, or prudently and reasonably acquired, for the purpose of furnishing the service in that area; but where the Commission takes special areas into account, it shall have such regard as it thinks proper to the special considerations applicable to an area that is sparsely settled or has other distinctive characteristics.

Matters to be excluded in determining appraised value of property.

(2.) For the purpose of this section, the Commission shall exclude from the appraised value of the property of the public utility any franchise, license, permit, or concession obtained or held by a public utility from or under a municipality or other public authority beyond the money (if any) paid to the municipality or other public authority as consideration for that franchise, licence, permit, or concession.

Schedules of rates to be filed with Commission.

16. Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, schedules showing all rates established by it and collected or enforced or to be collected or enforced.

Schedules to be open to public inspection.

17. Every public utility shall keep copies of such schedules open to public inspection under such rules and regulations as the Commission may prescribe.

Adherence to schedules.

18. No public utility shall without the consent of the Commission, directly or indirectly, by any device whatsoever, or in anywise charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered by the public utility than that prescribed in the sched-

Powers to prescribe terms governing use of municipal highway or bridge by public utility.

43. Subject to the terms of any agreement between any public utility and a municipality and of the franchise or rights of the company, and after such inquiry as the Commission may see fit to make, the Commission may by order prescribe the terms and conditions upon which the public utility may for any purpose of its service use any highway within the municipality, or any public bridge, viaduct, or subway constructed or to be constructed by the municipality, or by the municipality jointly with any other municipality, corporation, or Government.

Appraisal of property of public utility.

44. (1.) The Commission may by appraisal from time to time ascertain the value of the property of any public utility and may inquire into every fact which in its judgment has any bearing on that value, including the amount of money actually and reasonably expended in that undertaking, in order to furnish service reasonably adequate to the requirements of the community served by the company as that community exists at the time of the appraisal; and in making its appraisal or inquiry the Commission shall have access to all books, documents, and records in the possession of any department or board of the Government or the Province or any municipality.

Costs of appraisal.

(2.) The Commission in making its appraisal or inquiry under this section may order that all costs and expense of counsel, engineers, valutors, clerks, stenographers, and other assistants retained and employed by the Commission in and about the making of the appraisal and inquiry shall be paid by the public utility whose property is the subject of the appraisal and inquiry. Amounts chargeable under this subsection may, by order of the Commission, be made payable as the work of appraisal proceeds, and the certificate of the Chairman of the Commission shall be conclusive evidence of the amounts so payable. All expenses in connection with any appraisal or inquiry under this section, including all expenses incurred by the company whose property is the subject of appraisal, shall be charged by the company to the cost of operating the property as a current item of expense, but the Commission may by order authorize or require the public utility to amortize this charge over such period and in such manner as the Commission may prescribe.

Power to order keeping of depreciation account and to fix rates of depreciation.

45. (1.) Whenever the Commission, after inquiry, considers that it is necessary and reasonable that a depreciation account should be carried by a public utility, the Commission may by order require the company to keep an adequate depreciation account in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission shall from time to time ascertain and by order, after inquiry, fix proper and adequate rates of depreciation of the property of

conditions as it may designate, after such public utility has obtained the contemplated consent, franchise, licence, permit, vote, or other authority."

9. Section 15 of said chapter 47 is amended by striking out clause (a) of subsection (1), and substituting therefor the following:— Amends s. 15.

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

10. Section 19 of said chapter 47 is amended by inserting after the word "collected," in the second line, the words "or any rates charged or attempted to be charged." Amends s. 19.

11. (1.) Section 21 of said chapter 47 is amended by inserting after the word "stocks," in the first line of subsection (1), the words "or shares, or any." Amends s. 21.

(2.) Section 21 of said chapter 47 is further amended by adding thereto the following as subsection (3):—

"(3.) A municipality shall not be deemed to be a public utility within the meaning of this section."

12. Section 31 of said chapter 47 is amended by striking out the words "line of transportation by motor-vehicle of property or passengers" in the second and third lines. Amends s. 31.

13. Section 44 of said chapter 47 is amended by inserting after the word "all," in the second line of subsection (2), the words "or any part of the." Amends s. 44.

14. Section 59 of said chapter 47 is amended by striking out the words "or any Commissioner" in the second line of clause (b) of subsection (1). Amends s. 59.

15. Section 72 of said chapter 47 is amended by inserting the words "members or" after the word "its," in the third line, and the words "member or" after the word "any," in the fourth line of subsection (1); and by inserting the words "member or" before the word "officer," in the first line of subsection (2). Amends s. 72.

16. Section 85 of said chapter 47 is amended by striking out subsection (1), and substituting therefor the following:— Amends s. 85.

"(1.) Every order and regulation made by the Commission shall come into operation immediately unless the Commission in its discretion otherwise provides."

17. Section 87 of said chapter 47 is repealed, and the following is substituted therefor:— Re-enacts s. 87.

Amends s. 21.

5. Section 21 of said chapter 47 is amended by inserting after the word "shall," in the first line of subsection (1), the words "except as provided in subsection (4)"; and by adding the following as subsection (4):—

"(4.) In the case of any issue of bonds or debentures by a public utility made after the coming into force of this Act but before the appointment of the Commission, the provision in subsection (1) prohibiting the issue before approval of the Commission shall, if the approval of the Commission is subsequently obtained, not apply thereto; and such subsequent approval, whether given before or after the passing of the amending Act by which this subsection is inserted in this Act, shall act retroactively and be deemed to have been given prior to the issue for all purposes of subsection (1)."

Amends s. 40.

6. Section 40 of said chapter 47 is amended by inserting after the word "unable," in the sixth line, the words "without expenditures that the Commission considers unreasonable."

Amends s. 44.

7. Section 44 of said chapter 47 is amended by inserting after the word "expenses," in the tenth line of subsection (2), the words "approved by the Commission."

Amends s. 45.

8. Section 45 of said chapter 47 is amended by striking out subsection (2), and substituting therefor the following:—

"(2.) Every public utility shall conform its depreciation accounts to the rates fixed by the Commission and, if so ordered by the Commission, shall, out of earnings, set aside all moneys required and carry them in a depreciation fund. Such depreciation fund shall not, without the consent of the Commission, be expended otherwise than for replacements, improvements, new constructions, extensions, or additions to the property of the company."

Amends s. 85.

9. Section 85 of said chapter 47 is amended by adding to subsection (1) the words "or unless other provision is made in this Act."

VICTORIA, B.C.:

Printed by CHARLES F. BANFIELD, Printer to the King's Most Excellent Majesty.
1940.

TAB 8



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IMPORTANT INFORMATION

This Act is Current to February 6, 2013

UTILITIES COMMISSION ACT

[RSBC 1996] CHAPTER 473

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Definitions

1 In this Act:

"appraisal" means appraisal by the commission;

"authority" means the British Columbia Hydro and Power Authority;

"British Columbia's energy objectives" has the same meaning as in section 1 (1) of the *Clean Energy Act*;

"commission" means the British Columbia Utilities Commission continued under this Act;

"compensation" means a rate, remuneration, gain or reward of any kind paid, payable, promised, demanded, received or expected,

directly or indirectly, and includes a promise or undertaking by a public utility to provide service as consideration for, or as part of, a proposal or contract to dispose of land or any interest in it;

"costs" includes fees, counsel fees and expenses;

"demand-side measure" has the same meaning as in section 1 (1) of the *Clean Energy Act*;

"distribution equipment" means posts, pipes, wires, transmission mains, distribution mains and other apparatus of a public utility used to supply service to the utility customers;

"expenses" includes expenses of the commission;

(a) to encourage public utilities to reduce greenhouse gas emissions;

(b) to encourage public utilities to take demand-side measures;

(c) to encourage public utilities to produce, generate and acquire electricity from clean or renewable sources;

(d) to encourage public utilities to develop adequate energy transmission infrastructure and capacity in the time required to serve persons who receive or may receive service from the public utility;

(e) to encourage public utilities to use innovative energy technologies

(i) that facilitate electricity self-sufficiency or the fulfillment of their long-term transmission requirements, or

(ii) that support energy conservation or efficiency or the use of clean or renewable sources of energy;

(f) to encourage public utilities to take prescribed actions in support of any other goals prescribed by regulation;

"petroleum industry" includes the carrying on within British Columbia of any of the following industries or businesses:

(a) the distillation, refining or blending of petroleum;

(b) the manufacture, refining, preparation or blending of products obtained from petroleum;

(c) the storage of petroleum or petroleum products;

(d) the wholesale or retail distribution or sale of petroleum products;

(e) the retail distribution of liquefied or compressed natural gas;

"petroleum products" includes gasoline, naphtha, benzene, kerosene, lubricating oils, stove oil, fuel oil, furnace oil, paraffin, aviation fuels, liquid butane, liquid propane and other liquefied petroleum gas and all derivatives of petroleum and all products obtained from petroleum, whether or not blended with or added to other things;

"public hearing" means a hearing of which public notice is given, which is open to the public, and at which any person whom the commission determines to have an interest in the matter may be heard;

"public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

(a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or

(b) the conveyance or transmission of information, messages or communications by guided or unguided electromagnetic waves, including systems of cable, microwave, optical fibre or radiocommunications if that service is offered to the public for compensation,

but does not include

(c) a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries,

(d) a person not otherwise a public utility who provides the service or commodity only to the person or the person's employees or tenants, if the service or commodity is not resold to or used by others,

(e) a person not otherwise a public utility who is engaged in the petroleum industry or in the wellhead production of oil, natural gas or other natural petroleum substances,

(f) a person not otherwise a public utility who is engaged in the production of a geothermal resource, as defined in the *Geothermal Resources Act*, or

(g) a person, other than the authority, who enters into or is created by, under or in furtherance of an agreement designated under section 12 (9) of the *Hydro and Power Authority Act*, in respect of anything done, owned or operated under or in relation to that agreement;

"rate" includes

- (a) a general, individual or joint rate, fare, toll, charge, rental or other compensation of a public utility,
- (b) a rule, practice, measurement, classification or contract of a public utility or corporation relating to a rate, and
- (c) a schedule or tariff respecting a rate;

"service" includes

- (a) the use and accommodation provided by a public utility,
- (b) a product or commodity provided by a public utility, and
- (c) the plant, equipment, apparatus, appliances, property and facilities employed by or in connection with a public utility in providing service or a product or commodity for the purposes in which the public utility is engaged and for the use and accommodation of the public;

"tenant" does not include a lessee for a term of more than 5 years;

"value" or **"appraised value"** means the value determined by the commission.

Part 1 — Utilities Commission

Commission continued

2 (1) The British Columbia Utilities Commission is continued consisting of individuals appointed as follows by the Lieutenant Governor in Council after a merit based process:

- (a) one commissioner designated as the chair;
- (b) other commissioners appointed after consultation with the chair.

- (2) The Lieutenant Governor in Council, after consultation with the chair, may designate a commissioner appointed under subsection (1) (b) as a deputy chair.
- (3) The chair may appoint a deputy chair or commissioner to act as chair for any purpose specified in the appointment.
- (4) Sections 1 to 13, 15, 18 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 42, 44, 46.3, 48, 49, 54, 56, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the commission, and for that purpose a reference to a deputy chair in this Act is a reference to a vice chair under that Act.
- (4.1) Section 47 (2) of the *Administrative Tribunals Act* applies to the commission respecting an order for costs under sections 117 and 118 of this Act.
- (5) The chair is the chief executive officer of the commission and has supervision over and direction of the work and the staff of the commission.

Commission subject to direction

- 3** (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.
- (2) The commission must comply with a direction issued under subsection (1), despite
- (a) any other provision of
 - (i) this Act, except subsection (3) of this section, or
 - (ii) the regulations,
 - (a.1) any provision of the *Clean Energy Act* or the regulations under that Act, or
 - (b) any previous decision of the commission.
- (3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly
- (a) declare an order or decision of the commission to be of no force or effect, or
 - (b) require the commission to rescind an order or a decision.

Sittings and divisions

4 (1) The commission

- (a) must sit at the times and conduct its proceedings in a manner it considers convenient for the proper discharge and speedy dispatch of its duties under this Act
 - (b) [Repealed 2004-45-164.]
- (2) The chair may organize the commission into divisions.
- (3) The commissioners must sit
- (a) as the commission, or
 - (b) as a division of the commission.
- (4) If commissioners sit as a division
- (a) 2 or more divisions may sit at the same time,
 - (b) the division has all the jurisdiction of and may exercise and perform the powers and duties of the commission, and
 - (c) a decision or action of the division is a decision or action of the commission.
- (5) At a sitting of the commission or of a division of the commission, one commissioner is a quorum.
- (6) The chair may designate a commissioner to serve as chair at any sitting of the commission or a division of it.
- (7) If a proceeding is being held by the commission or by a division and a sitting commissioner is absent or unable to attend,
- (a) that commissioner is thereafter disqualified from continuing to sit on the proceeding, and
 - (b) despite subsection (5), the commissioner or commissioners remaining present and sitting must exercise and perform all the jurisdiction, powers and duties of the commission.
- (8) and (9) [Repealed 2003-46-2.]
- (10) In the case of a tie vote at a sitting of the commission or a division of the commission, the decision of the chair of the commission or the division governs.
- (11) If a division is comprised of one member and that member is unable for any reason to complete the member's duties, the chair of the commission, with the consent of all parties to the application, may organize a new division to continue to hear and determine the matter on terms agreed to by the parties, and the vacancy does not invalidate the proceeding.

Commission's duties**5** (0.1) [Repealed by 2010-22-61.]

(1) On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.

(2) If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.

(3) The commission may carry out a function or perform a duty delegated to it under an enactment of British Columbia or Canada.

(4)-(9) [Repealed 2010-22-61.]

Repealed**6** [Repealed 2004-45-165.]**Employees**

7 Despite the *Public Service Act*, the commission may employ a secretary and other officers and other employees it considers necessary and may determine their duties, conditions of employment and remuneration.

Technical consultants

8 The commission may appoint or engage persons having special or technical knowledge necessary to assist the commission in carrying out its functions.

Pensions

9 The Lieutenant Governor in Council may, by order, direct that the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act*, applies to commissioners, officers and other employees of the commission, but the commission may, alone or in cooperation with other corporations, departments, commissions or other agencies of the Crown, establish, support or participate in any one or more of

(a) a pension or superannuation plan, or

(b) a group insurance plan

for the benefit of commissioners, officers and other employees of the commission and their dependants.

Secretary's duties

10 (1) The secretary must

- (a) keep a record of the proceedings before the commission,
- (b) ensure that every rule, regulation and order of the commission is filed in the records of the commission,
- (c) have custody of all rules, regulations and orders made by the commission and all other records and documents of, or filed with, the commission, and
- (d) carry out the instructions and directions of the commission under this Act respecting the secretary's duties or office.

(2) On the application of a person who pays a prescribed fee, the secretary must deliver to the person a certified copy of any rule, regulation or order of the commission.

(3) In the absence of the secretary, the duties of the secretary under this Act may be performed by another person appointed by the commission.

(4) A rule, regulation and order of the commission must be signed by the chair, a deputy chair or an acting chair, and the original or a copy of it must be delivered to the secretary for filing.

Conflict of interest

11 (1) A commissioner or employee of the commission must not, directly or indirectly,

- (a) hold, acquire or have a beneficial interest in a share, stock, bond, debenture or other security of a corporation or other person subject to regulation under Part 3 of this Act,
- (b) have a significant beneficial interest in a device, appliance, machine, article, patent or patented process, or a part of it, that is required or used by a corporation or other person referred to in paragraph (a) for the purpose of its equipment or service, or
- (c) have a significant beneficial interest in a contract for the construction of works or the provision of a service for or by a corporation or other person referred to in paragraph (a).

(2) A commissioner or employee of the commission, in whom a beneficial interest referred to in subsection (1) is or becomes vested, must divest himself or herself of the beneficial interest within 3 months after appointment to the commission or acquisition of the property, as the case may be.

(3) The use or purchase for personal or domestic purposes, of gas, heat, light, power, electricity or petroleum products or service from a corporation or other person subject to regulation under this Act is not a contravention of this section, and does not disqualify a commissioner or employee from acting in any matter affecting that corporation or other person.

Obligation to keep information confidential

12 (1) Every commissioner and every officer and employee of the commission must keep secret all information coming to the person's knowledge during the course of the administration of this Act, except insofar as disclosure is necessary for the administration of this Act or insofar as the commission authorizes the person to release the information.

(2) A commissioner, officer or employee of the commission must not be required to testify or produce evidence in any proceeding, other than a criminal proceeding, about records or information obtained in the discharge of duties under this Act.

(3) Despite subsection (2), the Supreme Court may require the commission to produce the record of a proceeding that is the subject of an application for judicial review under the *Judicial Review Procedure Act*.

Annual report

13 (1) In each year, the commission must make a report to the Lieutenant Governor in Council for the preceding fiscal year, setting out briefly

(a) all applications and complaints to the commission under this Act and summaries of the commission's findings on them,

(b) other matters that the commission considers to be of public interest in connection with the discharge of its duties under this Act, and

(c) other information the Lieutenant Governor in Council directs.

(2) The report must be laid before the Legislative Assembly as soon as possible after it is submitted to the Lieutenant Governor in Council.

Part 2

Repealed

14-20 [Repealed 2003-46-5.]

Part 3 — Regulation of Public Utilities

Application of this Part

- 21** (1) This Part applies only to a public utility that is subject to the legislative authority of the Province.
- (2) The provision by a public utility of a class of service in respect of which the public utility is not subject to the legislative authority of the Province does not make this Part inapplicable to that public utility in respect of any other class of service.

Exemptions

- 22** (1) In this section:

"eligible person" means a person, or a class of persons, that

- (a) generates, produces, transmits, distributes or sells electricity,
- (b) for the purpose of heating or cooling any building, structure or equipment or for any industrial purpose, heats, cools or refrigerates water, air or any heating medium or coolant, using for that purpose equipment powered by a fuel, a geothermal resource or solar energy, or
- (c) enters into an energy supply contract, within the meaning of section 68, for the provision of electricity;

"minister" means the minister responsible for the administration of the *Hydro and Power Authority Act*.

- (2) The minister, by regulation, may
- (a) exempt from any or all of section 71 and the provisions of this Part
 - (i) an eligible person, or
 - (ii) an eligible person in respect of any equipment, facility, plant, project, activity, contract, service or system of the eligible person, and
 - (b) in respect of an exemption made under paragraph (a), impose any terms and conditions the minister considers to be in the public interest.
- (3) The minister, before making a regulation under subsection (2), may refer the matter to the commission for a review.

General supervision of public utilities

23 (1) The commission has general supervision of all public utilities and may make orders about

- (a) equipment,
- (b) appliances,
- (c) safety devices,
- (d) extension of works or systems,
- (e) filing of rate schedules,
- (f) reporting, and
- (g) other matters it considers necessary or advisable for
 - (i) the safety, convenience or service of the public, or
 - (ii) the proper carrying out of this Act or of a contract, charter or franchise involving use of public property or rights.

(2) Subject to this Act, the commission may make regulations requiring a public utility to conduct its operations in a way that does not unnecessarily interfere with, or cause unnecessary damage or inconvenience to, the public.

Commission must make examinations and inquiries

24 In its supervision of public utilities, the commission must make examinations and conduct inquiries necessary to keep itself informed about

- (a) the conduct of public utility business,
- (b) compliance by public utilities with this Act, regulations or any other law, and
- (c) any other matter in the commission's jurisdiction.

Commission may order improved service

25 If the commission, after a hearing held on its own motion or on complaint, finds that the service of a public utility is unreasonable, unsafe, inadequate or unreasonably discriminatory, the commission must

- (a) determine what is reasonable, safe, adequate and fair service, and
- (b) order the utility to provide it.

Commission may set standards

26 After a hearing held on the commission's own motion or on complaint, the commission may do one or more of the following:

- (a) determine and set just and reasonable standards, classifications, rules, practices or service to be used by a public utility;
- (b) determine and set adequate and reasonable standards for measuring quantity, quality, pressure, initial voltage or other conditions of supplying service;
- (c) prescribe reasonable regulations for examining, testing or measuring a service;
- (d) establish or approve reasonable standards for accuracy of meters and other measurement appliances;
- (e) provide for the examination and testing of appliances used to measure a service of a utility.

Joint use of facilities

27 (1) If the commission, after a hearing, finds that

- (a) public convenience and necessity require the use by a public utility of conduits, subways, poles, wires or other equipment belonging to another public utility, and
- (b) the use will not prevent the owner or other users from performing their duties or result in any substantial detriment to their service,

the commission may, if the utilities fail to agree on the use, conditions or compensation, make an order it considers reasonable, directing that the use or joint use of the conduits, subways, poles, wires or other equipment be allowed and prescribing conditions of and compensation for the use.

(2) If the commission, after a hearing, finds that the provision of adequate service by one public utility or the safety of the persons operating or using that service requires that wires or cables carrying electricity and run, placed, erected, maintained or used by another public utility be placed, constructed or equipped with safety devices, the commission may make an order it considers reasonable about the placing, construction or equipment.

(3) By the same or a later order, the commission may

- (a) direct that the cost of the placing, construction or equipment be at the expense of the public utility whose wire, cable or apparatus was most recently placed, or
- (b) in the discretion of the commission, apportion the cost between the utilities.

Utility must provide service if supply line near

- 28** (1) On being requested by the owner or occupier of the premises to do so, a public utility must supply its service to premises that are located within 200 metres of its supply line or any lesser distance that the commission prescribes suitable for that purpose.
- (2) Before supplying the service under subsection (1) or making a connection for the purpose, or as a condition of continuing to supply the service, the public utility may require the owner or occupier to give reasonable security for repayment of the costs of making the connection as set out in the filed schedule of rates.
- (2.1) If required to do so by regulation, the commission, in accordance with the prescribed requirements, must set a rate for the authority respecting the service provided under subsection (1).
- (2.2) A requirement prescribed for the purposes of subsection (2.1) applies despite
- (a) any other provision of this Act or any regulation under this Act, except for a regulation under section 3, or
 - (b) any previous decision of the commission.
- (3) After a hearing and for proper cause, the commission may relieve a public utility from the obligation to supply service under this Act on terms the commission considers proper and in the public interest.

Commission may order utility to provide service if supply line distant

- 29** On the application of a person whose premises are located more than 200 metres from a supply line suitable for that purpose, the commission may order a public utility that controls or operates the line
- (a) to supply, within the time the commission directs, the service required by that person, and
 - (b) to make extensions and install necessary equipment and apparatus on terms the commission directs, which terms may include payment of all or part of the cost by the applicant.

Commission may order extension of existing service

30 If the commission, after a hearing, determines that

(a) an extension of the existing services of a public utility, in a general area that the public utility may properly be considered responsible for developing, is feasible and required in the public interest, and

(b) the construction and maintenance of the extension will not necessitate a substantial increase in rates chargeable, or a decrease in services provided, by the utility elsewhere,

the commission may order the utility to make the extension on terms the commission directs, which may include payment of all or part of the cost by the persons affected.

Regulation of agreements

31 The commission may make rules governing conditions to be contained in agreements entered into by public utilities for their regulated services or for a class of regulated service.

Use of municipal thoroughfares

32 (1) This section applies if a public utility

(a) has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and

(b) cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use.

(2) On application and after any inquiry it considers advisable, the commission may, by order, allow the use of the street or other place by the public utility for that purpose and specify the manner and terms of use.

Dispensing with municipal consent

33 (1) This section applies if a public utility

(a) cannot agree with a municipality respecting placing its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse in a municipality, and

- (b) the public utility is otherwise unable, without expenditures that the commission considers unreasonable, to extend its system, line or apparatus from a place where it lawfully does business to another place where it is authorized to do business.
- (2) On application and after a hearing, for the purpose of that extension only and without unduly preventing the use of the street or other place by other persons, the commission may, by order,
- (a) allow the use of the street or other place by the public utility, despite any law or contract granting to another person exclusive rights, and
 - (b) specify the manner and terms of the use.

Order to extend service in municipality

- 34** (1) On the complaint of a municipality that a public utility doing business in the municipality fails to extend its service to a part of the municipality, and after any hearing the commission considers advisable, the commission may order the public utility to extend its service in a way that the commission considers reasonable and proper.
- (2) An order under subsection (1) may
- (a) in the commission's discretion, impose terms for the extension, including the expenditure to be incurred for all necessary works, and
 - (b) apportion the cost between the public utility, the municipality and consumers receiving service from the extension.

Other orders to extend service

- 35** If the commission, after a hearing, concludes that in its opinion an extension by a public utility of its existing service would provide sufficient business to justify the construction and maintenance of the extension, and the financial condition of the public utility reasonably warrants the capital expenditure required, the commission may order the utility to extend its service to the extent the commission considers reasonable and proper.

Use of municipal structures

- 36** Subject to any agreement between a public utility and a municipality and to the franchise or rights of the public utility, and after any hearing the commission considers advisable, the commission may, by order, specify the terms on which the public utility may use for any purpose of its service

- (a) a highway in the municipality, or
- (b) a public bridge, viaduct or subway constructed or to be constructed by the municipality alone or jointly with another municipality, corporation or government.

Supervisors and inspectors

37 (1) If the commission considers that a supervisor or inspector should be appointed to supervise or inspect, continuously or otherwise, the system, works, plant, equipment or service of a public utility with a view to establishing and carrying out measures for

- (a) the safety of the public and of the users of the utility's service, or
- (b) adequacy of service,

the commission may appoint a supervisor or inspector for that utility and may specify the person's duties.

(2) The commission may

- (a) set the salary and expenses of a supervisor or inspector appointed under subsection (1), and
- (b) order the amount set
 - (i) to be borne by the municipality in which the operations of the public utility are carried on or its service is provided, or
 - (ii) to be borne or apportioned in a way the commission considers equitable.

Public utility must provide service

38 A public utility must

- (a) provide, and
- (b) maintain its property and equipment in a condition to enable it to provide,

a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable.

No discrimination or delay in service

39 On reasonable notice, a public utility must provide suitable service without undue discrimination or undue delay to all persons who

- (a) apply for service,
- (b) are reasonably entitled to it, and
- (c) pay or agree to pay the rates established for that service under this Act.

Exemption for part of municipality

- 40** (1) On application, the commission may, by order, exempt a municipality from section 39 except in a defined area.
- (2) On application by any person and after notice to the municipality, the commission may enlarge or reduce an area defined under subsection (1).

No discontinuance without permission

- 41** A public utility that has been granted a certificate of public convenience and necessity or a franchise, or that has been deemed to have been granted a certificate of public convenience and necessity, and has begun any operation for which the certificate or franchise is necessary, or in respect of which the certificate is deemed to have been granted, must not cease the operation or a part of it without first obtaining the permission of the commission.

Duty to obey orders

- 42** A public utility must obey the lawful orders of the commission made under this Act for its business or service, and must do all things necessary to secure observance of those orders by its officers, agents and employees.

Duty to provide information

- 43** (1) A public utility must, for the purposes of this Act,
- (a) answer specifically all questions of the commission, and
 - (b) provide to the commission
 - (i) the information the commission requires, and
 - (ii) a report, submitted annually and in the manner the commission requires, regarding the demand-side measures taken by the public utility during the period addressed by the report, and the effectiveness of those measures.

(1.1) [Repealed 2010-22-64.]

(2) A public utility that receives from the commission any form of return must fully and correctly answer each question in the return and deliver it to the commission.

(3) On request by the commission, a public utility must deliver to the commission

(a) all profiles, contracts, reports of engineers, accounts and records in its possession or control relating in any way to its property or service or affecting its business, or verified copies of them, and

(b) complete inventories of the utility's property in the form the commission directs.

(4) On request by the commission, a public utility must file with the commission a statement in writing setting out the name, title of office, post office address and the authority, powers and duties of

(a) every member of the board of directors and the executive committee,

(b) every trustee, superintendent, chief or head of construction or operation, or of any department, branch, division or line of construction or operation, and

(c) other officers of the utility.

(5) The statement required under subsection (4) must be filed in a form that discloses the source and origin of each administrative act, rule, decision, order or other action of the utility.

Duty to keep records

44 (1) A public utility must have in British Columbia an office in which it must keep all accounts and records required by the commission to be kept in British Columbia.

(2) A public utility must not remove or permit to be removed from British Columbia an account or record required to be kept under subsection (1), except on conditions specified by the commission.

Long-term resource and conservation planning

44.1 (1) [Repealed 2010-22-65.]

(2) Subject to subsection (4), a public utility must file with the commission, in the form and at the times the commission requires, a long-term resource plan including all of the following:

- (a) an estimate of the demand for energy the public utility would expect to serve if the public utility does not take new demand-side measures during the period addressed by the plan;
 - (b) a plan of how the public utility intends to reduce the demand referred to in paragraph (a) by taking cost-effective demand-side measures;
 - (c) an estimate of the demand for energy that the public utility expects to serve after it has taken cost-effective demand-side measures;
 - (d) a description of the facilities that the public utility intends to construct or extend in order to serve the estimated demand referred to in paragraph (c);
 - (e) information regarding the energy purchases from other persons that the public utility intends to make in order to serve the estimated demand referred to in paragraph (c);
 - (f) an explanation of why the demand for energy to be served by the facilities referred to in paragraph (d) and the purchases referred to in paragraph (e) are not planned to be replaced by demand-side measures;
 - (g) any other information required by the commission.
- (3) The commission may exempt a public utility from the requirement to include in a long-term resource plan filed under subsection (2) any of the information referred to in paragraphs (a) to (f) of that subsection if the commission is satisfied that the information is not applicable with respect to the nature of the service provided by the public utility
- (4) [Repealed 2010-22-65.]
- (5) The commission may establish a process to review long-term resource plans filed under subsection (2).
- (6) After reviewing a long-term resource plan filed under subsection (2), the commission must
- (a) accept the plan, if the commission determines that carrying out the plan would be in the public interest, or
 - (b) reject the plan.
- (7) The commission may accept or reject, under subsection (6), a part of a public utility's plan, and, if the commission rejects a part of a plan,

- (a) the public utility may resubmit the part within a time specified by the commission, and
 - (b) the commission may accept or reject, under subsection (6), the part resubmitted under paragraph (a) of this subsection.
- (8) In determining under subsection (6) whether to accept a long-term resource plan, the commission must consider
- (a) the applicable of British Columbia's energy objectives,
 - (b) the extent to which the plan is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*,
 - (c) whether the plan shows that the public utility intends to pursue adequate, cost-effective demand-side measures, and
 - (d) the interests of persons in British Columbia who receive or may receive service from the public utility.
- (9) In accepting under subsection (6) a long-term resource plan, or part of a plan, the commission may do one or both of the following:
- (a) order that a proposed utility plant or system, or extension of either, referred to in the accepted plan or the part is exempt from the operation of section 45 (1);
 - (b) order that, despite section 75, a matter the commission considers to be adequately addressed in the accepted plan or the part is to be considered as conclusively determined for the purposes of any hearing or proceeding to be conducted by the commission under this Act, other than a hearing or proceeding for the purposes of section 99.

Expenditure schedule

- 44 . 2** (1) A public utility may file with the commission an expenditure schedule containing one or more of the following:
- (a) a statement of the expenditures on demand-side measures the public utility has made or anticipates making during the period addressed by the schedule;
 - (b) a statement of capital expenditures the public utility has made or anticipates making during the period addressed by the schedule;
 - (c) a statement of expenditures the public utility has made or anticipates making during the period addressed by the schedule to acquire energy from other persons.

(2) The commission may not consent under section 61 (2) to an amendment to or a rescission of a schedule filed under section 61 (1) to the extent that the amendment or the rescission is for the purpose of recovering expenditures referred to in subsection (1) (a) of this section, unless

(a) the expenditure is the subject of a schedule filed and accepted under this section, or

(b) the amendment or rescission is for the purpose of setting an interim rate.

(3) After reviewing an expenditure schedule submitted under subsection (1), the commission, subject to subsections (5), (5.1) and (6), must

(a) accept the schedule, if the commission considers that making the expenditures referred to in the schedule would be in the public interest, or

(b) reject the schedule.

(4) The commission may accept or reject, under subsection (3), a part of a schedule.

(5) In considering whether to accept an expenditure schedule filed by a public utility other than the authority, the commission must consider

(a) the applicable of British Columbia's energy objectives,

(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,

(c) the extent to which the schedule is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*,

(d) if the schedule includes expenditures on demand-side measures, whether the demand-side measures are cost-effective within the meaning prescribed by regulation, if any, and

(e) the interests of persons in British Columbia who receive or may receive service from the public utility.

(5.1) In considering whether to accept an expenditure schedule filed by the authority, the commission, in addition to considering the interests of persons in British Columbia who receive or may receive service from the authority, must consider and be guided by

(a) British Columbia's energy objectives,

- (b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act*,
 - (c) the extent to which the schedule is consistent with the requirements under section 19 of the *Clean Energy Act*, and
 - (d) if the schedule includes expenditures on demand-side measures, the extent to which the demand-side measures are cost-effective within the meaning prescribed by regulation, if any.
- (6) If the commission considers that an expenditure in an expenditure schedule was determined to be in the public interest in the course of determining that a long-term resource plan was in the public interest under section 44.1 (6),
- (a) subsection (5) of this section does not apply with respect to that expenditure, and
 - (b) the commission must accept under subsection (3) the expenditure in the expenditure schedule.

Certificate of public convenience and necessity

- 45** (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.
- (2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it
- (a) to operate the plant or system, and
 - (b) subject to subsection (5), to construct and operate extensions to the plant or system.
- (3) Nothing in subsection (2) authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.
- (4) The commission may, by regulation, exclude utility plant or categories of utility plant from the operation of subsection (1).
- (5) If it appears to the commission that a public utility should, before constructing or operating an extension to a utility plant or system, apply for a separate certificate of public convenience and necessity, the commission may, not later than 30 days after construction of the

extension is begun, order that subsection (2) does not apply in respect of the construction or operation of the extension.

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

(6.1) and (6.2) [Repealed 2008-13-8.]

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity,
and

(b) may impose conditions about

(i) the duration and termination of the privilege,
concession or franchise, or

(ii) construction, equipment, maintenance, rates or
service,

as the public convenience and interest reasonably require.

Procedure on application

46 (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

(2) The commission has a discretion whether or not to hold any hearing on the application.

(3) Subject to subsections (3.1) to (3.3), the commission may, by order, issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

(3.1) In deciding whether to issue a certificate under subsection (3) applied for by a public utility other than the authority, the commission must consider

- (a) the applicable of British Columbia's energy objectives,
- (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and
- (c) the extent to which the application for the certificate is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*,

(3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

(3.3) In deciding whether to issue a certificate under subsection (3) to the authority, the commission, in addition to considering the interests of persons in British Columbia who receive or may receive service from the authority, must consider and be guided by

- (a) British Columbia's energy objectives,
- (b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act*, and
- (c) the extent to which the application for the certificate is consistent with the requirements under section 19 of the *Clean Energy Act*.

(4) If a public utility desires to exercise a right or privilege under a consent, franchise, licence, permit, vote or other authority that it proposes to obtain but that has not, at the date of the application, been granted to it, the public utility may apply to the commission for an order preliminary to the issue of the certificate.

(5) On application under subsection (4), the commission may make an order declaring that it will, on application, under rules it specifies, issue the desired certificate, on the terms it designates in the order, after the public utility has obtained the proposed consent, franchise, licence, permit, vote or other authority.

(6) On evidence satisfactory to the commission that the consent, franchise, licence, permit, vote or other authority has been secured, the commission must issue a certificate under section 45.

(7) The commission may, by order, amend a certificate previously issued, or issue a new certificate, for the purpose of renewing, extending or consolidating a certificate previously issued.

(8) A public utility to which a certificate is, or has been, issued, or to which an exemption is, or has been, granted under section 45 (4), is authorized, subject to this Act, to construct, maintain and operate the plant, system or extension authorized in the certificate or exemption.

Order to cease work

47 (1) If a public utility

(a) is engaged, or is about to engage, in the construction or operation of a plant or system, and

(b) has not secured or has not been exempted from the requirement for, or is not deemed to have received a certificate of public convenience and necessity required under this Act,

any interested person may file a complaint with the commission.

(2) The commission may, with or without notice, make an order requiring the public utility complained of to cease the construction or operation until the commission makes and files its decision on the complaint, or until further order of the commission.

(3) The commission may, after a hearing, make the order and specify the terms under this Act that it considers advisable.

(4) If the commission considers it necessary to determine whether a person is engaged or is about to engage in construction or operation of any plant or system, the commission may request that person to provide information required by it and to answer specifically all questions of the commission, and the person must comply.

Cancellation or suspension of franchises and permits

48 (1) If the commission, after a hearing, determines that a public utility holding a franchise, licence or permit has failed to exercise or has not continued to exercise or use the right and privilege granted by the franchise, licence or permit, the commission may

(a) cancel the franchise, licence or permit, or

(b) suspend for a time the commission considers advisable the rights, or any of them, under the franchise, licence or permit.

(2) If a franchise, licence or permit is cancelled, the utility must cease to operate.

(3) If a right under a franchise, licence or permit is suspended, the utility must cease to exercise the suspended right during the period of suspension.

Accounts and reports

49 The commission may, by order, require every public utility to do one or more of the following:

- (a) keep the records and accounts of the conduct of the utility's business that the commission may specify, and for public utilities of the same class, adopt a uniform system of accounting specified by the commission;
- (b) provide, at the times and in the form and manner the commission specifies, a detailed report of finances and operations, verified as specified;
- (c) file with the commission, at the times and in the form and manner the commission specifies, a report of every accident occurring to or on the plant, equipment or other property of the utility, if the accident is of such nature as to endanger the safety, health or property of any person;
- (d) obtain from a board, tribunal, municipal or other body or official having jurisdiction or authority, permission, if necessary, to undertake or carry on a work or service ordered by the commission to be undertaken or carried on that is contingent on the permission.

Commission approval of issue of securities

50 (1) In this section, "**security**" means any share of any class of shares of a public utility or any bond, debenture, note or other obligation of a public utility whether secured or unsecured.

(2) Except in the case of a security evidencing indebtedness payable less than one year from its date, a public utility must not issue a security without first obtaining approval of the commission under this section and, if section 54 applies, under that section.

(3) Without first obtaining the commission's approval, a public utility must not,

- (a) in respect of a security that it has issued,
 - (i) increase a fixed dividend or fixed interest rate,
 - (ii) alter a maturity date for the issue,

- (ii) restrict the utility's right to redeem the issue,
- (iv) increase the premium to be paid on redemption, or
- (v) make a material alteration in the characteristics of the security, or

(b) purchase, redeem or otherwise acquire shares of any class of the utility except in accordance with any special rights or restrictions attached to them.

(4) Subsections (2) and (3) do not apply to the issue of shares under a genuine employee share purchase plan or genuine employee share option plan that has been filed with the commission.

(5) Without first obtaining the commission's approval, a public utility must not guarantee the payment of all or part of a loan or all or part of the interest on a loan made to another person.

(6) A public utility is not liable under a guarantee given by it after June 29, 1988, in contravention of subsection (5) or of a condition of approval imposed under subsection (7).

(7) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in the public interest.

(8) A municipality is not a utility for the purpose of this section.

Restraint on capitalization

51 A public utility must not do any of the following:

- (a) capitalize a franchise or right to be a corporation;
- (b) capitalize a franchise, licence, permit or concession in excess of the amount that, exclusive of tax or annual charge, is paid to the government, a municipality or other public authority as consideration for the franchise, licence, permit or concession;
- (c) issue a security or evidence of indebtedness against a contract for consolidation, amalgamation, merger or lease.

Restraint on disposition

52 (1) Except for a disposition of its property in the ordinary course of business, a public utility must not, without first obtaining the commission's approval,

- (a) dispose of or encumber the whole or a part of its property, franchises, licences, permits, concessions, privileges or rights, or
 - (b) by any means, direct or indirect, merge, amalgamate or consolidate in whole or in part its property, franchises, licences, permits, concessions, privileges or rights with those of another person.
- (2) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in the public interest.

Consolidation, amalgamation and merger

- 53** (1) A public utility must not consolidate, amalgamate or merge with another person
- (a) unless the Lieutenant Governor in Council
 - (i) has first received from the commission a report under this section including an opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, and
 - (ii) has, by order, consented to the consolidation, amalgamation or merger, and
 - (b) except in accordance with an order made under paragraph (a).
- (2) The Lieutenant Governor in Council may, in an order under subsection (1) (a), include conditions and requirements that the Lieutenant Governor in Council considers necessary or advisable.
- (3) An application for consent of the Lieutenant Governor in Council under subsection (1) must be made to the commission by the public utility.
- (4) The commission must inquire into the application and may for that purpose hold a hearing.
- (5) On conclusion of its inquiry, the commission must,
- (a) if it is of the opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, submit its report and findings to the Lieutenant Governor in Council, or
 - (b) dismiss the application.

(6) If a public utility gives notice to its shareholders of a meeting of shareholders in connection with a consolidation, amalgamation or merger, it must

- (a) set out in the notice the provisions of this section, and
- (b) file a copy of the notice with the commission at the time of mailing to the shareholders.

Reviewable interests

54 (1) In this section:

"child" includes a child in respect of whom a person referred to in the definition of "spouse" stands in the place of a parent;

"offeree" means a person to whom a take over bid is made;

"offeror" means a person, other than an agent, who makes a take over bid and includes 2 or more persons

- (a) whose bids are made jointly or in concert, or
- (b) who intend to exercise jointly or in concert any voting rights attaching to the shares for which a take over bid is made;

"spouse" means a person who

- (a) is married to another person, or
- (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years;

"take over bid" has the same meaning as in section 92 of the *Securities Act*;

"voting share" means a share that has, or may under any special rights or restrictions attached to the share have, the right to vote for the election of directors, and for this purpose **"share"** includes

- (a) a security convertible into such a share, and
- (b) options and rights to acquire such a share or such a convertible security.

(2) For the purposes of this section, persons are associates if any of the following apply:

- (a) one of the persons is a corporation

- (i) of which more than 10% of the shares outstanding of any class of the corporation are beneficially owned or controlled, directly or indirectly, by the other person, or
 - (ii) of which the other is a director or officer;
 - (b) each of the persons is a corporation and
 - (i) more than 10% of the shares outstanding of any class of shares of one are beneficially owned or controlled, directly or indirectly, by the other, or
 - (ii) more than 10% of the shares outstanding of any class of shares of each are beneficially owned or controlled, directly or indirectly, by the same person;
 - (c) they are partners or one is a partnership of which the other is a partner;
 - (d) one is a trust in which the other has a substantial beneficial interest or for which the other serves as trustee or in a similar capacity;
 - (e) they are obligated to act in concert in exercising a voting right in respect of shares of the utility;
 - (f) one is the spouse or child of the other;
 - (g) one is a relative of the other or of the other's spouse and has the same home as the other.
- (3) For the purpose of subsection (2), if a person has more than one associate, those associates are associates of each other.
- (4) For the purpose of this section, a person has a reviewable interest in a public utility if
- (a) the person owns or controls, or
 - (b) the person and the person's associates own or control,
- in the aggregate more than 20% of the voting shares outstanding of any class of shares of the utility.
- (5) A public utility must not, without the approval of the commission,
- (a) issue, sell, purchase or register on its books a transfer of shares in the capital of the utility or create, or
 - (b) attach to any shares, whether issued or unissued, any special rights or restrictions,
- if the issue, sale, purchase or registration or the creation or attachment of the special rights or restrictions would

- (c) cause any person to have a reviewable interest,
- (d) increase the percentage of voting shares owned by a person who has a reviewable interest,
- (e) be a registration of a transfer of shares, the acquisition of which was contrary to subsection (7) or (8), or
- (f) increase the voting rights attached to any shares owned by a person who has a reviewable interest.

(6) Failure of a public utility to comply with subsection (5) does not give rise to an offence if the public utility acts in the genuine belief based on an enquiry made with reasonable care, that the issue, sale, purchase or registration, or the creation or attachment of the special rights or restrictions, would not have the effects referred to in subsection (5) (c) to (f).

(7) A person must not acquire or acquire control of such numbers of any class of shares of a public utility as

- (a) in themselves, or
- (b) together with shares already owned or controlled by the person and the person's associates,

cause the person to have a reviewable interest in a public utility unless the person has obtained the commission's approval.

(8) Except if the acquisition or acquisition of control does not increase the percentage of voting shares held, owned or controlled by the person or by the person and the person's associates, a person having a reviewable interest in a public utility and any associate of that person must not acquire or acquire control of any voting shares in the public utility unless the person or associate has obtained the commission's approval.

(9) The commission may give its approval under this section subject to conditions and requirements it considers necessary or desirable in the public interest, but the commission must not give its approval under this section unless it considers that the public utility and the users of the service of the public utility will not be detrimentally affected.

(10) If the commission determines that there has been a contravention of subsection (5), (7) or (8), the commission may, on notice to the public utility and after a hearing, make an order imposing on the public utility conditions and requirements respecting the management and operation of the utility.

(11) A proceeding must not be brought against the commission or the government by reason of the exercise by the commission of its powers under subsection (9) or (10).

(12) An offeror who makes a take over bid for shares of a public utility must

(a) file with the commission a copy of the take over bid and all supporting or supplementary material within 5 days after the date the material is first sent to offerees, and

(b) include in or attach to the take over bid a notice setting out the provisions of this section and stating the number, without duplication, and designation of any shares of the public utility held by the offeror and the offeror's associates.

(13) Nothing in subsection (12) relieves a person from any requirement under the *Securities Act*.

Appraisal of utility property

55 (1) The commission may

(a) ascertain by appraisal the value of the property of a public utility, and

(b) inquire into every fact that, in its judgment, has a bearing on that value, including the amount of money actually and reasonably expended in the undertaking to provide service reasonably adequate to the requirements of the community served by the utility as that community exists at the time of the appraisal.

(2) In making its appraisal, the commission must have access to all records in the possession of a municipality or any ministry or board of the government.

(3) In making its appraisal under this section, the commission may order

(a) that all or part of the costs and expenses of the commission in making the appraisal must be paid by the public utility, and

(b) that the utility pay an amount as the work of appraisal proceeds.

(4) The certificate of the chair of the commission is conclusive evidence of the amounts payable under subsection (3).

(5) Expenses approved by the commission in connection with an appraisal, including expenses incurred by the public utility whose property is

appraised, must be charged by the utility to the cost of operating the property as a current item of expense, and the commission may, by order, authorize or require the utility to amortize this charge over a period and in the manner the commission specifies.

Depreciation accounts and funds

- 56** (1) If the commission, after inquiry, considers that it is necessary and reasonable that a depreciation account should be carried by a public utility, the commission may, by order, require the utility to keep an adequate depreciation account under rules and forms of account specified by the commission.
- (2) The commission must determine and, by order after a hearing, set proper and adequate rates of depreciation.
- (3) The rates must be set so as to provide, in addition to the expense of maintenance, the amounts required to keep the public utility's property in a state of efficiency in accordance with technical and engineering progress in that industry of the utility.
- (4) A public utility must adjust its depreciation accounts to conform to the rates set by the commission and, if ordered by the commission, must set aside out of earnings whatever money is required and carry it in a depreciation fund.
- (5) Without the consent of the commission, the depreciation fund must not be expended other than for replacement, improvement, new construction, extension or addition to the property of the utility.

Reserve funds

- 57** (1) The commission may, by order, require a public utility to create and maintain a reserve fund for any purpose the commission considers proper, and may set the amount or rate to be charged each year in the accounts of the utility for the purpose of creating the reserve fund.
- (2) The commission may order that no reserve fund other than that created and maintained as directed by the commission may be created by a public utility.

Commission may order amendment of schedules

- 58** (1) The commission may,
- (a) on its own motion, or

(b) on complaint by a public utility or other interested person that the existing rates in effect and collected or any rates charged or attempted to be charged for service by a public utility are unjust, unreasonable, insufficient, unduly discriminatory or in contravention of this Act, the regulations or any other law,

after a hearing, determine the just, reasonable and sufficient rates to be observed and in force.

(2) If the commission makes a determination under subsection (1), it must, by order, set the rates.

(2.1) The commission must set rates for the authority in accordance with

(a) [Repealed RS1996-473-58 (2.3).]

(b) the prescribed factors and guidelines, if any.

(2.2) [Repealed RS1996-473-58 (2.3).]

(2.3) Subsections (2.1) (a) and (2.2) are repealed on March 31, 2010.

(2.4) Despite subsection (2.3), a requirement prescribed for the purposes of subsection (2.1) (a) that is in effect immediately before March 31, 2010, continues to apply after that date as though subsection (2.2) were still in force, unless the prescribed requirement is amended or repealed after that date.

(3) The public utility affected by an order under this section must

(a) amend its schedules in conformity with the order, and

(b) file amended schedules with the commission.

Rate rebalancing

58 . 1 (1) In this section, "**revenue-cost ratio**" means the amount determined by dividing the authority's revenues from a class of customers during a period of time by the authority's costs to serve that class of customers during the same period of time.

(2) This section applies despite

(a) any other provision of

(i) this Act, or

(ii) the regulations, except a regulation under section 3,
or

(b) any previous decision of the commission.

(3) The following decision and orders of the commission are of no force or effect to the extent that they require the authority to do anything for the purpose of changing revenue-cost ratios:

- (a) 2007 RDA Phase 1 Decision, issued October 26, 2007;
- (b) order G-111-07, issued September 7, 2007;
- (c) order G-130-07, issued October 26, 2007;
- (d) order G-10-08, issued January 21, 2008,

and the rates of the authority that applied immediately before this section comes into force continue to apply and are deemed to be just, reasonable and not unduly discriminatory.

(4) [Repealed RS1996-473-58.1 (5).]

(5) Subsection (4) is repealed on March 31, 2010.

(6) Nothing in subsection (3) prevents the commission from setting rates for the authority, but the commission, after March 31, 2010, may not set rates for the authority such that the revenue-cost ratio, expressed as a percentage, for any class of customers increases by more than 2 percentage points per year compared to the revenue-cost ratio for that class immediately before the increase.

Discrimination in rates

59 (1) A public utility must not make, demand or receive

- (a) an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia, or
- (b) a rate that otherwise contravenes this Act, the regulations, orders of the commission or any other law.

(2) A public utility must not

- (a) as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, or
- (b) extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description.

(3) The commission may, by regulation, declare the circumstances and conditions that are substantially similar for the purpose of subsection (2) (b).

(4) It is a question of fact, of which the commission is the sole judge,

(a) whether a rate is unjust or unreasonable,

(b) whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or

(c) whether a service is offered or provided under substantially similar circumstances and conditions.

(5) In this section, a rate is "unjust" or "unreasonable" if the rate is

(a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,

(b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or

(c) unjust and unreasonable for any other reason.

Setting of rates

60 (1) In setting a rate under this Act

(a) the commission must consider all matters that it considers proper and relevant affecting the rate,

(b) the commission must have due regard to the setting of a rate that

(i) is not unjust or unreasonable within the meaning of section 59,

(ii) provides to the public utility for which the rate is set a fair and reasonable return on any expenditure made by it to reduce energy demands, and

(iii) encourages public utilities to increase efficiency, reduce costs and enhance performance,

(b.1) the commission may use any mechanism, formula or other method of setting the rate that it considers advisable, and may order that the rate derived from such a mechanism, formula or other method is to remain in effect for a specified period, and

(c) if the public utility provides more than one class of service, the commission must

- (i) segregate the various kinds of service into distinct classes of service,
- (ii) in setting a rate to be charged for the particular service provided, consider each distinct class of service as a self contained unit, and
- (iii) set a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates set for any other unit.

(2) In setting a rate under this Act, the commission may take into account a distinct or special area served by a public utility with a view to ensuring, so far as the commission considers it advisable, that the rate applicable in each area is adequate to yield a fair and reasonable return on the appraised value of the plant or system of the public utility used, or prudently and reasonably acquired, for the purpose of providing the service in that special area.

(3) If the commission takes a special area into account under subsection (2), it must have regard to the special considerations applicable to an area that is sparsely settled or has other distinctive characteristics.

(4) For this section, the commission must exclude from the appraised value of the property of the public utility any franchise, licence, permit or concession obtained or held by the utility from a municipal or other public authority beyond the money, if any, paid to the municipality or public authority as consideration for that franchise, licence, permit or concession, together with necessary and reasonable expenses in procuring the franchise, licence, permit or concession.

Rate schedules to be filed with commission

61 (1) A public utility must file with the commission, under rules the commission specifies and within the time and in the form required by the commission, schedules showing all rates established by it and collected, charged or enforced or to be collected or enforced.

(2) A schedule filed under subsection (1) must not be rescinded or amended without the commission's consent.

(3) The rates in schedules as filed and as amended in accordance with this Act and the regulations are the only lawful, enforceable and collectable rates of the public utility filing them, and no other rate may be collected, charged or enforced.

(4) A public utility may file with the commission a new schedule of rates that the utility considers to be made necessary by a rise in the price, over which the utility has no effective control, required to be paid by the public utility for its gas supplies, other energy supplied to it, or expenses and taxes, and the new schedule may be put into effect by the public utility on receiving the approval of the commission.

(5) Within 60 days after the date it approves a new schedule under subsection (4), the commission may,

- (a) on complaint of a person whose interests are affected, or
- (b) on its own motion,

direct an inquiry into the new schedule of rates having regard to the setting of a rate that is not unjust or unreasonable.

(6) After an inquiry under subsection (5), the commission may

- (a) rescind or vary the increase and order a refund or customer credit by the utility of all or part of the money received by way of increase, or
- (b) confirm the increase or part of it.

Schedules must be available to public

62 A public utility must keep a copy of the schedules filed open to and available for public inspection under commission rules.

Schedules must be observed

63 A public utility must not, without the consent of the commission, directly or indirectly, in any way charge, demand, collect or receive from any person for a regulated service provided by it, or to be provided by it, compensation that is greater than, less than or other than that specified in the subsisting schedules of the utility applicable to that service and filed under this Act.

Orders respecting contracts

64 (1) If the commission, after a hearing, finds that under a contract entered into by a public utility a person receives a regulated service at rates that are unduly preferential or discriminatory, the commission may

- (a) declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or

(b) make any other order it considers advisable in the circumstances.

(2) If a contract is declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

Part 3.1

Repealed

64.01-64.04 [Repealed 2010-22-69.]

Part 4 – Carriers, Purchasers and Processors

Definition

64.1 In this Part, "**sufficient notice**" means notice in the manner and form, within the period, with the content and by the person required by the commission.

Common carrier

65 (1) In this section, "**common carrier**" means a person declared to be a common carrier by the commission under subsection (2) (a).

(2) On application by an interested person and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, the commission may

(a) issue an order, to be effective on a date determined by it, declaring a person who owns or operates a pipeline for the transportation of

(i) one or more of crude oil, natural gas and natural gas liquids, or

(ii) any other type of energy resource prescribed by the Lieutenant Governor in Council,

to be a common carrier with respect to the operation of the pipeline, and

(b) in the order establish the conditions under which the common carrier must accept and carry energy resources.

(3) On application by a person that uses or seeks to use facilities operated by a common carrier, the commission, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, may establish the conditions under which the common carrier must accept and carry crude oil, natural gas, natural gas liquids or prescribed energy resources referred to in subsection (2) (a).

(3.1) Without limiting subsection (2) (b) or (3), the commission may establish conditions with respect to a common carrier in relation to any of the following matters:

- (a) a toll that may be charged by the common carrier;
- (b) extensions, improvements or abandonment of service.

(3.2) The commission may order that section 43 applies with respect to a common carrier as though the common carrier were a public utility referred to in that section.

(4) A common carrier must not unreasonably discriminate

- (a) between itself and persons who apply to the common carrier to transport, in its pipeline, crude oil, natural gas, natural gas liquids or prescribed energy resources referred to in subsection (2) (a) (ii), or
- (b) among the persons who so apply.

(5) A common carrier must comply with the conditions in any order applicable to the common carrier that is made under this section.

(6) The commission may, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary an order made under this section.

(7) If an agreement between a common carrier and another person

- (a) is made before an order is made under this section, and
- (b) is inconsistent with the conditions established by the commission in an order made under this section,

the commission may, in the order or in a subsequent order, after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary the agreement between the parties to eliminate the inconsistency.

(8) Subject to subsection (9), if an agreement is varied under subsection (7), the common carrier and the commission are not liable for damages suffered as a result of that variation by the other party to the agreement.

(9) Subsection (8) does not apply to a common carrier referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Common purchaser

66 (1) In this section, "**common purchaser**" means a person declared to be a common purchaser by the commission under subsection (2).

(2) On application by an interested person and after a hearing, sufficient notice of which has been given to persons the commission believes may be affected, the commission may issue an order, to be effective on a date determined by it, declaring a person who purchases or otherwise acquires, from a pool designated by the commission, crude oil, natural gas or natural gas liquids to be a common purchaser of the crude oil, natural gas or natural gas liquids.

(3) On application by a person whose crude oil, natural gas or natural gas liquids is or will be purchased by a common purchaser, the commission, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, may establish the conditions under which the common purchaser must purchase crude oil, natural gas or natural gas liquid.

(4) A common purchaser must not unreasonably discriminate

(a) between itself and persons who apply for the services offered by the common purchaser, or

(b) among the persons who so apply.

(5) A common purchaser must comply with the conditions in any order applicable to the common purchaser that is made under this section.

(6) The commission may, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary an order made under this section.

(7) If an agreement between a common purchaser and another person

(a) is made before an order is made under this section, and

(b) is inconsistent with the conditions established by the commission in an order made under this section,

the commission may, in the order or in a subsequent order, after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary the agreement between the parties to eliminate the inconsistency.

(8) Subject to subsection (9), if an agreement is varied under subsection (7), the common purchaser and the commission are not liable for damages suffered as a result of that variation by the other party to the agreement.

(9) Subsection (8) does not apply to a common purchaser referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Common processor

67 (1) In this section, "**common processor**" means a person declared to be a common processor by the commission under subsection (2).

(2) On application by an interested person and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, the commission may issue an order, to be effective on a date determined by it, declaring the person that owns or operates a plant for processing natural gas to be a common processor of natural gas.

(3) On application by a person that uses or seeks to use facilities operated by a common processor, the commission, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, may establish the conditions under which the common processor must accept and process natural gas.

(4) A common processor must not unreasonably discriminate

(a) between itself and persons who apply for the services offered by the common processor, or

(b) among the persons who so apply.

(5) A common processor must comply with the conditions in any order applicable to the common processor made under this section.

(6) The commission may, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary an order made under this section.

(7) If an agreement between a common processor and another person

(a) is made before an order is made under this section, and

(b) is inconsistent with the conditions established by the commission in an order made under this section,

the commission may, in the order or a subsequent order, after a hearing, sufficient notice of which has been given to all persons the commission

believes may be affected, vary the agreement between the parties to eliminate the inconsistency.

(8) Subject to subsection (9), if an agreement is varied under subsection (7), the common processor and the commission are not liable for damages suffered as a result of that variation by the other party to the agreement.

(9) Subsection (8) does not apply to a common processor referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Part 5 — Electricity Transmission

Definitions

68 In this Part:

"electricity transmission facilities" means conductors, circuits, transmission towers, substations, switching stations, transformers and any other equipment or facilities that are necessary for the purpose of transmitting electricity;

"energy" means electricity or natural gas;

"energy supply contract" means a contract under which energy is sold by a seller to a public utility or another buyer, and includes an amendment of that contract, but does not include a contract in respect of which a schedule is approved under section 61 of this Act;

"gas marketer" means a person who holds a gas marketer licence issued under section 71.1 (6) (a);

"low-volume consumer" has the meaning ascribed to it under rules made by the commission under section 71.1 (10);

"natural gas" means any methane, propane or butane that is sold for consumption as a domestic, commercial or industrial fuel or as an industrial raw material;

"public utility" means a public utility to which Part 3 applies;

"seller" means a person who sells or trades in energy.

Repealed

69 [Repealed 2003-46-10.]

Use of electricity transmission facilities

- 70** (1) On application and after a hearing, the commission may make an order directing a public utility to allow a person, other than a public utility, to use the electricity transmission facilities of the public utility if the commission finds that
- (a) the person and the public utility have failed to agree on the use of the facilities or on the conditions or compensation for their use,
 - (b) the use of the facilities will not prevent the public utility or other users from performing their duties or result in any substantial detriment to their service, and
 - (c) the public interest requires the use of the facilities by the person.
- (2) An order under subsection (1) may contain terms and conditions the commission considers advisable, including terms and conditions respecting the rates payable to the public utility for the use of its electricity transmission facilities.
- (3) After a hearing, the commission may, by order, vary or rescind an order made under this section.
- (4) Any interested person may apply to the commission for an order under this section, and the application must contain the information the commission specifies.

Energy supply contracts

- 71** (1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must
- (a) file a copy of the contract with the commission under rules and within the time it specifies, and
 - (b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.
- (1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.
- (2) The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.

(2.1) In determining under subsection (2) whether an energy supply contract filed by a public utility other than the authority is in the public interest, the commission must consider

- (a) the applicable of British Columbia's energy objectives,
- (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,
- (c) the extent to which the energy supply contract is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*,
- (d) the interests of persons in British Columbia who receive or may receive service from the public utility,
- (e) the quantity of the energy to be supplied under the contract,
- (f) the availability of supplies of the energy referred to in paragraph (e),
- (g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and
- (h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).

(2.2) Subsection (2.1) (a) to (c) does not apply if the commission considers that the matters addressed in the energy supply contract filed under subsection (1) were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

(2.21) In determining under subsection (2) whether an energy supply contract filed by the authority is in the public interest, the commission, in addition to considering the interests of persons in British Columbia who receive or may receive service from the authority, must consider and be guided by

- (a) British Columbia's energy objectives,
- (b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act*,
- (c) the extent to which the energy supply contract is consistent with the requirements under section 19 of the *Clean Energy Act*,
- (d) the quantity of the energy to be supplied under the contract,

- (e) the availability of supplies of the energy referred to in paragraph (d),
 - (f) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (d), and
 - (g) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (d).
- (2.3) A public utility may submit to the commission a proposed energy supply contract setting out the terms and conditions of the contract and a process the public utility intends to use to acquire power from other persons in accordance with those terms and conditions.
- (2.4) If satisfied that it is in the public interest to do so, the commission, by order, may approve a proposed contract submitted under subsection (2.3) and a process referred to in that subsection.
- (2.5) In considering the public interest under subsection (2.4) with respect to a submission by a public utility other than the authority, the commission must consider
- (a) the applicable of British Columbia's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1,
 - (c) the extent to which the application for the proposed contract is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*, and
 - (d) the interests of persons in British Columbia who receive or may receive service from the public utility.
- (2.51) In considering the public interest under subsection (2.4) with respect to a submission by the authority, the commission, in addition to considering the interests of persons in British Columbia who receive or may receive service from the authority, must consider and be guided by
- (a) British Columbia's energy objectives,
 - (b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act*, and
 - (c) the extent to which the application for the proposed contract is consistent with the requirements under section 19 of the *Clean Energy Act*.

(2.6) If the commission issues an order under subsection (2.4), the commission may not issue an order under subsection (3) with respect to a contract

- (a) entered into exclusively on the terms and conditions, and
- (b) as a result of the process

referred to in subsection (2.3).

(3) If subsection (2) applies, the commission may

- (a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
- (b) make any other order it considers advisable in the circumstances.

(4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

(5) An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest.

Gas marketers

71.1 (1) A person must not perform a gas marketing activity within the meaning of subsection (2) unless

- (a) the person is a public utility and the public utility performs the gas marketing activity within any area in which it is authorized to provide service, or
- (b) the person holds a gas marketer licence issued to the person under subsection (6) (a).

(2) For the purposes of subsection (1), a person performs a gas marketing activity if the person

- (a) sells or offers to sell natural gas to a low-volume consumer,
- (b) acts as the agent or broker for a seller in a sale of natural gas to a low-volume consumer, or
- (c) acts or offers to act as the agent or broker of a low-volume consumer in a purchase of natural gas.

(3) A gas marketer must comply with the commission rules issued under subsection (10) and the terms and conditions, if any, attached to the gas marketer licence held by the gas marketer.

(4) A gas marketer must not carry on or offer to carry on business as a gas marketer in a name other than the name in which it is licensed unless authorized to do so in the licence.

(5) If a person is not in compliance with subsection (1), (3) or (4), the commission may do one or more of

(a) declare an energy supply contract between the person and a low-volume consumer unenforceable, either wholly or to the extent the commission considers proper, in which event the contract is enforceable to the extent specified, and

(b) if the person is a gas marketer,

(i) amend the terms and conditions of, or impose new terms and conditions on, the gas marketer licence, and

(ii) suspend or cancel the gas marketer licence.

(5.1) If the commission, under subsection (5) (a), declares an energy supply contract to be unenforceable, either wholly or in part, the commission may also order the person to pay to the low-volume consumer some or all of the money paid under the contract by the low-volume consumer.

(6) The commission may

(a) on application, issue a gas marketer licence to any person who is not a public utility,

(b) impose, in respect of any gas marketer licence issued by the commission, terms and conditions that the commission considers appropriate,

(c) amend any of the terms and conditions imposed in respect of a gas marketer licence, and

(d) suspend or cancel a gas marketer licence.

(7) The commission may require, as a condition of granting a gas marketer licence, that the gas marketer post security in a form, and in accordance with such terms and conditions, as the commission considers appropriate.

(8) The commission may order that some or all of the security posted by a gas marketer in accordance with a requirement imposed under

subsection (7) be paid out to those persons who the commission considers have been or may be affected by an act or omission of the gas marketer.

(9) Sections 42 and 43 apply to each gas marketer as if that gas marketer were a public utility.

(10) The commission may make the following rules:

- (a) defining "low-volume consumer";
- (b) respecting the process by which application may be made for a gas marketer licence and specifying the form and content of applications for that licence;
- (c) respecting the imposition of terms and conditions on gas marketer licences;
- (d) requiring an applicant for a gas marketer licence to obtain a bond, letter of credit or other specified security and requiring the filing with the commission of proof, satisfactory to the commission, of that security;
- (e) respecting the form and content of security that may be required under paragraph (d) and the person by whom and the terms on which it is to be held;
- (f) respecting the circumstances in which and the persons to whom disbursement of some or all of the security required under paragraph (d) is to be made.

Part 6 – Commission Jurisdiction

Jurisdiction of commission to deal with applications

72 (1) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, complaining that a person constructing, maintaining, operating or controlling a public utility service or charged with a duty or power relating to that service, has done, is doing or has failed to do anything required by this Act or another general or special Act, or by a regulation, order, bylaw or direction made under any of them.

(2) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, requesting the commission to

- (a) give a direction or approval which by law it may give, or

(b) approve, prohibit or require anything to which by any general or special Act, the commission's jurisdiction extends.

Mandatory and restraining orders

73 (1) The commission may order and require a person to do immediately or by a specified time and in the way ordered, so far as is not inconsistent with this Act, the regulations or another Act, anything that the person is or may be required or authorized to do under this Act or any other general or special Act and to which the commission's jurisdiction extends.

(2) The commission may forbid and restrain the doing or continuing of anything contrary to or which may be forbidden or restrained under any Act, general or special, to which the commission's jurisdiction extends.

Inspections

74 For the purposes of this Act, a person authorized in writing by the commission may

- (a) enter on and inspect property, and
- (a.1) inspect and make copies of records.
- (b) [Repealed 2012-27-33.]

Commission not bound by precedent

75 The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions.

Jurisdiction as to liquidators and receivers

76 (1) The fact that a liquidator, receiver, manager or other official of a public utility, or other person engaged in the petroleum industry, or a person seizing a public utility's property has been appointed by a court in British Columbia, or is acting under the authority of a court, does not prevent the exercise by the commission of any jurisdiction conferred by this Act.

(2) A liquidator, receiver, manager, official or person seizing must act in accordance with this Act and the orders and directions of the commission, whether the orders are general or particular.

(3) The liquidator or other person referred to in subsection (1), and any person acting under that person, must obey the orders of the commission, within its jurisdiction, and the commission may enforce its orders against the person even though the person is appointed by or acts under the authority of a court.

Power to extend time

77 If a work, act, matter or thing is, by order or decision of the commission, required to be performed or completed within a specified time, the commission may, if the circumstances of the case in its opinion so require, extend the time so specified

(a) on notice and hearing, or

(b) in its discretion, on application, without notice to any person.

Evidence

78 (1) [Repealed 2004-45-169.]

(2) An inquiry that the commission considers necessary may be made by a member or officer or by a person appointed by the commission to make the inquiry, and the commission may act on that person's report.

(3) Each member, officer and person appointed has, for the purpose of the inquiry, the powers referred to in section 74 of this Act and section 34 (3) and (4) of the *Administrative Tribunals Act*.

(4) If a person is appointed to inquire and report on a matter, the commission may order by whom, and in what proportion, the costs incurred must be paid, and may set the amount of the costs.

Findings of fact conclusive

79 The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

Commission not bound by judicial acts

80 In determining a question of fact, the commission is not bound by the finding or order of a court in a proceeding involving the determination of that fact, and the finding or order is, before the commission, evidence only.

Pending litigation

81 The fact that a suit, prosecution or other proceeding in a court involving questions of fact is pending does not deprive the commission of jurisdiction to hear and determine the same questions of fact.

Power to inquire without application

82 (1) The commission

(a) may, on its own motion, and

(b) must, on the request of the Lieutenant Governor in Council,

inquire into, hear and determine a matter that under this Act it may inquire into, hear or determine on application or complaint.

(2) For the purpose of subsection (1), the commission has the same powers as are vested in it by this Act in respect of an application or complaint.

Action on complaints

83 If a complaint is made to the commission, the commission has powers to determine whether a hearing or inquiry is to be had, and generally whether any action on its part is or is not to be taken.

General powers not limited

84 The enumeration in this Act of a specific commission power or authority does not exclude or limit other powers or authorities given to the commission.

Hearings to be held in certain cases

85 (1) Except in case of urgency, of which the commission is sole judge, the commission must not, without a hearing, make an order involving an outlay, loss or deprivation to a public utility.

(2) If an order is made in case of urgency without a hearing, on the application of a person interested, the commission must as soon as practicable hear and reconsider the matter and make any further order it considers advisable.

Public hearing

86 If this Act requires that a hearing be held, it must be a public hearing whenever, in the opinion of the commission or the Lieutenant Governor in Council, a public hearing is in the public interest.

Repealed

86.1 [Repealed 2004-45-170.]

When oral hearings not required

86.2 (1) Despite any other provision of this Act, in any circumstance in which, under this Act, a hearing may or must be held, the commission may conduct a written hearing.

(2) The commission may make rules respecting the circumstances in which and the process by which written hearings may be conducted and specifying the form and content of materials to be provided for written hearings.

Recitals not required in orders

87 In making an order, the commission is not required to recite or show on the face of the order the taking of any proceeding, the giving of any notice or the existence of any circumstance necessary to give the commission jurisdiction.

Application of orders

88 (1) In making an order, rule or regulation, the commission may make it apply to all cases, or to a particular case or class of cases, or to a particular person.

(2) The commission may exempt a person from the operation of an order, rule or regulation made under this Act for a time the commission considers advisable.

(3) The commission may, on conditions it considers advisable, with the advance approval of the Lieutenant Governor in Council, exempt a person, equipment or facilities from the application of all or any of the provisions of this Act or may limit or vary the application of this Act.

(4) The commission has no power under this section to make an order respecting a person, or a person in respect of a matter, who has been exempted under section 22.

Withdrawal of application

88.1 If an applicant withdraws all or part of an application or the parties advise the commission that they have reached a settlement of all or part of an application, the commission may order that the application or part of it is dismissed.

Partial relief

89 On an application under this Act, the commission may make an order granting the whole or part of the relief applied for or may grant further or other relief, as the commission considers advisable.

Commencement of orders

90 (1) In an order or regulation, the commission may direct that the order or regulation or part of it comes into operation

(a) at a future time,

(b) on the happening of an event specified in the order or regulation, or

(c) on the performance, to the satisfaction of the commission, by a person named by it of a term imposed by the order.

(2) The commission may, in the first instance, make an interim order, and reserve further direction for an adjourned hearing or further application.

Orders without notice

91 (1) If the special circumstance of a case so requires, the commission may, without notice, make an interim order authorizing, requiring or forbidding anything to be done that the commission is empowered to authorize, require or forbid on application, notice or hearing.

(2) The commission must not make an interim order under subsection (1) for a longer time than it considers necessary for a hearing and decision.

(3) A person interested may, before final decision, apply to modify or set aside an interim order made without notice.

Directions

92 If, in the exercise of a commission power under an Act, the commission directs that a structure, appliance, equipment or works be provided, constructed, reconstructed, removed, altered, installed, operated, used or maintained, the commission may, except as otherwise provided in the Act conferring the power, order

(a) by what person interested at or within what time,

(b) at whose cost and expense,

(c) on what terms including payment of compensation, and

(d) under what supervision,

the structure, appliance, equipment or works must be carried out.

Repealed

93-94 [Repealed 2004-45-170.]

Lien on land

95 (1) If the commission makes an order for payment of money, costs or a penalty, the commission may register a copy of the order certified by the commission's secretary in a land title office.

(2) On registration in a land title office, an order is a lien and charge on all the land of the person ordered to make the payment that is in the land title district in which the order is registered, to the same extent and with the same effect and realizable in the same way as a judgment of the Supreme Court under the *Court Order Enforcement Act*.

Substitute to carry out orders

96 (1) If a person defaults in doing anything directed by an order of the commission under this Act,

(a) the commission may authorize a person it considers suitable to do the thing, and

(b) the person authorized may do the thing authorized and may recover from the person in default the expense incurred in doing the thing, as money paid for and at the request of that person.

(2) The certificate of the commission of the amount expended is conclusive evidence of the amount of the expense.

Entry, seizure and management

97 (1) The commission may take the steps and employ the persons it considers necessary to enforce an order made by it, and, for that purpose, may forcibly or otherwise enter on, seize and take possession of the whole or part of the business and the property of a public utility affected by the order, together with the records, offices and facilities of the utility.

(2) The commission may, until the order has been enforced or until the Lieutenant Governor in Council otherwise orders, assume, take over and continue the management of the business and property of the utility in the interest of its shareholders, creditors and the public.

(3) While the commission continues to manage or direct the management of the utility, the commission may exercise, for the business and property, the powers, duties, rights and functions of the directors, officers or managers of the utility in all respects, including the employment and dismissal of officers or employees and the employment of others.

(4) On the commission taking possession of the business and property of the utility, each officer and employee of the utility must obey the lawful

orders and instructions of the commission for that business and property, and of any person placed by the commission in authority in the management of the utility or a department of its undertaking or service.

(5) On taking possession of the business and property of a public utility, the commission may determine, receive or pay out all money due to or owing by the utility, and give cheques and receipts for money to the same extent and to the same effect as the utility or its officers or employees could do.

(6) The costs incurred by the commission under this section are in the discretion of the commission, and the commission may order by whom and in what amount or proportion costs are to be paid.

Defaulting utility may be dissolved

98 (1) If a public utility incorporated under an Act of the Legislature fails to comply with a commission order, and the commission believes that no effective means exist to compel the utility to comply, the commission, in its discretion, may transmit to the Attorney General a certificate, signed by its chair and secretary, setting out the nature of the order and the default of the public utility.

(2) Ten days after publication in the Gazette of a notice of receipt of the certificate by the Attorney General, the Lieutenant Governor in Council may, by order, dissolve the public utility.

Part 7 – Decisions and Appeals

Reconsideration

99 The commission, on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation.

Requirement for hearing

100 If a hearing is held or required under this Act before a rule or regulation is made, the rule or regulation must not be altered, suspended or revoked without a hearing.

Appeal to Supreme Court or Court of Appeal

101 (1) An appeal lies from

- (a) a decision of the commission under section 109.1 or 109.2 to the Supreme Court, and
 - (b) any other decision or order of the commission to the Court of Appeal, with leave of a justice of that court.
- (2) The party appealing under subsection (1) (b) must give notice of the application for leave to appeal, stating the grounds of appeal, to the commission, to the Attorney General and to any party adverse in interest, at least 2 clear days before the hearing of the application.
- (3) If leave is granted, under subsection (1) (b) within 15 days from the granting, the appellant must give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.
- (4) The commission and the Attorney General may be heard on an appeal under subsection (1) (b).
- (4.1) The commission has full party status on an appeal under subsection (1) (a).
- (5) [Repealed 2012-27-36.]

Stay on appeal

- 102** (1) An appeal to the Court of Appeal does not of itself stay or suspend the operation of the decision, order, rule or regulation appealed from, but the Court of Appeal may grant a suspension, in whole or in part, until the appeal is decided, on the terms the court considers advisable.
- (2) The commission may, in its discretion, suspend the operation of its decision, order, rule or regulation from which an appeal is taken under section 101 (1) (b) until the decision of the Court of Appeal is given.
- (3) An appeal to the Supreme Court under section 101 (1) (a) operates as a stay of the decision under section 109.2 to impose an administrative penalty, unless the court orders otherwise.

Costs of appeal

- 103** (1) [Repealed 2012-27-38.]
- (2) Neither the commission nor an officer, employee or agent of the commission is liable for costs in respect of an application or appeal referred to in section 101.

Case stated by commission

- 104** (1) The commission may, on its own motion or on the application of a party who gives the security the commission directs, and must, on the request

of the Attorney General, state a case in writing for the opinion of the Court of Appeal on a question that, in the opinion of the commission or of the Attorney General, is a question of law.

(2) The Court of Appeal must hear and determine all questions of law arising on the stated case and must remit the matter to the commission with the court's opinion.

(3) [Repealed 2012-27-39.]

Jurisdiction of commission exclusive

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

(2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.

Part 8 – Offences and Penalties

Offences

106 (1) The following persons commit an offence:

(a) a person who fails or refuses to obey an order of the commission made under this Act;

(b) a person who does, causes or permits to be done an act, matter or thing contrary to this Act or omits to do an act, matter or thing required to be done by this Act;

(c) a public utility

(i) that fails or refuses to prepare and provide to the commission in the time, manner and form, and with the particulars and verification required under this Act, an information return, the answer to a question submitted by the commission or information required by the commission under this Act,

(ii) that willfully or negligently makes a return or provides information to the commission that is false in any particular,

(iii) that gives, or an officer of which gives, to an officer, agent, manager or employee of the utility a direction,

instruction or request to do or refrain from doing an act referred to in paragraph (d) (i) to (vii) and in respect of which the officer, agent, manager or employee is convicted under paragraph (d) (i) to (vii), or

(iv) an officer, agent, manager or employee of which is convicted of an offence under paragraph (d) (viii);

(d) an officer, agent, manager or employee of a public utility

(i) who fails or refuses to complete and provide to the commission a report or form of return required under this Act,

(ii) who fails or refuses to answer a question contained in a report or form of return required under this Act,

(iii) who willfully gives a false answer to a question contained in a report or form of return required under this Act,

(iv) who evades a question or gives an evasive answer to a question contained in a report or form of return required under this Act, if the person has the means to ascertain the facts,

(v) who, after proper demand under this Act, fails or refuses to exhibit to the commission or a person authorized by it an account, record or memorandum of the public utility that is in the person's possession or under the person's control,

(vi) who fails to properly use and keep the system of accounting of the public utility specified by the commission under this Act,

(vii) who refuses to do any act or thing in that system of accounting when directed by the commission or its representative,

(viii) on whom the commission serves notice directing the person to provide to the commission information or a return that the utility may be required to provide under this Act and who willfully refuses or fails to provide the information or return to the best of the person's knowledge, or means of knowledge, in the manner and time directed by the commission, or

(ix) who knowingly registers or causes to be registered on the books of the public utility any issue or transfer of

shares that has been made contrary to section 54 (5), (7) or (8);

(e) the president, and each vice president, director, managing director, superintendent and manager of a public utility that fails or refuses to obey an order of the commission made under this Act;

(f) the mayor and each councillor or member of the ruling body of a municipality that fails or refuses to obey an order of the commission made under this Act;

(g) [Repealed 2003-46-15.]

(h) a person who obstructs or interferes with a commissioner, officer or person in the exercise of rights conferred or duties imposed under this Act;

(i) a person who knowingly solicits, accepts or receives, directly or indirectly, a rebate, concession or discrimination for service of a public utility, if the service is provided or received in violation of this Act;

(j) except so far as the person's public duty requires the person to report on or take official action, an officer or employee of the commission, or person having access to or knowledge of a return made to the commission or of information procured or evidence taken under this Act, other than a public inquiry or public hearing, who, without first obtaining the authority of the commission, publishes or makes known information, having obtained or knowing it to have been derived from the return, information or evidence;

(k) a person who applies to a public utility to register on its books any issue or transfer of shares that has been made contrary to section 54 (5), (7) or (8).

(2) Subsection (1) (e) and (f) does not apply if the person proves

(a) that, according to the person's position and authority, the person took all necessary and proper means in the person's power to obey and carry out, and to procure obedience to and the carrying out of the order, and

(b) that the person was not at fault for the failure or refusal.

(3) Subsection (1) (h) does not apply if the commissioner, officer or person does not, on request at the time, produce a certificate of his or her appointment or authority.

- (4) A person convicted of an offence under this section is liable to a penalty not greater than \$1 000 000.
- (5) If this Act makes anything an offence, each day the offence continues constitutes a separate offence.
- (6) Subject to section 109.2 (4), nothing in or done under this section affects the liability of a public utility otherwise existing or prejudices enforcement of an order of the commission in any way otherwise available.
- (7) If the commission imposes on a person an administrative penalty under section 109.2, a prosecution for an offence under this Act for the same contravention may not be brought against the person.

Restraining orders

107 If a person contravenes a term, condition or requirement of

- (a) a regulation under section 22,
- (b) a certificate of public convenience and necessity issued under section 46,
- (c) an approval under section 50 or 54 (5), (7) or (8),
- (d) an order under section 53 or 54 (10), or
- (e) a reliability standard adopted under section 125.2,

the contravention may be restrained in a proceeding brought by the minister in the Supreme Court.

Repealed

108 [Repealed 2012-27-42.]

Remedies not mutually exclusive

109 Subject to sections 106 (7) and 109.2 (4), if a person contravenes anything referred to in section 107, the remedies and penalties for the contravention are not mutually exclusive, and any or all of them may be applied in any one case.

Part 8.1 – Administrative Penalties

Contraventions

109.1 (1) After giving a person an opportunity to be heard, the commission, for the purposes of section 109.2, may find that the person has contravened a provision of

- (a) this Act or the regulations, or
 - (b) an order, standard or rule of the commission or a reliability standard adopted by the commission.
- (2) If a corporation contravenes a provision referred to in subsection (1), a director, officer or agent of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.
- (3) Without limiting section 112, if an employee, contractor or agent of a corporation contravenes a provision referred to in subsection (1) of this section in the course of carrying out the employment, contract or agency, the corporation also contravenes the provision.
- (4) The commission may not find that a person has contravened a provision referred to in subsection (1) if the person demonstrates to the satisfaction of the commission that
- (a) the person exercised due diligence to prevent the contravention, or
 - (b) the person's actions or omissions relevant to the provision were the result of an officially induced error.
- (5) Nothing in subsection (4) prevents the commission from doing anything else that the commission is authorized to do under this Act with respect to an act or omission by the person.
- (6) If a person referred to in subsection (2) or (3) has not contravened a provision referred to in subsection (1) as a result of demonstrating to the satisfaction of the commission anything referred to in subsection (4), the commission may find, subject to subsection (4), that any of the other persons referred to in subsection (2) or (3) have contravened the provision.
- (7) A person does not contravene a provision referred to in subsection (1) by doing or omitting to do something if that act or omission is reasonably necessary to conform to the requirements of the *Workers Compensation Act* or any regulations under that Act.

Administrative penalties

- 109.2** (1) If the commission finds that a person has contravened a provision referred to in section 109.1 (1), the commission may impose an administrative penalty on the person in an amount that does not exceed the prescribed limit.
- (2) If a contravention of a prescribed provision occurs over more than one day or continues for more than one day, separate administrative penalties,

each not exceeding the prescribed limit for the purposes of subsection (1), may be imposed for each day the contravention continues.

(3) Before the commission imposes an administrative penalty on a person, the commission, in addition to considering anything else the commission considers relevant, must consider the following:

- (a) previous contraventions by, administrative penalties imposed on and orders issued to the following:
 - (i) the person;
 - (ii) if the person is an individual, a corporation for which the individual is or was a director, officer or agent;
 - (iii) if the person is a corporation, an individual who is or was a director, officer or agent of the corporation;
- (b) the gravity and magnitude of the contravention;
- (c) the extent of the harm to others resulting from the contravention;
- (d) whether the contravention was repeated or continuous;
- (e) whether the contravention was deliberate;
- (f) any economic benefit derived by the person from the contravention;
- (g) the person's efforts to prevent and correct the contravention;
- (h) the cost of compliance with the provision contravened;
- (i) whether the person self-reported the contravention;
- (j) the degree and quality of cooperation during the commission's investigation;
- (k) any undue hardship that might arise from the amount of the penalty;
- (l) any other matters prescribed by the Lieutenant Governor in Council.

(4) If a person is charged with an offence under this Act, an administrative penalty may not be imposed on the person in respect of the same circumstances that gave rise to the charge.

Notice of contravention or penalty

109.3 (1) If the commission finds under section 109.1 that a person has contravened a provision referred to in that section or imposes under

section 109.2 an administrative penalty on a person, the commission must give to the person a notice of the decision, and the notice must include reasons for the decision and specify the following:

- (a) the contravention;
- (b) the amount of the penalty, if any;
- (c) the date by which the penalty, if any, must be paid;
- (d) the person's right, with respect to the decision, to apply for a reconsideration under section 99 or to appeal it under section 101;
- (e) an address to which a request for a reconsideration under section 99 may be sent.

(2) If the commission imposes an administrative penalty on a person, the commission may make public the reasons for and the amount of the penalty.

Due date of penalty

109.4 A person on whom an administrative penalty is imposed under section 109.2 must pay the penalty

- (a) within 30 days after the date on which the notice referred to in section 109.3 (1) is given to the person, or
- (b) by a later date ordered by the commission.

Recovery of penalty from ratepayers prohibited

109.5 In setting rates for a public utility, the commission must not allow the public utility to recover from persons who receive or may receive service from the public utility the costs of paying an administrative penalty imposed under this Part.

Enforcement of administrative penalty

109.6 (1) An administrative penalty constitutes a debt payable to the government by the person on whom the penalty is imposed.

(2) If a person fails to pay an administrative penalty as required under section 109.4, the government may file with the Supreme Court or Provincial Court a certified copy of the notice imposing the penalty and, on being filed, the notice has the same force and effect, and all proceedings may be taken on the notice, as if the notice were a judgment of that court.

Revenue from administrative penalties

109.7 The commission must pay into the consolidated revenue fund all amounts derived from administrative penalties.

Limitation period

109.8 (1) The time limit for giving a notice under section 109.3 imposing an administrative penalty is 2 years after the date on which the act or omission alleged to constitute the contravention first came to the attention of the chair of the commission.

(2) A certificate purporting to have been issued by the chair of the commission and certifying the date referred to in subsection (1) is proof of that date.

Part 9 – General

Powers of commission in relation to other Acts

110 The powers given to the commission by this Act apply

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

Substantial compliance

111 Substantial compliance with this Act is sufficient to give effect to the orders, rules, regulations and acts of the commission, and they must not be declared inoperative, illegal or void for want of form or an error or omission of a technical or clerical nature.

Vicarious liability

112 In construing and enforcing this Act, or a rule, regulation, order or direction of the commission, an act, omission or failure of an officer, agent or other person acting for or employed by a public utility, if within the scope of the person's employment, is deemed in every case to be the act, omission or failure of the utility.

Public utilities may apply

113 A person who is subject to regulation under this Act may make application or complaint to the commission about a matter affecting a public utility, as if made by another party interested.

Municipalities may apply

114 (1) In this section, "**municipality**" includes a regional district.

(2) If a municipality believes that the interests of the public in the municipality or a part of it are sufficiently concerned, the municipality may, by resolution, become an applicant, complainant or intervenant in a matter within the commission's jurisdiction.

(3) The municipality may, for subsection (2), take a proceeding or incur expense necessary

(a) to submit the matter to the commission,

(b) to oppose an application or complaint before the commission, or

(c) if necessary, to become a party to a proceeding or appeal under this Act.

Certified documents as evidence

115 (1) A copy of a rule, regulation, order or other document in the commission secretary's custody, purporting to be certified by the secretary to be a true copy, is evidence of the document without proof of the signature.

(2) A certificate purporting to be signed by the commission secretary stating that no rule, regulation or order on a specified matter has been made by the commission, is evidence of the fact stated without proof of the signature.

Class representation

116 (1) With the approval of the Attorney General, the commission may appoint counsel to represent a class of persons interested in a matter for the purpose of instituting or attending on an application or hearing before the commission or another tribunal or authority.

(2) The commission may fix the costs of the counsel and may order by whom and in what amount or proportion they be paid.

Costs of commission

117 (1) In this section, "**costs of the commission**" includes costs incurred by the commission for the services of consultants and experts engaged in connection with the proceeding.

(2) The commission may order that the costs of the commission incidental to a proceeding before it are to be paid by one or more participants in the proceeding in such amounts and proportions as the commission may determine.

Participant costs

118 (1) The commission may order a participant in a proceeding before the commission to pay all or part of the costs of another participant in the proceeding.

(2) If the commission considers it to be in the public interest, the commission may pay all or part of the costs of participants in proceedings before the commission that were commenced on or after April 1, 1993 or that are commenced after June 18, 1993.

(3) Amounts paid for costs under subsection (2) must not exceed the limits prescribed for the purposes of this section.

Tariff of fees

119 With the advance approval of the Lieutenant Governor in Council, the commission may prescribe a tariff of fees for a matter within the commission's jurisdiction.

No waiver of rights

120 (1) Nothing in this Act releases or waives a right of action by the commission or a person for a right, penalty or forfeiture that arises under a law of British Columbia.

(2) No penalty enforceable under this Act is a bar to or affects recovery for a right, or affects or bars a proceeding against or prosecution of a public utility, its directors, officers, agents or employees.

Relationship with *Local Government Act*

121 (1) Nothing in or done under the *Community Charter* or the *Local Government Act*

(a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or

(b) relieves a person of an obligation imposed under this Act or the *Gas Utility Act*.

(2) In this section, "**authorization**" means

(a) a certificate of public convenience and necessity issued under section 46,

(b) an exemption from the application of section 45 granted, with the advance approval of the Lieutenant Governor in Council, by the commission under section 88, and

(c) an exemption from section 45 granted under section 22, only if the public utility meets the conditions prescribed by the Lieutenant Governor in Council.

(3) For the purposes of subsection (2) (c), the Lieutenant Governor in Council may prescribe different conditions for different public utilities or categories of public utilities.

Repealed

122 [Repealed 2004-45-172.]

Service of notice

123 (1) A notice that the commission is empowered or required to give to a person under this Act must be in writing and may be served either personally or by mailing it to the person's address.

(2) If a notice is mailed, service of the notice is deemed to be effected at the time at which the letter containing the notice, properly addressed, postage prepaid and mailed, would be delivered in the ordinary course of post.

Reasons to be given

124 (1) If an application to the commission is opposed, the commission must prepare written reasons for its decision.

(2) If an application is unopposed, the commission may, and at the request of the applicant must, prepare written reasons for its decision.

(3) Written reasons must be made available by the secretary to any person on payment of the fee set by the commission.

(4) [Repealed 2003-46-20.]

Regulations

125 (1) The Lieutenant Governor in Council may make regulations as referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may, for the purpose of recovering the expenses arising out of the administration of this Act in a fiscal year, make regulations as follows:

(a) setting, or authorizing the commission to set, by order of the commission, and to collect fees, levies or other charges from

(i) public utilities, a class of public utility or a particular public utility, and

(ii) other persons to whom a provision of this Act applies or a class of those persons;

(b) setting, or authorizing the commission to set, the fees, levies or other charges payable by the members of the different classes referred to in paragraph (a) in different amounts;

(c) exempting, or authorizing the commission to exempt, a public utility or other person, or a class of either of them, from the payment of a fee, levy or other charge;

(d) authorizing the commission to retain all or part of any fees, levies or other charges collected by the commission under a regulation;

(e) requiring the commission to set a rate for the purposes of section 28 (2.1) and prescribing requirements for the purposes of that section.

(2.1) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations respecting the imposition of administrative penalties, including, without limitation, prescribing

(a) provisions for the purposes of section 109.2 (2),

(b) matters to be considered under section 109.2 (3) before imposing an administrative penalty,

(c) the criteria for determining appropriate administrative penalties, and

(d) different limits on different administrative penalties, including different limits for contraventions by different classes of persons.

(3) The commission may make regulations on a matter for which it is empowered by this Act to make regulations.

Minister's regulations

- 125.1** (1) In this section, "**minister**" means the minister responsible for the administration of the *Hydro and Power Authority Act*.
- (2)-(3) [Repealed 2010-22-72.]
- (4) The minister may make regulations as follows:
- (a) [Repealed 2010-22-72.]
 - (b) respecting exemptions under section 22;
 - (c) [Repealed 2010-22-72.]
 - (d) [Repealed 2010-22-72.]
 - (e) for the purposes of sections 44.1 and 44.2,
 - (i) prescribing rules for determining whether a demand-side measure, or a class of demand-side measures, is adequate, cost-effective or both,
 - (ii) declaring a demand-side measure, or a class of demand-side measures, to be cost effective and necessary for adequacy, and
 - (iii) prescribing rules or factors a public utility must use in making the estimate referred to in section 44.1 (2) (a);
 - (iv) [Repealed 2010-22-72.]
 - (f) [Repealed 2010-22-72.]
 - (g) prescribing factors and guidelines for the purposes of section 58 (2.1) (b), including, without limitation, factors and guidelines to encourage
 - (i) energy conservation or efficiency,
 - (ii) the use of energy during periods of lower demand,
 - (iii) the development and use of energy from clean or renewable resources, or
 - (iv) the reduction of the energy demand a public utility must serve;
 - (h) defining a term or phrase used in section 58.1 and not defined in this Act;
 - (i) identifying facts that must be used in interpreting the definition in section 58.1;
 - (j)-(n) [Repealed 2010-22-72.]

- (o) prescribing standard-making bodies for the purposes of section 125.2 (1) and matters for the purposes of section 125.2 (3) (d);
 - (p) prescribing owners, operators, direct users, generators and distributors, or classes of any of them, for the purposes of section 125.2 (8).
- (5) In making a regulation under this section, the minister may
- (a) make regulations of specific or general application, and
 - (b) make different regulations for different persons, places, things, measures, transactions or activities.

Adoption of reliability standards, rules or codes

125.2 (1) In this section:

"reliability standard" means a reliability standard, rule or code established by a standard-making body for the purpose of being a mandatory reliability standard for planning and operating the North American bulk power system, and includes any substantial change to any of those standards, rules or codes;

"standard-making body" means

- (a) the North American Electric Reliability Corporation,
 - (b) the Western Electricity Coordinating Council, and
 - (c) a prescribed standard-making body.
- (2) For greater certainty, the commission has exclusive jurisdiction to determine whether a reliability standard is in the public interest and should be adopted in British Columbia.
- (3) The authority must review each reliability standard and provide to the commission, in accordance with the regulations, a report assessing
- (a) any adverse impact of the reliability standard on the reliability of electricity transmission in British Columbia if the reliability standard were adopted under subsection (6),
 - (b) the suitability of the reliability standard for British Columbia,
 - (c) the potential cost of the reliability standard if it were adopted under subsection (6), and
 - (d) any other matter prescribed by regulation or identified by order of the commission for the purposes of this section.

(4) The commission may make an order for the purposes of subsection (3) (d).

(5) If the commission receives a report under subsection (3), the commission must

(a) make the report available to the public in a reasonable manner, which may include by electronic means, and for a reasonable period of time, and

(b) consider any comments the commission receives in reply to the publication referred to in paragraph (a).

(6) After complying with subsection (5), the commission, subject to subsection (7), must adopt the reliability standards addressed in the report if the commission considers that the reliability standards are required to maintain or achieve consistency in British Columbia with other jurisdictions that have adopted the reliability standards.

(7) The commission is not required to adopt a reliability standard under subsection (6) if the commission determines, after a hearing, that the reliability standard is not in the public interest.

(8) A reliability standard adopted under subsection (6) applies to every

(a) prescribed owner, operator and direct user of the bulk power system, and

(b) prescribed generator and distributor of electricity.

(9) Subsection (8) applies to a person prescribed for the purposes of that subsection despite any exemption issued to the person under section 22 or 88 (3).

(10) The commission may make orders providing for the administration of adopted reliability standards.

(10.1) Without limiting subsection (10), section 43 (1) (a) and (b) (i) applies to a person to whom a reliability standard adopted under subsection (6) of this section applies, as though the person were a public utility.

(11) The commission, on its own motion or on complaint, may

(a) rescind an adoption made under subsection (6), or

(b) adopt a reliability standard previously rejected under subsection (7)

if the commission determines, after a hearing, that the rescission or adoption is in the public interest.

(12) The commission, without the approval of the minister responsible for the administration of the *Hydro and Power Authority Act*, may not set a standard or rule under section 26 of this Act with respect to a matter addressed by a reliability standard assessed in a report submitted to the commission under subsection (3) of this section.

Intent of Legislature

126 If a provision of this Act is held to be beyond the powers of British Columbia, that provision must be severed from the remainder of the Act, and the remaining provisions of the Act have the same effect as if they had been originally enacted as a separate enactment and as the only provisions of this Act.

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TAB 9

Black's Law Dictionary[®]

Eighth Edition

Bryan A. Garner
Editor in Chief

THOMSON
—★—
WEST

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1.1.10.1; *Institutes* 1.1.3). Cf. HONESTE VIVERE; SUUM CUIQUE TRIBUERE.

alteruter (al-tər-yoo-tər or awl-). [Law Latin] One of two; either.

altius non tollendi (al-shee-əs non tə-len-dī). [Latin "of not raising higher"] *Roman & civil law*. A servitude prohibiting a landowner from building a house above a certain height.

altius tollendi (al-shee-əs tə-len-dī). [Latin "of raising higher"] *Roman & civil law*. A servitude that allows a landowner to build a house as high as desired.

alto et basso. See DE ALTO ET BASSO.

altum mare (al-təm mair-ee or mahr-ee), *n.* [Law Latin] *Hist.* The high seas; the deep seas.

a lui et a ses heritiers pour toujours (a lwee ay a sayz e-ree-tyay poor too-zhoor). [Law French] To him and his heirs forever. See *and his heirs* under HEIR.

alvei mutatio (al-vee-i myoo-tay-shee-oh). [Latin fr. *alveus* "the bed or channel of a stream"] *Hist.* A change in a stream's course.

alveus (al-vee-əs), *n.* [Law Latin] *Hist.* The bed or channel through which a stream flows in its ordinary course. [Cases: Waters and Water Courses ⇨89. C.J.S. *Waters* §§ 170-174, 188-189.]

ALWD (ahl-wəd or al-wəd), *abbr.* See ASSOCIATION OF LEGAL WRITING DIRECTORS.

ALWD Citation Manual. A guide to American legal citation written and edited by legal-writing professionals affiliated with the Association of Legal Writing Directors. • First published in 2000 as an alternative to the *Bluebook*, it contains one citation system for all legal documents and does not distinguish between citations in law-journal footnotes and those in other writings. The full name is the *ALWD Citation Manual: A Professional System of Citation*. — Often shortened to *ALWD Manual*. Cf. BLUEBOOK.

a.m. *abbr.* ANTE MERIDIEM.

AMA, *abbr.* 1. American Medical Association. 2. Against medical advice.

a ma intent (ah mah an-tawn). [Law French] On my action.

amalgamation (ə-mal-gə-may-shən), *n.* The act of combining or uniting; consolidation <amalgamation of two small companies to form a new corporation>. See MERGER. [Cases: Corporations ⇨581. C.J.S. *Corporations* §§ 792-797.] — **amalgamate**, *vb.* — **amalgamator**, *n.*

Amalphitan Code (ə-mal-fə-tən). *Hist.* A compilation of maritime law made late in the 11th century at the port of Amalfi near Naples. • The Code was regarded as a primary source of maritime law throughout the Mediterranean to the end of the 16th century. — Also termed *Amalphitan Table*; *Laws of Amalfi*; *Tablets of Amalfi*.

a manibus (ay man-ə-bəs), *n.* [Law Latin] *Hist.* A royal scribe.

amanuensis (ə-man-yoo-en-sis), *n.* [fr. Latin *ab-* "from" + *manus* "hand"] One who takes dictation; a scribe or secretary.

a manu servus (ay man-yoo sər-vəs). [Latin] A hand-servant; scribe; secretary.

ambactus (am-bak-təs). [Latin] *Hist.* 1. A messenger. 2. A servant whose services are hired out by the master.

ambasciator (am-bash-ee-ay-tər). [Law Latin] *Hist.* A person sent about in the service of another; an ambassador.

ambassador. 1. A diplomatic officer of the highest rank, usu. designated by a government as its resident representative in a foreign state. • Ambassadors represent the sovereign as well as the nation and enjoy many privileges while abroad in their official capacity, including immunity. Ambassadors are distinguished from ministers and envoys, who represent only the state where they are from and not the sovereign. Ambassadors are also generally distinguished from certain legates who have only ecclesiastical authority. But the papal nuncio and some legates, such as the *legate a latere*, bear the rank of ambassador. See NUNCIO; LEGATE. [Cases: Ambassadors and Consuls ⇨1-8. C.J.S. *Ambassadors and Consuls* §§ 2-32.] 2. A representative appointed by another. 3. An unofficial or nonappointed representative. — Also spelled (archaically) *embassador*. — **ambassadorial**, *adj.* — **ambassadorship**, *n.*

ambassador extraordinary. An ambassador who is employed for a particular purpose or occasion and has limited discretionary powers. Cf. *ambassador plenipotentiary*.

ambassador leger. See *resident ambassador*.

ambassador ordinary. See *resident ambassador*.

ambassador plenipotentiary. An ambassador who has unlimited discretionary powers to act as a sovereign's or government's deputy, esp. to carry out a particular task, such as treaty negotiations. — Also termed *minister plenipotentiary*; *envoy plenipotentiary*. Cf. *ambassador extraordinary*.

ordinary ambassador. See *resident ambassador*.

resident ambassador. An ambassador who resides in a foreign country as the permanent representative of a sovereign or nation. • A resident ambassador has the right to request a personal interview with the host nation's head of state. — Also termed *ambassador leger*; *ordinary ambassador*; *ambassador ordinary*.

Amber Alert. A system by which the police can rapidly broadcast to the general public a report of a missing or endangered child by means of radio and television announcements. • The alert is named for Amber Hagerman of Texas, a nine-year-old who was abducted and murdered in 1996 by an unknown person. The system has been adopted by many communities in the U.S. and Canada. Local variations exist. In Arkansas, for example, the system is called the Morgan Nick Alert after a child who was abducted by a stranger in 1995. — Also termed *Amber Plan*.

A.M. Best Company. An investment-analysis and -advisory service. • A.M. Best rates the financial strength of businesses from A++ (strongest) to A+, A, A-, B++, and so on to C- and D. A grade of E means that the company is under state supervision,

of a parliamentary proposal or question it means consideration paragraph by paragraph or part by part.

"Hence, under the doctrine of consideration by paragraph, or *seriatim*, each part is discussed and may be amended and perfected to suit; then, without putting it to a vote for final adoption, the next part or paragraph is similarly open to discussion and amendment, but is not voted on for final adoption yet; and, in like manner, each additional part is perfected in turn until all the parts of a proposal have been considered." George Demeter, *Demeter's Manual of Parliamentary Law and Procedure* 146 (1969).

informal consideration. Consideration without limit on how often a member may speak to the same question. • Informal consideration is substantially equivalent to consideration in committee of the whole or quasi-committee of the whole, without the fiction of the assembly resolving itself into a committee. See *committee of the whole* under COMMITTEE.

serial consideration. See *consideration seriatim*.

3. *Hist.* A court's judgment. — Also termed (in Roman law) *consideratio*.

consideration, failure of. See FAILURE OF CONSIDERATION.

consideration, want of. See WANT OF CONSIDERATION.

consideratum est per curiam (kən-sid-ə-ray-təm est pər kyoor-ee-əm). [Latin] *Hist.* It is considered by the court. • This was the formal language preceding the judgment of a common-law court. — Sometimes shortened to *consideratum est*. Cf. IDEO CONSIDERATUM EST.

"A judgment is the decision or sentence of the law, given by a court of justice, as the result of proceedings instituted therein for the redress of an injury. The language of the judgment is not, therefore, that 'it is decreed,' or 'resolved,' by the court, but that 'it is considered by the court,' *consideratum est per curiam*, that the plaintiff recover his debt, etc. In the early writers, *considerare*, *consideratio* always means the judgment of a court." 1 John Bouvier, *Bouvier's Law-Dictionary* 619 (8th ed. 1914).

consign (kən-sɪn), *vb.* 1. To transfer to another's custody or charge. 2. To give (goods) to a carrier for delivery to a designated recipient. 3. To give (merchandise or the like) to another to sell, *usu.* with the understanding that the seller will pay the owner for the goods from the proceeds.

consignation (kon-sig-nay-shən), *n.* 1. A debtor's delivery of money to an authorized third party after the creditor refuses to accept the payment. • Unlike a tender, a valid consignation discharges the debtor. Cf. TENDER (1). 2. CONSIGNMENT (1).

consignator (kən-sig-nə-tor), *n.* A person authorized to accept delivery of money from a debtor if a creditor refuses to accept it. See CONSIGNATION.

consignee (kon-si-nee or kən-). One to whom goods are consigned.

consignment (kən-sɪn-mənt). 1. The act of consigning goods for custody or sale. — Also termed (archaically) *consignation*. [Cases: Factors ⇨5.] 2. A quantity of goods delivered by this act, esp. in a single shipment. 3. Under the UCC, a transaction in which a person delivers goods to a merchant for the purpose of sale, and (1) the merchant deals in goods of that kind under a name other than the name of the person making delivery, is not an auctioneer, and is not generally known by its creditor to be substantial-

ly engaged in selling others' goods, (2) with respect to each delivery, the aggregate value of the goods is \$1,000 or more at the time of delivery, (3) the goods are not consumer goods immediately before delivery, and (4) the transaction does not create a security interest that secures an obligation. UCC § 9-102(a)(20). 4. See *bailment for sale* under BAILMENT.

consignment sale. See SALE.

consignor (kən-si-nər or kon-si-nor). One who dispatches goods to another on consignment.

consiliarius (kən-sil-ee-air-ee-əs), *n.* [fr. Latin *consilium* "advice"] 1. *Roman law.* A person who advises a magistrate; one who sits with the judge and assists in deciding cases. See CONCILIIUM (1). 2. *Hist.* A counselor learned in law. See APOCRISARIUS.

consimili casu. See CASU CONSIMILI.

consistorial court. See CONSISTORY COURT.

consistorium (kon-sis-tor-ee-əm), *n.* [Latin] *Roman law.* In the later Empire, the emperor's privy council that functioned both as a general council of state and as a supreme court of law.

consistory court (kən-sis-tər-ee). *Eccles. law.* In England, a diocesan court exercising jurisdiction over the clergy and church property, such as a cemetery, and other ecclesiastical matters. • Consistory courts are presided over by the bishop's chancellor or the chancellor's commissary. — Also termed *consistorial court*. Cf. BISHOP'S COURT.

consobrini (kon-sə-bri-ni), *n. pl.* [Latin] *Roman law.* First cousins; children of brothers and sisters, or, more precisely, of two sisters.

consol (kon-sol or kən-sol). See *annuity bond* under BOND (3).

Consolato del Mare (kawn-soh-lah-toh del mah-ray). [Italian "consulate of the sea"] *Hist. Maritime law.* An influential collection of European maritime customs, referred to by commercial judges (*consuls*) in ports of the kingdom of Aragon and other Mediterranean maritime towns. • The *Consolato del Mare* was compiled in the 14th century and soon became one of the leading maritime codes of Europe. It is widely believed to be a Spanish work, but some historians suggest that its origin is actually Italian. — Also written *Consolat de Mar*.

consolidate, *vb.* 1. To combine or unify into one mass or body. 2. *Civil procedure.* To combine, through court order, two or more actions involving the same parties or issues into a single action ending in a single judgment or, sometimes, in separate judgments. [Cases: Action ⇨54-59; Federal Civil Procedure ⇨8. C.J.S. *Actions* §§ 204-219.] 3. *Corporations.* To unite (two or more corporations or other organizations) to create one new corporation or other organization. [Cases: Corporations ⇨581. C.J.S. *Corporations* §§ 792-797.]

consolidated appeal. See APPEAL.

consolidated bond. See BOND (3).

consolidated financial statement. See FINANCIAL STATEMENT.

mere-continuation doctrine. A principle under which a successor corporation will be held liable for the acts of a predecessor corporation, if only one corporation remains after the transfer of assets, and both corporations share an identity of stock, shareholders, and directors. — Also termed *continuity-of-entity doctrine*. Cf. SUBSTANTIAL-CONTINUITY DOCTRINE. [Cases: Corporations ⇨445.1. C.J.S. *Corporations* § 657.]

mere-evidence rule. *Criminal procedure.* The former doctrine that a search warrant allows seizure of the instrumentalities of the crime (such as a murder weapon) or the fruits of the crime (such as stolen goods), but does not permit the seizure of items that have evidentiary value only (such as incriminating documents). • The Supreme Court has abolished this rule, and today warrants may be issued to search for and seize all evidence of a crime. *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642 (1967); Fed. R. Crim. P. 41(b). [Cases: Searches and Seizures ⇨102. C.J.S. *Searches and Seizures* §§ 132-134.]

mere license. See *bare license* under LICENSE.

mere licensee. See *bare licensee* under LICENSEE.

mere right. An abstract right in property, without possession or even the right of possession. — Also termed *jus merum*; *merum jus*; *meer dreit*.

"The mere right of property, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right*, *jus merum*; and the estate of the owner is in such cases said to be totally divested, and put to a right. A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favour of his antagonist; who has thereby obtained the absolute right of possession The heir therefore in this case has only a *mere right*, and must be strictly held to the proof of it, in order to recover the lands." 2 William Blackstone, *Commentaries on the Laws of England* 197-98 (1766).

merestone (meer-stohn). *Archaic.* A stone that marks land boundaries. — Also spelled *mearstone*.

meretricious (mer-ə-trish-əs), adj. 1. Involving prostitution <a meretricious encounter>. 2. (Of a romantic relationship) involving either unlawful sexual connection or lack of capacity on the part of one party <a meretricious marriage>. 3. Superficially attractive but fake nonetheless; alluring by false show <meretricious advertising claims>.

meretricious relationship. *Archaic.* A stable, marriage-like relationship in which the parties cohabit knowing that a lawful marriage between them does not exist.

mergee (mər-jee). A participant in a corporate merger.

merger. 1. The act or an instance of combining or uniting. 2. *Contracts.* The substitution of a superior form of contract for an inferior form, as when a written contract supersedes all oral agreements and prior understandings. [Cases: Contracts ⇨245. C.J.S. *Contracts* § 416.]

"Where two parties have made a simple contract for any purpose, and afterwards have entered into an identical engagement by deed, the simple contract is merged in the deed and becomes extinct. This extinction of a lesser in a higher security, like the extinction of a lesser in a greater

interest in lands, is called *merger*." William R. Anson, *Principles of the Law of Contract* 85 (Arthur L. Corbin ed., 3d Am. ed. 1919).

3. *Contracts.* The replacement of a contractual duty or of a duty to compensate with a new duty between the same parties, based on different operative facts, for the same performance or for a performance differing only in liquidating a duty that was previously unliquidated. 4. *Property.* The absorption of a lesser estate into a greater estate when both become the same person's property. Cf. SURRENDER (3). [Cases: Estates in Property ⇨10. C.J.S. *Estates* §§ 129, 152.]

"[I]t would be absurd to allow a person to have two distinct estates, immediately expectant on each other, while one of them includes the time of both There would be an absolute incompatibility in a person filling, at the same time, the characters of tenant and reversioner in one and the same estate; and hence the reasonableness, and even necessity, of the doctrine of merger." 3 James Kent, *Commentaries on American Law* *99 (George Comstock ed., 11th ed. 1866).

5. *Criminal law.* The absorption of a lesser included offense into a more serious offense when a person is charged with both crimes, so that the person is not subject to double jeopardy. • For example, a defendant cannot be convicted of both attempt (or solicitation) and the completed crime — though merger does not apply to conspiracy and the completed crime. — Also termed *merger of offenses*. [Cases: Criminal Law ⇨30. C.J.S. *Criminal Law* §§ 14, 16-18.] 6. *Civil procedure.* The effect of a judgment for the plaintiff, which absorbs any claim that was the subject of the lawsuit into the judgment, so that the plaintiff's rights are confined to enforcing the judgment. Cf. BAR (5). [Cases: Judgment ⇨582. C.J.S. *Judgments* § 704.] 7. The joining of the procedural aspects of law and equity. 8. The absorption of one organization (esp. a corporation) that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former. • Corporate mergers must conform to statutory formalities and usu. must be approved by a majority of the outstanding shares. Cf. CONSOLIDATION (4); BUYOUT. [Cases: Corporations ⇨581. C.J.S. *Corporations* §§ 792-797.]

bust-up merger. A merger in which the acquiring corporation sells off lines of business owned by the target corporation to repay the loans used in the acquisition.

cash merger. A merger in which shareholders of the target company must accept cash for their shares. — Also termed *cash-out merger*; *freeze-out merger*. [Cases: Corporations ⇨584. C.J.S. *Corporations* §§ 799-801.]

conglomerate merger. A merger between unrelated businesses that are neither competitors nor customers or suppliers of each other. [Cases: Monopolies ⇨20(9). C.J.S. *Monopolies* §§ 110, 114.]

"A merger which is neither vertical nor horizontal is a conglomerate merger. A pure conglomerate merger is one in which there are no economic relationships between the acquiring and the acquired firm. Mixed conglomerate mergers involve horizontal or vertical relationships, such as the acquisition of a firm producing the same product as the acquirer but selling it in a different geographical market, which is not a horizontal merger because the merging companies are not competitors" 54 Am. Jur. 2d Mo-

TAB 10

A Dictionary of

Law

SIXTH EDITION

Edited by

ELIZABETH A. MARTIN

JONATHAN LAW

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VANCOUVER

impeding choice to engage in sexual activity (s 31); engaging in sexual activity in the presence of a person with a mental disorder impeding choice (s 32); and causing a person with a mental disorder impeding choice to watch a sexual act (s 33).

Mental Health Act Commission A regulatory body established in 1983 to monitor the operation of the Mental Health Act 1983. Its members, appointed by the Secretary of State for Health, include psychiatrists, nurses, lawyers, members of other clinical professions, and lay people. Commissioners are responsible for regularly visiting patients detained under the Act, reviewing psychiatric care, investigating certain complaints, and advising ministers.

Mental Health Review Tribunal A tribunal, constituted under the Mental Health Act 1983, to which applications may be made for the discharge from hospital of a person detained there for assessment or treatment of *mental disorder or under a *hospital order or a *guardianship order. Such tribunals include legally and medically qualified members appointed by the Lord Chancellor and are under the supervision of the *Council on Tribunals.

mental health treatment requirement A requirement that may be imposed by a sentencing court as part of a *community order or a *suspended sentence order under the Criminal Justice Act 2003. An offender who is not insane but who is held to be suffering from a treatable mental health problem may be required to undergo appropriate treatment. Such a requirement can only be imposed with the consent of the offender.

mental impairment *See* ARRESTED DEVELOPMENT.

MEP Member of the European Parliament. *See* EUROPEAN PARLIAMENT.

mercantile agent A commercial *agent who has authority either to sell goods, to consign goods for the purpose of sale, to buy goods, or to raise money on the security of goods on behalf of his principal.

mercenary *n.* A person recruited to fight in an armed conflict for private gain who is neither a national of a party to the conflict nor a member of its armed forces. Mercenaries are not entitled to combatant status and, if captured, are therefore not entitled to prisoner-of-war status for the purposes of protection under the *Geneva Conventions. British officers undertaking such service (e.g. in Oman) were commonly known as **contract officers**. *See also* FOREIGN ENLISTMENT.

merchantable quality An *implied condition now replaced by *satisfactory quality.

merchant shipping registration *See* SHIP.

mercy *n.* *See* PREROGATIVE OF MERCY.

mere equity A right affecting property that is less significant than an *equitable right or a *legal right; it does not affect anyone except the parties to the transaction in which it is contained. An example is the right to rectify a document.

merger *n.* **1.** An amalgamation between companies of similar size in which either the members of the merging companies exchange their shares for shares in a new company or the members of some of the merging companies exchange their shares for shares in another merging company. It is usually effected by a *takeover bid. Under current EU mergers law, mergers with a **Community dimension**, i.e. a combined Community-wide turnover of at least 250M euros and a combined worldwide turnover of over 500M euros, must be notified to the EU Mergers Secretariat. However, if each of the merging companies derives two-thirds of its EU business from one and the same member state, the merger does not have to be notified. *Compare* TAKEOVER.

2. The extinguishing of a lesser interest in land when it comes into the same ownership as a greater one. For example, if a freehold owner acquires the unexpired leasehold estate, the latter may merge into the freehold. Whether or not merger occurs depends on the circumstances of the transaction (thus a leasehold that is subject to a subsisting mortgage will not normally merge with the freehold) and the intention of the parties.

mesne profits Money that a landlord can claim from a tenant who continues to occupy property after his tenancy ends, the amount being equivalent to the current market rent of the property. This may be more than the rent that the tenant was paying before the tenancy ended. If the landlord continues to accept the original rent from the tenant at the end of the tenancy, a new tenancy may be created.

message *n.* A house and its associated garden, outbuildings, and orchard.

Michaelmas Day *See* QUARTER DAYS.

micro-state *n.* A state with an area of less than 500 square miles and a population under 100,000. Examples of micro-states include Andorra, Antigua and Barbuda, Grenada, and Monaco, all of which have been admitted to membership of the United Nations. Although the UN membership of such small states was contentious, ultimately the principle of universality of membership of states, whatever their size, prevailed over the issue of whether or not they were capable of fulfilling their obligations as members. *See also* RECOGNITION.

Middle Temple One of the four *Inns of Court, situated in the Temple between the Strand and the Embankment. The earliest recorded claim for its existence is 1404.

Midsummer Day *See* QUARTER DAYS.

military court A *court martial or the *Court of Chivalry.

military law *See* feature ASPECTS OF SERVICE LAW on p. 491. *Compare* MARTIAL LAW.

Military Staff Committee A committee established under Article 47 of the United Nations Charter. Articles 43–47 of the Charter (within *Chapter VII) envisage, through the Military Staff Committee, advance military cooperation for UN collective military security. This body is to advise the Security Council on all questions relating to armed forces placed at the disposal of the latter. It consists of the chiefs of staff of the permanent members of the Security Council, although other members of the United Nations may be invited to sit with it when the efficient discharge of the Committee's responsibilities so requires.

Due to deadlock, principally among the permanent members of the Security Council, the Committee declared that it could make no further progress on the matter of military cooperation for UN collective security measures. Although the Committee still formally exists it has had no real function to perform since its establishment in October 1945. *See also* COLLECTIVE SECURITY; ENFORCEMENT ACTION.

military stores Any chattel belonging to the Crown that is issued, or stored for the purpose of being issued when required, for military purposes. *Compare* NAVAL PROPERTY.

military testament *See* PRIVILEGED WILL.

minerals *pl. n.* *See* MINING LEASE.

minimum term *See* LIFE IMPRISONMENT.

minimum wage The lowest rate of remuneration that an employer may pay. The current minimum adult hourly rate (from October 2005) is £5.05; this will increase to

TAB 11

ESSENTIALS OF
CANADIAN LAW

STATUTORY
INTERPRETATION

SECOND EDITION

RUTH SULLIVAN

Faculty of Law, University of Ottawa



Sullivan, Ruth (Contribution by). Statutory Interpretation, Second Edition.
Toronto, ON, Canada: Irwin Law, 2007. p iii.
<http://site.ebrary.com/lib/courthouselibrariesbc/Doc?id=10350931&ppg=4>

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142 STATUTORY INTERPRETATION

maintenance, operation or improvement of marital property; and subject to the equitable considerations recognized elsewhere in the Act the contribution of each spouse to the fulfilment of these responsibilities entitles each spouse to an equal share of the marital property and imposes on each spouse, in relation to the other, the burden of an equal share of the marital debts." [Emphasis added.]

...

In common with similar provisions in other jurisdictions, s. 2 establishes the general principle that each spouse is entitled to an equal share of marital property.... The principle must be respected. In applying that principle, the courts are not permitted to engage in measurements of the relative contribution of spouses to a marriage. Nevertheless ... the principle is expressly made subject to the equitable considerations recognized elsewhere in the Act.⁴²

The purpose statement made it clear that the Act was animated by more than one guiding principle, that the ideal of partnership and pooling between spouses might in appropriate circumstances be tempered by concerns of fairness and of avoiding unjust enrichment.

As purpose statements become more commonplace in legislation, they figure ever more prominently in interpretation.

d) Headings

The majority of Canadian Interpretation Acts state that headings are not part of the enactment in which they appear, the implication being that they should not be taken into account (at least not in the absence of ambiguity). Other Interpretation Acts say nothing of headings. In practice, courts often ignore the Interpretation Acts and rely on case law to decide what use should be made of headings. In the older cases, courts emphasize the external nature of headings and refuse to rely on them unless the language of the legislation is ambiguous. In more recent cases, there is a tendency to treat headings as an integral part of the context, to be relied on like any other contextual feature. This is the approach taken by the Supreme Court of Canada towards the headings that appear in the *Charter*. In *Law Society of Upper Canada v. Skapinker*, Estey J. wrote:

The *Charter*, from its first introduction into the constitutional process, included many headings including the heading now in question.... It

⁴² *Ibid.* at 221-22.

is clear that these headings were systematically and deliberately included as an integral part of the *Charter* for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the *Charter*.⁴³

This approach to headings has been adopted in interpreting ordinary legislation as well.

In *R. v. Lohnes*,⁴⁴ for example, the Supreme Court of Canada relied on headings in adopting a restrictive reading of section 175(1)(a) of the *Criminal Code*. That section made it an offence to cause a disturbance in or near a public place. It was one of several sections grouped under the heading "Disorderly Conduct." The issue was whether the word "disturbance" should be read broadly to include mental or emotional upset or should be limited to overt, publicly exhibited disorder. McLachlin J. wrote:

[H]eadings and preambles may be used as intrinsic aids in interpreting ambiguous statutes. Section 175(1)(a) appears under the section "Disorderly Conduct". Without elevating headings to determinative status, the heading under which s. 175(1)(a) appears supports the view that Parliament had in mind, not the emotional upset or annoyance of individuals, but disorder and agitation which interfere with the ordinary use of a place.⁴⁵

Headings are also useful in exploring the structure of legislation. In *Charlebois v. Saint John (City)*,⁴⁶ in concluding that the term "institution" in New Brunswick's *Official Languages Act* did not include municipalities, a majority of the Supreme Court of Canada relied on the presumption that statutes are coherent structures, in which all the parts work together to advance a legislation scheme. To reveal the structure of the Act, the court analyzed the headings and their relation to the provisions set out beneath each heading. Charron J. wrote:

A reading of the OLA reveals two main structural features. First, the word "institution", as defined in s.1, acts as a central provision that identifies those public bodies on which the Legislature imposes

43 [1984] 1 S.C.R. 357 at 376. See also *B.(R.) v. Children's Aid Society of Metro Toronto*, [1995] 1 S.C.R. 315 at paras. 25–26.

44 [1992] 1 S.C.R. 167.

45 *Ibid.* at 179. See also *R. v. Kelly*, [1992] 2 S.C.R. 170 and *R. v. Zundel*, [1992] 2 S.C.R. 731.

46 [2005] S.C.J. No. 77 [*Charlebois*].

TAB 12

Sullivan and Driedger on the Construction of Statutes

Fourth Edition

by

Ruth Sullivan

Professor of Law
University of Ottawa



Butterworths
A Member of the LexisNexis Group

questions of substantive law, procedure and evidence arising during the course of trial whereas para. (i) refers to conclusion of the judge or jury on the ultimate issue of guilt or innocence.⁴⁷

The presumption can also be rebutted by suggesting reasons why in these circumstances the legislature may have wished to be redundant or to include superfluous words. Drafters may anticipate potential misunderstandings or problems in applying the legislation and, in an effort to forestall these difficulties, may resort to repetition or the inclusion of unnecessary detail.⁴⁸ Repetition or superfluous words may also be introduced to make the legislation easier to read or work with or, in the case of bilingual legislation, to preserve parallelism between the two language versions. Repetition is not an evil when it serves an intelligible purpose. When tautologous words are deliberately included in legislation for reasons such as these, the courts say they are added *ex abundantia cautela*, out of an abundance of caution, and the presumption against tautology is rebutted.

In the *Chrysler* case, for example, McLachlin J. in her dissenting judgment conceded that the phrase "and any matters related thereto" appearing in the *Competition Tribunal Act* would be unnecessary if its only function were to confer ancillary powers on the Tribunal. However, in her view,

one must approach such general phrases against the background that they are commonly used in many statutes, not to confer unmentioned powers, but to ensure that the powers clearly given be exercised without undue restraint. It is true, as Gonthier J. points out, that ancillary powers can be inferred and need not be set out. Yet the reality is that statutes commonly do set them out, if only in the hope of avoiding arguments seeking to unduly restrict the effective exercise of expressly conferred powers.... Given the relatively common use of phrases like "and all [or any] matters related thereto" in legislative drafting, I do not find [Mr. Justice Gonthier's] argument persuasive.⁴⁹

When there is reason to believe that the tautologous words were deliberately included in the legislation, the presumption is rebutted.

THE PRESUMPTION OF CONSISTENT EXPRESSION

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid

⁴⁷ *Ibid.*; see also *Zaidan Group Ltd. v. City of London* (1989), 64 D.L.R. (4th) 514 (Ont. C.A.); *affd* [1991] 3 S.C.R. 593; *Clarke v. Clarke* (1990), 73 D.L.R. (4th) 1, at 16 (S.C.C.); *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 74 O.R. (2d) 325, at 339 (H.C.); *revd* 1 O.R. (3d) 122 (C.A.).

⁴⁸ See, for example, *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 55: "...the additional words are not intended to add to the meaning of benefit, but to prevent the meaning ... from being restricted."

⁴⁹ *Supra* note 42, at 435.

stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it then makes sense to infer that where a different form of expression is used, a different meaning is intended.

Same words, same meaning. In *R. v. Zeolkowski* Sopinka J. wrote: "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation."⁵⁰ Reliance on this principle is illustrated in the majority judgment of the Supreme Court of Canada in *Thomson v. Canada (Minister of Agriculture)*.⁵¹ The issue there was whether a Deputy Minister of the federal government could deny security clearance to a person, contrary to the recommendation made by the Security Intelligence Review Committee after reviewing the person's file. The governing provision was s. 52(2) of the *Canadian Security Intelligence Act* which provided that on completion of its investigation, the Review Committee shall provide the Minister "with a report containing any recommendations that the Committee considers appropriate". The majority held that the ordinary meaning of the word "recommendations" is advice or counsel and that mere advice or counsel is not binding on the Minister. However, Cory J. added:

There is another basis for concluding that "recommendations" should be given its usual meaning in s. 52(2).

The word is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act. Section 52(1) directs the Committee to provide the Minister and Director of CSIS with a report ... and any "recommendations" that the Committee considers appropriate....

It would be obviously inappropriate to interpret "recommendations" in s. 52(1) as a binding decision. This is so, since it would result in the Committee encroaching on the management powers of CSIS. Clearly, in s. 52(1) "recommendations" has its ordinary and plain meaning of advising or counselling. Parliament could not have intended the word "recommendations" in the subsequent subsection of the same section to receive a different interpretation. The word must have the same meaning in both sections.⁵²

The reasoning of Cory J. is exemplary. He first notes that elsewhere in the legislation the word or expression to be interpreted has a single clear meaning; he then invokes the presumption of consistent expression to justify his conclusion that this meaning must prevail throughout. Finally, he points out that the presumption applies with particular force where the provisions in which the re-

⁵⁰ (1989), 61 D.L.R. (4th) 725, at 732 (S.C.C.).

⁵¹ (1992), 89 D.L.R. (4th) 218 (S.C.C.).

⁵² *Ibid.*, at 243-44.

TAB 13

**THE
DICTIONARY
OF
CANADIAN
LAW**

by

Daphne A. Dukelow, B.Sc., LL.B., LL.M.

Betsy Nuse, B.A. (Hon.)

A Carswell Publication

nation becomes inadvisable. *Air Regulations*, C.R.C., c. 2, s. 101.

ALTERNATIVA PETITIO NON EST AUDIENDA. [L.] An alternate petition will not be heard.

ALTERNATIVE. *n.* One of several possibilities.

ALTERNATIVE DISPUTE RESOLUTION. A term for processes such as arbitration, conciliation, mediation and settlement, designed to settle disputes without formal trials.

ALTERNATIVE FUEL. Natural gas and any product obtained therefrom that is capable of being used as a fuel and coal and any product obtained therefrom that is capable of being so used. *Energy Supplies Emergency Act*, R.S.C. 1985, c. E-9, s. 22(3).

ALTERNATIVE MEASURES. Measures other than judicial proceedings under this Act used to deal with a young person alleged to have committed an offence. *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 2.

ALTIMETER SETTING REGION. A low level airspace designated and defined as such in the Designated Airspace Handbook. *Altimeter Setting Procedures Order*, C.R.C., c. 33, s. 2.

ALTITUDE. *n.* The altitude indicated on an altimeter set to the current altimeter setting in accordance with the requirements of the Altimeter Setting Procedures Order. *Cruising Altitudes Order*, C.R.C., c. 39, s. 2. See CRUISING ~.

ALTO ET BASSO. [L.] High and low.

ALTUM MARE. [L.] The high sea.

ALUMINUM-SHEATHED CABLE. A cable consisting of one or more conductors of approved type assembled into a core and covered with a liquid-and-gas-tight sheath of aluminum or aluminum alloy. *Power Corporation Act*, R.R.O. 1980, Reg. 794, s. 0.

ALUMNI ASSOCIATION. An association of graduates of a university.

ALUMNUS. *n.* [L.] A person educated at a university or college.

A.M. *abbr.* 1. [L. ante meridiem] Before noon. 2. Amplitude modulation. *Radio Broadcasting regulations*.

AMALGAM. See ALKALI METAL ~.

AMALGAMATED ASSOCIATION. An association formed by an amalgamation of cooperative associations that is confirmed by the issuance of a certificate of amalgamation. *Canada Cooperative Associations Act*, R.S.C. 1985, c. C-40, s. 129.

AMALGAMATED COMPANY. A company that results from an amalgamation.

AMALGAMATION. *n.* A term describing various ways the interests of two or more companies may unite. H. Sutherland, D.B. Horsley & J.M. Edmiston, eds., *Fraser's Handbook on Canadian Company Law*, 7th ed. (Toronto: Carswell, 1985) at 513. See STATUTORY ~.

AMALGAMATION OR RECONSTRUCTION. An arrangement pursuant to which an association (in this subsection called "the transferor association") transfers or sells or proposes to transfer or sell to any other association (in this subsection called "the transferee association"), the whole or a substantial part of the business and assets of the transferor association for a consideration consisting in whole or in part of shares, debentures or other securities of the transferee association and, either any part of such consideration is proposed to be distributed among members or shareholders of the transferor association of any class, or the transferor association proposes to cease carrying on the business or part of its business so sold or transferred or proposed to be sold or transferred. *Canada Cooperative Associations Act*, R.S.C. 1985, c. C-40, s. 125(6).

AMANUENSIS. *n.* A person who writes or copies on another's behalf.

AMATEUR. *n.* When used in respect of a natural person, means a person who has not at any time, (i) entered or competed in any athletic contest or exhibition for a staked bet, private or public money or gate receipts, or received any consideration for his services as an athlete except merchandise or an order for merchandise not exceeding \$35 in value, or reasonable travelling and living expenses actually incurred while going to, remaining at, and returning from, the place of contest or exhibition, (ii) taught, pursued or assisted in the pursuit of any athletics as a means of livelihood, (iii) sold or pledged his prizes, or (iv) promoted or managed an athletic contest or exhibition for personal gain. *Athletics Control Act*, R.R.O. 1980, Reg. 76, s. 1.

AMATEUR. *adj.* When used in respect of an athletic association, club, corporation, league or unincorporated organization, means that the association, club, corporation, league or unincorporated organization is composed of amateurs or is ordinarily recognized as being composed of amateurs. *Athletics Control Act*, R.R.O. 1980, Reg. 76, s. 1.

AMATEUR ATHLETIC ASSOCIATION. See REGISTERED CANADIAN ~.

AMATEUR SPORT. 1. Any athletic activity

CONSIDER

CONSIDER. *v.* To examine, inspect; to turn one's mind to.

CONSIDERATIO CURIAE. [L.] The judgment of the court.

CONSIDERATION. *n.* 1. In a contract, an interest, right, profit or benefit accrues to the one party while some detriment, forbearance, loss or responsibility is suffered or undertaken by the other party. G.H.L. Fridman, *The Law of Contract in Canada*, 2d ed. (Toronto: Carswell, 1986) at 75. 2. In a contract for the sale of goods, it is called the price and must be in money. G.H.L. Fridman, *Sale of Goods in Canada*, 3d ed. (Toronto: Carswell, 1986) at 42. See ADEQUATE ~; EXCLUDED ~; EXECUTED ~; EXECUTORY ~; FUTURE ~; GOOD ~; MERITORIOUS ~; PAST ~; PRESENT ~; VALUABLE ~.

CONSIDERATUM EST PER CURIAM. [L.] The court has considered.

CONSIDERED. *adj.* Determined; regarded.

CONSIGNED. *adj.* Shipped, consigned or entrusted to a mercantile agent for sale, reconsignment or other disposition. *The Sales on Consignment Act*, R.S.S. 1978, c. S-4, s. 2.

CONSIGNED CAR. A carlot of grain consigned to an operator under a delivery and settlement agreement between the operator and the owner of the grain. *Canada Grain Regulations*, C.R.C., c. 889, s. 2.

CONSIGNEE. *n.* A person to whom the goods are sent.

CONSIGNMENT. *n.* 1. Sending goods to another to sell or purchase. 2. The goods themselves.

CONSIGNOR. *n.* 1. A person who consigns goods. 2. (i) A person other than a person who, (A) arranges, sells or offers for sale, or (B) negotiates for, or (C) holds himself out as one who sells, or (D) furnishes or provides, transportation services where the transportation service offered is to be or has been in part furnished by a carrier other than that person, or (E) is a forwarding agent, a transportation broker, a cartage agent or any person engaged in a similar operation or anyone who enters into a pooling of freight arrangement, or (ii) a common carrier by rail, a common carrier by air or a common carrier by water, where the transportation of goods is incidental to an immediate prior or subsequent transportation of goods by a common carrier by rail, a common carrier by air or a common carrier by water. *Public Commercial Vehicles Act*, R.R.O. 1980, Reg. 832, s. 1.

CONSIST. *v.* To be made up of.

CONSISTENT. *adj.* Harmonious; in agreement with.

CONSOL. *abbr.* Consolidated.

CONSOLATION DOUBLE. The pay-out price of a daily double ticket on a horse that was declared the official winner of the first half of the daily double coupled with a horse, entry or mutuel field in the second half of the daily double that did not start in the race. *Race Track Supervision Regulations*, C.R.C., c. 441, s. 2.

CONSOLIDATE. *v.* To combine, unite.

CONSOLIDATED FUND. The aggregate of all public money that is on hand and on deposit to the credit of a province.

CONSOLIDATED LOAN. A loan acquired for the purpose of consolidating liabilities.

CONSOLIDATED REVENUE FUND. 1. Aggregate of all public moneys that are on deposit at the credit of the Receiver General. *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 2. 2. The aggregate of all public moneys that are on deposit at the credit of the Treasurer or in the name of any agency of the Crown approved by the Lieutenant Governor in Council. *Ministry of Treasury and Economics Act*, R.S.O. 1980, c. 291, s. 1.

CONSOLIDATED TAXES. Arrears of taxes less the amount of any discount by which the arrears may be reduced. *Local Tax Arrears Consolidation Act*, R.S.A. 1980, c. L-29, s. 1.

CONSOLIDATING STATUTE. A statute which draws together, with only minor amendments and improvements, all statutory provisions related to a particular topic into a single act. P.St.J. Langan, ed., *Maxwell on The Interpretation of Statutes*, 12th ed. (Bombay: N.M. Tripathi, 1976) at 20 and 21.

CONSOLIDATION. *n.* 1. In statute law, the uniting of many acts of Parliament into one. 2. The healing or stabilization of an employment injury following which no improvement of the state of health of the injured worker is foreseeable. *An Act Respecting Industrial Accidents and Occupational Diseases*, S.Q. 1985, c. 6, s. 2. See POSTAL ~ POINT.

CONSOLIDATION ACT. An act, usually with amendments, which repeals a number of earlier acts and includes, sometimes, some rules of the common law.

CONSOLIDATION OF ACTIONS. The combination of proceedings involving the same parties or issues.

CONSORT. *n.* Either of a man and a woman who (a) are married and cohabiting or (b) are living together as husband and wife and who

STATUTE OF FRAUDS

STATUTE OF FRAUDS. A statute passed to prevent perjuries and frauds.

STATUTE OF LIMITATIONS. A statute which prescribes the specified period of time within which criminal charges must be laid or legal actions must be taken.

STATUTE OF WESTMINSTER. The British statute which repealed the Colonial Laws Validity Act as it applied to the dominions. By section 2(2) it granted each dominion power to amend or repeal imperial statutes which were part of the law of that dominion and it stated that no dominion statute would be void on grounds of repugnancy to an existing or future imperial statute. Section 7(2) clarified that section 2 applied to Canada's provincial Legislatures in addition to Canada's federal Parliament, but that the Parliament and each legislature could only enact laws within their own jurisdiction under the B.N.A. Act. The power to amend or repeal extended to both future and existing imperial statutes. P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 41.

STATUTORY. *adj.* Governed or introduced by statute law.

STATUTORY AMALGAMATION. Under a prescribed procedure, two or more companies incorporated under one governing act enter into a joint agreement prescribing the terms and conditions of amalgamation and the way to effect it. When the procedure is completed, the amalgamated companies are treated as a single company. H. Sutherland, D.B. Horsley & J.M. Edmiston, eds., *Fraser's Handbook on Canadian Company Law*, 7th ed. (Toronto: Carswell, 1985) at 525.

STATUTORY APPROPRIATION. 1. An amount permitted or directed to be paid from the Revenue Fund that (i) is recommended by the Commissioner and authorized by Ordinance but that was not included in the estimates; or (ii) has been included in the estimates and previously authorized by an Ordinance permitting the charging of moneys to a purpose; or (iii) is authorized pursuant to sections 34 or 43. *Financial Administration Act*, S.N.W.T. 1982, c. 2, s. 2. 2. An amount permitted or directed to be paid from the General Revenue Fund by this or any other Act but does not include an amount paid (i) under the authority of a supply vote; (ii) pursuant to section 50, 51 or 57; (iii) pursuant to section 75; or (iv) to reduce the principal amount of any Government securities. *Financial Administration Act*, R.S.A. 1980, c. F-9, s. 1.

STATUTORY AUTHORITY. The Crown or any other person authorized by statute to expropriate or to cause injurious affection to land, or

upon condition that compensation be paid therefor, to take, interfere with or injure property other than land.

STATUTORY COURT. A court which derives its existence and powers from statute. S.A. Cohen, *Due Process of Law* (Toronto: Carswell, 1977) at 395.

STATUTORY DECLARATION. A solemn declaration in the form and manner from time to time provided by the provincial evidence acts or by the Canada Evidence Act.

STATUTORY INCREASE. The amount by which the rent charged for a rental unit may be increased without application to the Minister under this Act or may have been increased without application under the Residential Tenancies Act or under The Residential Premises Rent Review Act, 1975 (2nd Session). *Residential Rent Regulation Act*, S.O. 1986, c. 63, s. 1.

STATUTORY INSTRUMENT. (a) Any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which such instrument relates; or (ii) by or under the authority of the Governor-in-Council, otherwise than in the execution of a power conferred by or under an Act of Parliament; but (b) does not include (i) any instrument referred to in paragraph (a) and issued, made or established by a corporation incorporated by or under an Act of Parliament unless (A) the instrument is a Regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs; or (B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament; (ii) any instrument referred to in paragraph (a) and issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament; (iii) any instrument referred to in paragraph (a) and in respect of which, or in respect of the production or disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto; or (iv) an Ordinance of the

TAB 14

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VANCOUVER, B.C. V6Z 2N3 CANADA
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BRITISH COLUMBIA
UTILITIES COMMISSION

ORDER
NUMBER G-127-99

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by Kanelk Transmission Company Limited
for Approval to Dispose of Utility Assets

BEFORE: P. Ostergaard, Chair)
L.R. Barr, Deputy Chair)
P.G. Bradley, Commissioner) December 2, 1999
K.L. Hall, Commissioner)
B.L. Clemenhagen, Commissioner)

O R D E R

WHEREAS:

- A. On June 8, 1999, Kanelk Transmission Company Limited ("Kanelk") applied to the Commission, pursuant to Sections 52 and 41 of the Utilities Commission Act ("the Act"), to dispose of its utility assets in British Columbia and assign the associated Certificate of Public Convenience and Necessity ("CPCN") to British Columbia Hydro and Power Authority ("B.C. Hydro"); and
- B. Kanelk's British Columbia facilities were built in 1951. The 138 kV transmission system runs from TransAlta Utilities Corporation's facilities at Pocaterra, Alberta to B.C. Hydro's Natal Substation, then continues east to terminate at Coleman, Alberta. The system is used at present by B.C. Hydro to serve its customers in the Elk Valley; and
- C. Kanelk and B.C. Hydro signed an Asset Purchase Agreement ("the Agreement"), dated December 15, 1998, for the sale of the utility assets for \$4,322,967 subject to Commission approval; and
- D. The closing date of April 30, 1999 in the Agreement was subsequently amended by three letter agreements, with the closing date in the October 27, 1999 letter agreement specified as December 10, 1999; and

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-127-99-**

2

E. The District of Elkford, the District of Sparwood, the Regional District of East Kootenay, the Independent Power Association of British Columbia, and Fording Coal Ltd. expressed their interest and concerns about the sale of Kanelk's utility assets; and

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-127-99**

3

- F. After a Pre hearing Conference, established by Order No. G-71-99 and held in Elkford on July 22, 1999, and after a series of Information Requests and Responses, the Commission informed the parties that they would be given until September 15, 1999 to resolve outstanding issues. In the event that substantive opposition continued to exist, the Commission advised that it may initiate a formal public hearing process to occur in Elkford; and
- G. The Commission, in Letter No. L-54-99 dated October 15, 1999, concluded that an oral hearing would not be required, directed Kanelk to respond to a Fording Coal Ltd. proposal by October 29, 1999, solicited further written submissions from intervenors by November 12, 1999, and a reply by Kanelk, if any, by November 19, 1999.

NOW THEREFORE for the Reasons given in Appendix A to this Order, the Commission approves Kanelk's application to dispose of its utility assets in British Columbia and assign the associated Certificate of Public Convenience and Necessity to B.C. Hydro, based on the determinations in the attached Decision.

DATED at the City of Vancouver, in the Province of British Columbia, this 2nd day of December 1999.

BY ORDER

Original signed by:

Peter Ostergaard
Chair

Attachment



REASONS FOR DECISION

KANELK TRANSMISSION COMPANY LIMITED Application for Approval to Dispose of Utility Assets

THE APPLICATION

On June 8, 1999, Kanelk Transmission Company Limited ("Kanelk") applied to the Commission to dispose of its utility assets, consisting of a 120 km, 138 kV transmission line located in the Elk Valley, to British Columbia Hydro and Power Authority ("B.C. Hydro") for a purchase price of \$4,322,967. The transmission line serves B.C. Hydro's customers located in the Elk Valley, the District of Elkford, and coal mines at Fording River, Greenhills and Line Creek, pursuant to a Certificate of Public Convenience and Necessity ("CPCN") issued by the British Columbia Public Utilities Commission on October 24, 1949.

The Application states that the quality of service to customers in the Elk Valley will not be affected by the sale of the assets to B.C. Hydro since the transmission line will continue to be interconnected to transmission facilities on the Alberta side of the B.C.-Alberta border. As well, the system support services purchased by Kanelk under Rider A, Special Facilities Credit, to Rate Schedule GIS, and provided to B.C. Hydro by Kanelk under Section 2.2 of the Wholesale Transmission Service and System Support Services Agreement, would continue to be available to B.C. Hydro. The relevant sections of Rider A, Special Facilities Credit, to Rate Schedule GIS have been revised and are directly available to B.C. Hydro.

THE PURCHASE

The net book value of the line on December 31, 1998 (based on material supplied by Kanelk as part of the negotiated settlement process that resulted in Order No. G-6-98, which approved the Wholesale Transmission and System Support Service Agreement) is \$3.6148 million. B.C. Hydro proposes to capitalize the Kanelk Line at the full purchase price of \$4.322 million.

B.C. Hydro stated that it is aware it is common practice to include a purchased existing utility plant into the rate base at the net book value of the asset. This practice is followed to prevent shareholders from passing on the risk, associated with the purchase of a utility plant at appreciated capital values, to ratepayers through increased revenue requirements. In this case, B.C. Hydro suggests that capitalizing the Kanelk Line at the full purchase price is appropriate since ratepayers will benefit through reduced future revenue requirements as a result of B.C. Hydro owning the Kanelk Line. In response to a Commission staff Information Request for precedents on this matter, B.C. Hydro cited a 1984 Decision, where the Commission allowed West Kootenay Power and Light Company, Limited to include the premium of \$11.9 million over book value paid to Cominco Ltd. for generation assets, as a utility asset when determining its revenue requirements. However, that Decision only dealt with the fact that the premium had not been recorded in the correct account within the Uniform System of Accounts. The inclusion of the acquisition premium in rate base was the result of a 1982 Ministerial Order, which exempted Cominco Ltd. from regulation, and approved the sale of Cominco Plants No. 2, 3 and 4 for \$20 million, with the purchase price to be allocated in the books of account between real property, dams and equipment, and buildings.

THE REGULATORY PROCESS

At a Pre-hearing Conference in Elkford on July 22, 1999, intervenors raised a number of issues about the proposed sale. After a series of Information Requests and Responses, the Commission informed the parties that they would be given until September 15, 1999 to resolve outstanding issues. In the event that substantive opposition continued to exist, the Commission advised that it may initiate a formal public hearing process to occur in Elkford.

Subsequently, the Commission concluded that an oral hearing was not required and Letter No. L-54-99 directed Kanelk to respond to a Fording Coal Ltd. ("Fording") proposal by October 29, 1999, with further written submissions from intervenors by November 12, 1999, and with reply by Kanelk, if any, by November 19, 1999.

THE ISSUES

Local governments affected by the proposed sale initially opposed the sale of the transmission line to B.C. Hydro, on the basis that ownership by the Crown corporation resulted in a loss of property tax revenue to them. In mid September 1999, the Regional District of East Kootenay and the District of Sparwood advised the Commission that the Finance, Administration and Engineering Committee of the Regional Board had accepted a mitigation offer from B.C. Hydro, and that these two local governments now supported B.C. Hydro's ownership of the

Kanelk line. Therefore, the two remaining parties with substantive concerns were the Independent Power Association of British Columbia ("IPABC") and Fording.

On September 8, 1999, the IPABC stated that it was not possible to make any final determination of its position until it knew the details of any agreement with respect to lost tax revenues. After receiving a response from B.C. Hydro, the IPABC submitted that the transfer of the CPCN to B.C. Hydro is not in the public interest, as B.C. Hydro's justification for the purchase is "woefully inadequate", and the payments to the local governments raise the issue of undue discrimination. In its June 22, 1999 letter of support, B.C. Hydro noted that the purchase of the Kanelk transmission line would reduce B.C. Hydro's expected present value of future revenue requirements by \$1.407 million. The 8% discount rate used by B.C. Hydro in the determination of the net present value of the asset purchase represents B.C. Hydro's Weighted Average Cost of Capital. The Commission agrees that, on balance, the purchase will have the benefit of reducing B.C. Hydro's future revenue requirements and that the analysis is reasonable.

Fording's concern about the proposed sale focussed on its ability to retain future transmission access at rates that only consider the Kanelk line cost of service. Fording's interest arises from its proposal for a coal-fired thermal generation plant at its Fording River mine.

The issue was first raised in the 1995 public hearing into Kanelk's rates. In its October 17, 1995 Decision the Commission noted:

"At the request of Commission counsel, Kanelk reviewed the utility's CPCN, as amended, and determined that it fully describes the existing services provided by Kanelk and that further modifications were not needed at this time (T. 299). Fording Coal requested that the CPCN dated October 18th, 1967 be varied to remove the requirement for the consent of East Kootenay and B.C. Hydro, or either of them, to wheel power over the Kanelk system, thereby allowing this jurisdiction to revert to the Commission (T. 544). B.C. Hydro argued that this is, in fact, a radical step towards retail wheeling and suggested that the Commission's recent report, The Electricity Market Structure Review, recommended that the government reject retail wheeling at this time (T. 537).

Fording Coal responded that the request was actually focused on the potential to give Fording Coal the ability to view TransAlta as a supplier (T. 548).

The Commission agrees that there is merit to Fording Coal's request to modify the CPCN, but it may be premature until government policy with respect to competitive service in British Columbia is determined. If there is a change to transmission access in the rest of the B.C. Hydro service area, the Commission will review the appropriateness of the Kanelk CPCN at that time and will ensure that Fording Coal is not discriminated against."

In its November 12, 1999 submission, Fording stated:

“Fording does not oppose the sale of the utility assets, in as much as Kanelk/B.C. Hydro have provided evidence for the Commission to consider which purports to set forth the net benefit to B.C. Hydro. However, Fording submits that it is unfair and unjust to itself and other customers, both existing and reasonably foreseeable, to have to bear the cost, financial burdens as well as potential lost economic opportunities which would not have been the circumstance if Kanelk had remained the owner of the assets.”

The sale of utility assets by Kanelk will terminate the Wholesale Transmission Service and System Support Services Agreement, under which Kanelk provided wheeling and system support services to B.C. Hydro, for serving its loads in the Elk Valley. Fording argued that this Agreement gave third parties a right to seek and receive access to transmission facilities at rates using the cost and other principles as currently embodied in the Kanelk rates. Alternatively, if it did not have this right, it felt it should have. Fording sought to make this access a condition of the asset transfer.

According to Fording, in the current circumstances, an access rate would be calculated on the basis of Kanelk's costs or alternatively a bypass rate would be negotiated with B.C. Hydro calculated in similar circumstances. However, if the Application is approved by the Commission without the inclusion of mitigation measures (inherited rights), Fording believes that the rate for this same service would be determined on the basis of the lower of the rates proposed in B.C. Hydro's letter of July 29, 1999, or a bypass rate calculated pursuant to Commission principles established in previous decisions. On the basis of information supplied by B.C. Hydro and Kanelk, Fording felt that regulatory approval without inherited rights results in an immediate six to seven-fold increase in the rate.

Kanelk's view is that Fording does not have any rights conferred by the Agreement but agrees that, if Fording were to build a generating plant and apply to become a wholesale customer, Kanelk would likely apply for an amendment to its tariffs which would equitably allocate Kanelk's revenue requirement between B.C. Hydro and Fording. Kanelk felt it is speculative as to what, if any, tariff would ultimately be approved by the Commission in such a circumstance.

Fording responded that its initiatives and activities could be more aptly described as “effective strategic planning (visionary) in a dynamic and rapidly evolving electric market. The market structure in the future will, arguably, not be identical to that which exists today.”

Kanelk noted in its November 19, 1999 reply that:

- “1. ...there is no reasonable basis to conclude that potential future wholesale users of the Kanelk facilities would be materially harmed, and in fact they could be better off, if the Kanelk assets were transferred to B.C. Hydro;
2. Kanelk does not offer a competitive alternative to B.C. Hydro for retail customers;
3. Approval of Kanelk’s application will not have any impact on a retail customer’s opportunity to negotiate an economic bypass rate with B.C. Hydro;”

COMMISSION DETERMINATIONS

The Commission concludes that it is in the public interest for the sale of the Kanelk utility assets to B.C. Hydro to proceed. The Commission is not prepared to accept Fording’s argument that it should receive transmission access under B.C. Hydro ownership at rates based on the Kanelk line’s cost of service. If Fording’s proposed generating plant proceeds further towards financing and construction, Fording has the option under Section 70 (“Use of Transmission Facilities”) of the Utilities Commission Act to apply for an order enabling Fording to use B.C. Hydro’s transmission facilities at rates, terms, and conditions considered advisable by the Commission at that time.

The Commission approves Kanelk’s application, under Sections 52 and 41 of the Utilities Commission Act, to dispose of its utility assets and to assign the associated Certificate of Public Convenience and Necessity to B.C. Hydro.

The Commission does not accept B.C. Hydro’s proposal to capitalize the utility assets of Kanelk at the full purchase price of \$4.323 million. The Commission is of the view that it is more appropriate to record the Kanelk utility assets at net book value. This is the more normal regulatory accounting treatment which protects customers from utility assets previously paid for by customers being increased by a new utility owner. B.C. Hydro has not established sufficient reasons to increase the capitalization of Kanelk.

TAB 15

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TAB 16

BRITISH COLUMBIA ELECTRIC }
RAILWAY CO. LTD. }

APPELLANT; 1960
*May 4, 5, 6
Oct. 4

AND

THE PUBLIC UTILITIES COMMISSION OF BRITISH
COLUMBIA, BRITISH COLUMBIA LUMBER MAN-
UFACTURERS' ASSOCIATION, THE CORPORA-
TION OF THE CITY OF VICTORIA, THE COR-
PORATION OF THE DISTRICT OF OAK BAY,
THE CORPORATION OF THE DISTRICT OF
SAANICH, CORPORATION OF THE TOWN-
SHIP OF ESQUIMALT AND CITY OF VANCOU-
VERRESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

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

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

1960
 B.C.
 ELECTRIC
 RAILWAY
 Co. LTD.
 v.
 PUBLIC
 UTILITIES
 COMMISSION
 OF B.C.
 et al.

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

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

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

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

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

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

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

APPEAL from a portion of a judgment of the Court of Appeal for British Columbia¹, comprising the answer to the first of five questions submitted to it by the Public Utilities Commission. Appeal allowed, Kerwin C.J. dissenting.

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

¹(1959), 29 W.W.R. 533.

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

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

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

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

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

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

The Court's answer to Question 1 reads:

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

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

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

16. (1) In fixing any rate:—

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

(b) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:

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

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

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

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

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

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

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

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

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

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

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

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

Section 141C read:

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

Section 141D read in part:

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

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

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

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

Whether its omission affects the matter is to be determined.

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

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

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

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

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

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

¹ (1679), 2 Show. 81, 89 E.R. 807.

² (1869), L.R. 4 H.L. 226 at 237, 38 L.J. Ex. 177.

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

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

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

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

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

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

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

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

¹(1923), 262 U.S. 679.

²(1925), 271 U.S. 23 at 31.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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The second part of Question (1) reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Commission has therefore consented to the filing to be effective July 15th, 1958, of all the rate schedules submitted by the Company for the Mainland and Vancouver Island, as modified and supplemented by the Company during the course of the hearings on its application, except the residential rate schedules and Mainland Rate 3035 for industrial users.

The Commission has decided that the principal residential rate on the Mainland (Schedule 1109) and the principal residential rate on the Island (Schedule 1110 under which the principal divisions are Billing Codes 1110 and 1112) should be adjusted to yield not more than three-quarters of the additional revenue proposed. The adjustment must be applied primarily to reduce sharp changes in impact and lessen disproportionately large percentage increases in the consumption range of 60 KWH to 280 KWH per month. Comparable adjustments must also be made in some of the related special residential rates of lesser importance. Most of the relief would be given to the small residential user.

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

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

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

16. (1) In fixing any rate:—

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- (a) The Commission shall consider all matters which it deems proper as affecting the rate:
- (b) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:
- (c) Where the public utility furnishes more than one class of service, the Commission shall segregate the various kinds of service into distinct classes or categories of service; and for the purpose of fixing the rate to be charged for the service rendered, each distinct class or category of service shall be considered as a self-contained unit, and the rates fixed for each unit shall be such as are considered just and reasonable for that unit without regard to the rates fixed for any other unit. If it is considered by the Lieutenant-Governor in Council that the rates as so determined might be inequitable or contrary to the general public interest, the Lieutenant-Governor in Council may direct that two or more classes or categories of service shall be considered as one unit in fixing the rate:

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

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

The Court of Appeal concurred in this view. The judgment of the Court¹, delivered by Sheppard J.A., refers to this question in the following words:

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

¹(1959), 29 W.W.R. 533 at 538.

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

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From this decision the present appeal is brought.

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

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

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

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

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

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

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

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

"Unjust" and "unreasonable" as applied to rates shall be construed to include respectively injustice and unreasonableness, whether arising from the fact that rates are excessive as being more than a fair and reasonable charge for service of the nature and quality furnished by the public utility, or from the fact that rates are insufficient to yield fair compensation for the service rendered, or arising in any other manner:

The word "service", which appears in this definition, is defined in the Act to include:

the use and accommodation afforded consumers or patrons, and any product or commodity furnished by a public utility; and also includes, unless the context otherwise requires, the plant, equipment, apparatus, appliances, property, and facilities employed by or in connection with any public utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which the public utility is engaged and to the use and accommodation of the public:

These defined words appear in two sections of the Act which relate to the rates to be charged by a public utility.

Section 8, which is among a group of sections dealing with the duties and restrictions imposed on public utilities, provides:

8. (1) No public utility shall make demand or receive any unjust, unreasonable, unduly discriminatory, or unduly preferential rate for any service furnished by it within the Province, or any rate otherwise in violation of law; and no public utility shall, as to rates or service, subject any person or locality, or any particular description of traffic, to any undue prejudice or disadvantage, or extend to any person any form of agreement, or any rule or regulation, or any facility or privilege, except such as are regularly and uniformly extended to all persons under substantially similar circumstances and conditions in respect of service of the same description, and the Commission may by regulations declare what constitute substantially similar circumstances and conditions.

¹[1929] S.C.R. 186 at 193, 2 D.L.R. 4.

(2) It shall be a question of fact, of which the Commission shall be the sole judge, whether any rate is unjust or unreasonable, or whether in any case there is undue discrimination, preference, prejudice, or disadvantage in respect of any rate or service, or whether service is offered or furnished under substantially similar circumstances and conditions. 1938, c. 47, s. 8; 1939, c. 46, s. 5.

Section 20, which empowers the Commission to determine rates, reads as follows:

20. The Commission may upon its own motion or upon complaint that the existing rates in effect and collected or any rates charged or attempted to be charged by any public utility for any service are unjust, unreasonable, insufficient, or discriminatory, or in anywise in violation of law, after a hearing, determine the just, reasonable, and sufficient rates to be thereafter observed and in force, and shall fix the same by order. The public utility affected shall thereupon amend its schedules in conformity with the order and file amended schedules with the Commission.

It will be noted that this section, in addition to the use of the words "unjust" and "unreasonable", also uses the terms "insufficient" and "sufficient" in relation to rates.

Both of these sections contemplate a system of rates which would be fair to the consumer on the one hand and which will yield fair compensation to the public utility on the other hand.

Section 16, the section with which we are concerned in this appeal, also deals with this matter of fairness of rates. In addition, it spells out the method by which a public utility is to obtain fair compensation for its service; i.e., by a fair and reasonable return upon its rate base, which rate base, pursuant to s. 45, the Commission can determine by appraisal.

Section 16 deals with the duties of the Commission in fixing rates. Clause (a) of subs. (1) states that the Commission shall consider all matters which it deems proper as affecting the rate. It confers on the Commission a discretion to determine the matters which it deems proper for consideration and it requires the Commission to consider such matters.

Clause (b) of subs. (1) does not use the word "consider", which is used in clause (a), but directs that the Commission "shall have due regard", among other things, to two specific matters. These are:

- (i) The protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and

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- (ii) To giving to the public utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable the public utility to furnish the service.

As I read them, the combined effect of the two clauses is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (b). It would appear, reading ss. 8, 16 and 20 together, that the Act contemplates these two matters to be of primary importance in the fixing of rates.

In my opinion, therefore, these two factors should be given priority over any other matters which the Commission may consider under clause (a), or any other things to which it shall have due regard under clause (b), when it is fixing any rate.

The second portion of question (1)(a) was as to whether, in case of conflict among the matters and things referred to in clauses (a) and (b) of s. 16(1), it was the Commission's duty to act to the best of its discretion. I have already expressed my view regarding the priority as between those things specifically mentioned in clause (b) and the other matters or things referred to in clauses (a) and (b). This leaves the question as to possible conflict as between the two matters specifically mentioned in clause (b).

Clearly, as between these two matters there is no priority directed by the Act, but there is a duty imposed upon the Commission to have due regard to both of them. The rate to be imposed shall be neither excessive for the service nor insufficient to provide a fair return on the rate base. There must be a balancing of interests. In my view, however, if a public utility is providing an adequate and efficient service (as it is required to do by s. 5 of the Act), without incurring unnecessary, unreasonable or excessive costs in so doing, I cannot see how a schedule of rates, which, overall, yields less revenue than would be required to provide that rate of return on its rate base which the Commission has determined to be fair and reasonable, can be considered, overall, as being excessive. It may be that within the schedule certain rates may operate unfairly, relatively, as

between different classes of service or different classes of consumers. If so, the Commission has the duty to prevent such discrimination. But this can be accomplished by adjustments of the relative impact of the various rates in the schedule without having to reduce the total revenues which the whole schedule of rates is designed to produce.

Accordingly, it is my opinion that the answer to question (1)(a) should be "No". My answer to question (1)(b) would be that the Commission, in priority to any other matters which it may deem proper to consider under clause (a) and any of the other things referred to in clause (b) of s. 16(1), should have due regard to the two matters specifically mentioned in clause (b). In the present case, having decided that certain of the rates proposed by the appellant would impose an unreasonable burden upon certain classes of consumers, the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, until a rate schedule is devised which meets the requirements of clause (b) of s. 16(1).

In my view the appeal should be allowed, but no costs should be payable.

Appeal allowed, Kerwin C.J. dissenting.

Solicitor for the appellant: A. Bruce Robertson, Vancouver.

Solicitors for The Public Utilities Commission of British Columbia, respondent: Clark, Wilson, Clark, White & Maguire, Vancouver.

Solicitors for The Corporation of The City of Victoria, The Corporation of The District of Oak Bay, The Corporation of The District of Saanich and Corporation of The Township of Esquimalt, respondents: Straith, O'Grady, Buchan, Smith & Whitley, Victoria.

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

TAB 17

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-116-07**



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**IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473**

and

An Application by Terasen Gas Inc.
for Approval of the Sale of Land at 3700 2nd Avenue, Burnaby, B.C.

BEFORE: R.H. Hobbs, Chair September 21, 2007
A.W.K. Anderson, Commissioner

O R D E R

WHEREAS:

- A. On July 27, 2007, Terasen Gas Inc. ("Terasen Gas") filed an application (the "Application") pursuant to Section 52 of the Utilities Commission Act (the "Act") requesting approval to dispose of 7.67 acres of vacant land at 3700 2nd Avenue, Burnaby, B.C. ("Lochburn"); and
- B. The Commission by Order No. G-86-07, established a written comment process for the review of the Application. The Regulatory Timetable included dates for registration of Intervenor and Interested Parties, information requests, responses, and comments; and
- C. Concurrent with the submission of the Application to the Commission, Terasen Gas provided a copy of the Application to all stakeholders and registered Intervenor to the Terasen Gas Multi Year PBR (2004-2007 extended to 2008-2009) as well as the 2006 Annual Review and Mid-Term Assessment Review; and
- D. The Application states that the land at Lochburn is part of what was purchased by Terasen Gas (formerly B.C. Gas Inc.) from British Columbia Hydro and Power Authority. Order in Council No. 1830/1988 ("OIC 1830") titled B.C. Gas Inc. Order, established, for the setting of rates and all other purposes under the Act, the appraised value of the plant in service ("rate base") of B.C. Gas Inc. as of July 16, 1988 to be \$582,699,000, and allocated the plant in service as set out in Schedule 1 of OIC 1830. Schedule 1 of OIC 1830, which is an allocation of rate base to asset accounts, allocated \$24,781,000 to "Land and land rights"; and
- E. In the Application Terasen Gas calculates and submits that 79.93 percent of the original cost of the land was included in rate base and 20.07 percent of the cost of the land was treated as a non-regulated asset; and
- F. The 7.67 acres of vacant land is 39.21 percent of the entire parcel of land at Lochburn; and
- G. The calculation of the net gain on sale has the effect of the shareholder absorbing the remediation costs out of the proceeds; and

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- H. The Application sets out that the vacant land is no longer required, nor will be required in future, for the provision of natural gas distribution service; and
- I. On August 31, 2007 Terasen Gas filed its response to Commission Information Request ("IR") No. 1. Terasen Gas also filed a confidential response to Commission IR No. 1 Question 1.1. Subsequently, on September 10, 2007 Terasen Gas filed a clarification for a response to an information request; and
- J. There is no registered Intervenor in this proceeding thus no written Intervenor comments were filed. On September 14, 2007 Terasen Gas filed its Written Submission; and
- K. Terasen Gas' Written Submissions state that it is also requesting approval to remove from rate base, following the sale of the vacant land, the amount of \$1,136,155, being the rate base value of the 7.67 acres. In the Application Terasen Gas has states that it is prepared, on a without prejudice basis, to provide \$2.5 million of the gain on sale of the vacant land to its customers through a rider in addition to the \$1.1 million of the proceeds of the sale that will go to reduce rate base; and
- L. The Commission has reviewed the Application along with the supporting material and finds that approval is warranted.

NOW THEREFORE the Commission orders as follows:

- 1. Pursuant to Section 52 of the Act, the disposition of the vacant land at Lochburn, consisting of 7.67 acres of the entire parcel of land is approved.
- 2. Terasen Gas is to file a report with the Commission following the date of completion of the sale that includes a summary of the actual proceeds and costs.
- 3. Removal of the amount of \$1,136,155 from the rate base of Terasen Gas following the sale is approved.
- 4. A refund of \$2.5 million to ratepayers over one year by a rate rider to be filed with the first quarterly gas review following the date of completion of the sale is approved.

DATED at the City of Vancouver, in the Province of British Columbia, this 21st day of September 2007.

BY ORDER

Original signed by:

Robert H. Hobbs
Chair

TAB 18

1.0 BACKGROUND

1.1 Pacific Northern Gas Ltd.

Pacific Northern Gas Ltd. ("PNG"), a subsidiary of Westcoast Energy Inc. ("Westcoast"), received approval from the then Public Utilities Commission of British Columbia ("PUC") on December 5, 1966 for the construction and operation of a natural gas system extending from Summit Lake to Prince Rupert which would serve 13 communities. PNG provides service from a district office in Terrace and a head office in Vancouver. PNG's system is primarily an industrial gas transmission system which, by the end of 1992, was providing service to approximately 14,800 residential, 2,400 commercial and small industrial, and 14 special contract and large industrial customers in west-central British Columbia.

1.2 Northland Utilities (B.C.) Limited

Northland Utilities (B.C.) Limited ("Northland") is a wholly-owned subsidiary of Northwestern Utilities Limited ("Northwestern") and a member company of the Canadian Utilities Group. Northland has two divisions, one in Dawson Creek and the other in Tumbler Ridge, British Columbia. The Northland district office in Dawson Creek serves both Dawson Creek and Tumbler Ridge. The Northland district office reports to Northwestern's regional office in Grande Prairie Alberta, which, in turn reports to Northwestern's head office in Edmonton.

1.2.1 Northland Utilities (B.C.) Limited - Dawson Creek Division

The Dawson Creek Division was granted a Certificate of Public Convenience and Necessity ("CPCN") on December 12, 1950 by the PUC for the construction and operation of a natural gas system in and about the Village of Dawson Creek. A similar CPCN was issued on November 17, 1954 for service within the boundaries of the Village of Pouce Coupe. When the Dawson Creek Division applied to provide service in and about the Hamlet of Rolla, the PUC issued a CPCN on July 6, 1962 which consolidated the service areas of Dawson Creek, Pouce Coupe and Rolla. By the end of 1992, Dawson Creek Division was providing service to 4,372 residential, 658 commercial customers and 1 industrial customer.

1.2.2 Northland Utilities (B.C.) Limited - Tumbler Ridge Division

Northland was granted the right to provide natural gas service to Tumbler Ridge on April 1, 1982. The utility obtained grants, refundable at the end of ten years, totalling \$1.2 million from Quintette Coal Limited ("Quintette") and the District of Tumbler Ridge ("the District") which were recorded by the utility as no-cost capital. Despite the contributions, the natural gas rates in Tumbler Ridge remained the highest in the Province. To confront this problem, on May 4, 1988, representatives of the District, Quintette, Northland, the Ministry of Energy, Mines and Petroleum Resources and the Commission reached agreement whereby:

1. Quintette and the District would relieve Northland of its obligation to refund their \$1.2 million loan;
2. Northland would forego recovery of the accumulated shortfall of approximately \$1.7 million; and
3. The Provincial Government would provide a contribution equal to the net book value of the processing plant at June 1, 1988 approximately equal to \$1.8 million.

By the end of 1992, the Tumbler Ridge Division was serving 1,172 residential, 79 commercial and 2 industrial customers.

2.0 THE APPLICATIONS AND HEARING

PNG applied on March 12, 1993 for Commission approval, pursuant to Section 61(6) of the Utilities Commission Act ("the Act"), for the acquisition from Northwestern of all of the outstanding shares of Northland. The effective date of the purchase and sale is January 1, 1993 with an expected closing date of March 31, 1993 which date was subsequently extended to May 31, 1993. The purchase price is \$2.5 million which is allocated as \$800,000 for the common equity of Tumbler Ridge, \$1.3 million for the common equity of Dawson Creek and an acquisition premium of \$400,000.

PNG reviewed the proposed acquisition with the Mayors and other municipal officials in the District, the City of Dawson Creek, the Village of Pouce Coupe and the Peace River Regional District. PNG did not believe that a public hearing was required for this Application and received written support for that position from the City of Dawson Creek and the Village of Pouce Coupe. While the District and the Peace River Regional District did not oppose PNG's acquisition of Northland, they requested that a public hearing be held prior to the Commission granting its approval. PNG requested that if a hearing were required, it be undertaken expeditiously.

Northland applied on March 15, 1993 for Commission approval, pursuant to Section 61(4) of the Act to register on its books a transfer of shares in the capital of Northland. Northland submitted that the transfer of shares from Northwestern to PNG would have no detrimental impact on Northland or the customers of Northland.

The Commission concluded that there is sufficient public interest for the Application to be heard in a public forum and set down a public hearing on May 5, 1993 in Dawson Creek.

At the hearing, PNG witnesses were Messrs. Roy Dyce, Executive Vice President and General Manager; and a Director of PNG and Thomas Weaver, Comptroller. Northland witnesses were Messrs. Dennis Ellard, Senior Vice President and General Manager of Northland and Northwestern, Ed Porter, Vice President, Gas Supply at Northwestern, Reg Swanek, Manager Financial Planning at Northwestern, and Tom Fiddler, District Manager for Northland.

4 3.0 THE ISSUES

3.1 Rate Base

The District expressed written concerns on a number of items which included PNG's acquisition price for Northland, the valuation of the Tumbler Ridge existing assets, and the effects on natural gas rates. PNG filed the District's written concerns and its response as Exhibit 5 in the hearing. On the issue of asset valuation, PNG stated that since it intends only to purchase the shares of Northland and continue its operations as a separate company, the proposed acquisition would not affect Northland's assets or Northland's obligations to its customers in the Tumbler Ridge area.

In acquiring Northland, PNG agreed to pay an acquisition premium of \$400,000. PNG stated that this premium will not be recorded in the rate base of Northland and will not be included as part of the management service charges that PNG might charge to Northland. On the books of PNG, it intends to record this premium as a non-utility item (T. 16-19). While PNG does not intend to recover the acquisition premium directly, PNG believes that if efficiencies occur due only to PNG owning Northland's shares then it would like the possibility of arguing that the saving should be shared between the customers and the utility (T. 16).

Regarding the valuation of existing assets, the District seeks to be assured that the contributions of \$1.2 million from the District and Quintette and \$1.8 million from the Province should continue to favourably influence customer rates. PNG replied in Exhibit 5 that those contributions will continue to receive the same accounting and rate making treatment and continue to benefit customer rates in this area. The application of the contributions as a permanent credit to the rate base in 1988 resulted in a reduction in the Tumbler Ridge Division rate base from approximately \$5.6 million in 1987 to about \$2.2 million in 1992, as shown in Northland's Annual Reports to the Commission.

Commission staff questioned PNG about the expected upgrades to its billing system. PNG provides customer billing for its 17,000 customers on a Wang computer that it acquired in 1984. With the purchase of Northland, there will be an additional 6,000 customers which PNG indicates will necessitate additional storage capacity, a computer memory upgrade, communication equipment between Dawson Creek, Tumbler Ridge and Vancouver, and at least one additional person in the billing department. At the present time, Northland uses electronic meter reading in conjunction with the Northwestern billing system but this capability is not compatible with the

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PNG computer. PNG stated that all upgrades to the Wang computer will be economically evaluated and PNG does not anticipate making any other significant changes or replacements to the computer since it meets PNG's needs at the present time. However, PNG speculates that perhaps in three years it could be less costly to change to a new computer rather than continuing to run the Wang computer (T. 29-31).

3.2 Distribution Systems

Northland's distribution systems built since the mid-1980's are medium and high density polyethelene pipe (T. 61, 62). Steel with yellow jacket coating was used for sizes larger than four inches and for higher pressure service. Parts of the Dawson Creek system date from the 1950's and contain small quantities of older generation polyethelene pipe and coal tar coated steel pipe which were common at the time of installation. Other materials such as aluminium have not been used. Northland indicated recent experience with the materials in its system has been satisfactory and expects that situation to continue, providing present operating conditions, such as pressures, do not change. No upgrades or repairs are planned (T. 61-63).

On page 3 of the filed evidence of Mr. Dyce, and under cross-examination (T. 25-28), PNG stated it had inspected both distribution systems and the Tumbler Ridge gas processing plant, and was satisfied all are in good condition and well operated. The cathodic protection had been well maintained over the years and PNG saw no requirement for extraordinary repairs to the systems. Some pipe coating material is different from that presently used in the PNG system but this is not expected to present a problem.

Northland has not had a lost time accident since the early 1980's (T. 65, 66). PNG indicated it was satisfied that the facilities of both divisions are safe and meet relevant codes (T. 26). PNG will continue to utilize Northwestern's Emergency Procedures Manual and plans to review Northland's safety procedures and emergency response plans if the Applications are approved (T. 34).

Northwestern has established guidelines for the frequency of leak surveys and other inspections (T. 63, 64). Northland's lost and unaccounted for gas is approximately 2 percent, compared to about 1 percent for Northwestern's system as a whole. Northland attributed the difference to the

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relative size of its system, which made the loss calculation more sensitive to changes in the input information.

Northland presently receives support from Northwestern's regional office in Grande Prairie and from Northwestern's head office in Edmonton. These services will in future be provided from PNG's district office in Terrace and head office in Vancouver. At the present time, PNG does not intend to relocate the local offices in Dawson Creek or Tumbler Ridge or to change the way the operation is run (T. 34). PNG anticipates there may be areas where it can combine its efforts with Centra Gas British Columbia Inc., another subsidiary of Westcoast, which serves the Fort St. John area near Dawson Creek (T. 38).

The Letter Agreement between Northwestern and PNG provides that the District Agent at Tumbler Ridge and Agency Supervisor at Dawson Creek may return to Northwestern's employ after a four month transition period. Northland indicated it was not aware of any employees who did not wish to continue with Northland if the PNG application were successful (T. 59).

The Commission is reassured by the evidence about the condition of the distribution systems, Northland's safety record and the continuity of staff notwithstanding the change in ownership.

3.3 Tumbler Ridge Processing Plant

The Tumbler Ridge gas processing plant removes acid gas (CO₂ and H₂S) from the raw gas obtained from Sceptre Resources Limited facilities in the area, or from the Westcoast raw gas gathering pipeline (Exhibit 7, Question 5). The marketable gas is then distributed by Northland's Tumbler Ridge system.

The District raised a concern that the acid gas content of the gas being processed at the plant is increasing (T. 14, 15). PNG was aware of this concern and had contacted a number of producers who are active in the area with a view to enhancing the availability of gas with lower acid gas content. PNG has obtained information on gas supply reserves for Tumbler Ridge from Northland. PNG felt the situation regarding the acid gas content of available supply was something it can handle and has no definite plans to replace or upgrade the plant (T. 32, 33). Over the next 10 years, no major system expansion is anticipated to be needed for supply reasons (Exhibit 3, Question 14).

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Although PNG operates a propane air plant and compressor stations, it does not have staff who are familiar with and able to support the maintenance and operation of a sour gas processing plant. Support, including training and back-up, is available from Westcoast which operates the major Pine River Plant at Chetwynd and other sour gas facilities. A Westcoast employee assisted with PNG's inspection of the Tumbler Ridge plant (T. 33, 34).

3.4 Gas Supply and Supply Management

As set out in Northland responses to Exhibit 7, Questions 4 and 5, gas supply for Dawson Creek is provided under a Sales Agreement with Peace River Transmission Company Limited ("Peace River") dated September 4, 1956. Peace River purchases this gas from Westcoast under an agreement which continues until December 31, 1997 and thereafter unless terminated on six months notice. PNG expects these arrangements to continue in effect in the short term and will attempt to amend the agreements to provide a rolling four year gas supply as required by the Energy Supply Contract Rules pursuant to the Commission's March 11, 1993 Decision (Exhibit 3, Questions 6 to 12).

Over the longer term, PNG will evaluate other gas supply resources, including direct supply arrangements that may entail entering into transportation service arrangements with Peace River and Westcoast. PNG anticipates economies of scale will result when it negotiates Northland's gas supply arrangements as part of the larger requirements of PNG. Benefits may also result from combining the temperature sensitive load profile of Northland's predominately core market customer base with that of the large industrial customer base on the PNG system to allow greater utilization of Northland's valley gas (T. 21, 22).

PNG does not employ a full-time gas supply manager but Mr. Dyce and two other employees devote part of their time to gas supply matters. In addition, Canadian Hydrocarbons Marketing Inc. ("CHMI"), a subsidiary of Westcoast, acts as supply manager. PNG finds it more cost effective to bring in outside help rather than hiring a full-time employee (T. 36, 37).

Gas supply for Tumbler Ridge is purchased in the form of raw gas under a Gas Sales Agreement with CanWest Gas Supply Inc. ("CanWest") dated November 1, 1991. This supply arrangement was approved by Commission Order No. E-7-93 subject to the filing by October 1, 1993 of amendments to the Gas Sales Agreement which:

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- bring the length of the supply commitment under the contract into conformance with the Energy Supply Contract Rules pursuant to the Commission's March 11, 1993 Decision; and
- provide Northland with priority access to production in the Grizzly area which is committed to CanWest.

In response to Question 13 of Exhibit 2, and in Mr. Dyce's evidence, PNG indicated it had commenced preliminary discussions with CanWest to amend the agreement and is confident it could negotiate the required changes.

As an alternative to buying raw gas and sweetening it in the Tumbler Ridge plant, Northland may, in the future, have access to marketable gas via a sweet gas line from the Pine River Plant. Westcoast is at a very preliminary stage of considering a new pipeline that would carry marketable gas to production operations in the Tumbler Ridge area. PNG is monitoring this activity and would seek to obtain access to that sweet gas (T. 15).

The Commission anticipates the supply arrangements for Dawson Creek and Tumbler Ridge will become adequate upon the successful conclusion of the evaluations and negotiations that PNG will undertake.

3.5 Services Provided to Northland

Northwestern provides Northland with some operations and maintenance services from the Grande Prairie regional office. Northwestern's services include procurement of pipe, meters and other items (T. 46, 47 and 61). Northwestern also provides Northland with administrative services which include auditing, financing, accounting, regulatory, gas supply and customer billing (T. 47). Mr. Ellard stated that he could not recall any service that didn't come from Northwestern. Mr. Ellard considered that if an outside service were required for Northland, it would come through Northwestern (T. 55, 56).

PNG indicated it would provide Northland with engineering, procurement, construction management, inspection and meter calibration from either its Vancouver or Terrace offices (T. 34-

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36). Aside from the billing function and some minor outside consulting work, this is not expected to require PNG to hire additional staff.

In response to Exhibit 3, Question 3, PNG stated that:

"Upon PNG's acquisition of Northland, an administrative and management services agreement will be entered into whereby PNG will provide Northland with services similar to those that were provided by Northwestern to Northland."

Mr. Weaver elaborated upon this services agreement which he said would include customer billing, legal, executive and administrative services. All of the corporate support services that were not carried on by the district office or the division office would be provided by the PNG head office in Vancouver. PNG was unable to estimate the charge for these services since it did not have any experience with Northland which would aid in assessing the level of service required. PNG was willing to provide assurances that it would not charge Northland more for equivalent service than was charged by Northwestern (T. 19, 20).

PNG has indicated that it may require outside assistance in servicing Northland. PNG does not have experience in operating a sour gas plant and may request assistance from the Westcoast sour gas plant at Chetwynd, which is located approximately 100 miles away. Mr. Dyce stated that Westcoast could provide assistance as needed, or could be requested to provide training and back-up. He indicated that PNG may have to enter into a service agreement with Westcoast (T. 33, 34). Another area where PNG obtains outside assistance is gas supply management through its affiliated company CHMI.

3.6 Financing

In its Application, PNG made the following statement regarding its financing capability:

"Pacific Northern has adequate funds available through its existing lines of credit to complete the proposed purchase of the shares of Northland, and has the capacity to raise the necessary debt and equity financing required to meet the future capital requirements for the distribution systems in the Dawson Creek area and Tumbler Ridge, and to maintain the required levels of service to the present and anticipated future customers of those distribution systems."

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In its Application, PNG stated that it intends to refinance Northland's debt:

"Pacific Northern will, at the time of purchase of the Northland shares, repay the existing long-term debt owed by Northland to Northwestern, and will in the near term refinance that debt with lower cost, short-term debt available through Pacific Northern's existing bank lines of credit. The refinancing of Northland's debt will enable Northland to avoid applying for approval of a rate increase which would otherwise have been required in 1993;"

All of Northland's debt is long-term and is held by its parent, Northwestern, under terms that allow repayment in whole or in part within 30 days notice. The 1992 Annual Report for Northland shows that the mid-year long-term debt component represents approximately 60 percent of the capital structure in both Divisions which totals about \$3.1 million at an average cost of 12.79 percent per annum. As quoted above, PNG intends to repay Northland's long-term debt, and refinance with short-term debt with an expected cost of 6.75 percent per annum (Exhibit 2, p. 17).

PNG has plans to issue long-term debt in the fourth quarter of 1993 as a replacement for Northland's short-term debt and other PNG financings. While PNG's existing long-term debt requires a two times interest coverage before additional long-term debt is issued, PNG expects that adding Northland's refinancing requirements will not affect PNG's ability to issue new long-term debt (Exhibit 2, p. 18).

Even though the issuance of long-term debt for Northland is expected, Mr. Weaver acknowledged that there could be circumstances where the issuance could not take place in the fall of 1993. Mr. Dyce speculated that if the refinancing did not occur and other costs did not rise then the shareholders could possibly receive the benefit from the continued use of short-term debt (T. 23, 24).

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4.0 COMMISSION CONCLUSIONS

The Commission considered that over the longer term, customer service is unlikely to be detrimentally affected by PNG's acquisition of the outstanding shares of Northland owned by Northwestern. The transition to use of PNG for support of maintenance and operations activities, gas supply management and billing systems has the potential for negative impacts to Northland and PNG's customers. These impacts should be somewhat offset since the purchase of the shares allows PNG the capability to refinance Northland's long-term debt at the present lower interest rates. This will avoid a rate increase application for 1993 and may offset other cost increases in future years.

Over the longer term, closer integration with gas supply management activities on the Westcoast system should enhance the reliability of service. Special attention to operations support will be required so that the distance from PNG's Terrace district office will not impede access to materials and staff. PNG's intention to maintain Northland's organization and staff and to continue Northland's mains extension policy will also provide stability to the utility. PNG should be able to provide administrative support in regulatory, environmental, legal and gas supply matters more economically. Material procurement, operations and maintenance backup and support for sour gas operations are areas with the potential to cause higher costs than when Northwestern provided these services.

In reviewing the Applications by PNG and Northland, Section 61(8) of the Act directs the Commission to consider the effect of the requested approval on the public utility and the users of its services and permits approval only if the utility and its users will not be detrimentally affected. The Commission interprets Section 61 of the Act as requiring that the proposed acquisition not adversely affect PNG's and Northland's ("the Utilities'") ability to provide ongoing service of the quality that their customers have the right to expect and at rates which are fair to those customers and to the Utilities.

In its review, the Commission focused on the concerns that relate to the potential for detrimental effects on the Utilities and their customers by following the instructions given in the Act and the guidelines set out in the 1985 Decision with respect to an Application by Fort Nelson Gas Ltd. and Colony Pacific Exploration Ltd.

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The guidelines include:

- (a) The utility's ability to finance future requirements;
- (b) Continuation of existing covenants that would preserve the customers' interests;
- (c) The Utilities' ability to maintain the required level of service into the future;
- (d) Compliance of the Application with pertinent legislation and regulation; and
- (e) Preservation of the public interest.

The Commission has based its Decision on its conclusions drawn from the evidence filed and examined at the hearing on each of the issues listed and with reference to the Act and the guidelines in order to determine whether or not, in the Commission's judgment, there is potential for detrimental effects to PNG, Northland, their customers and in the broader sense, to the public interest.

(a) PNG's ability to finance future requirements

As discussed in Section 3.6, PNG stated that it has adequate funds to purchase the shares of Northland and has the capacity to raise the necessary debt and equity to finance future capital requirements of Northland. PNG also expects that the addition of Northland's financing requirements will not affect PNG's ability to issue new long-term debt. As a result, the acquisition premium of \$400,000 does not appear to place any restriction on PNG's ability to obtain short or long-term financing.

On the basis of the foregoing, the Commission concludes there is no basis for assuming that PNG's proposed ownership of Northland would jeopardize the ongoing financial integrity of either company and that there is no significant probability of detrimental effects.

(b) Continuation of existing covenants that would preserve the customers' interest

As discussed in Section 2.0, PNG is applying to acquire all of the outstanding shares of Northland which will result in Northland continuing to operate after the purchase is completed. Northland provided a list of its outstanding contracts, agreements, covenants and franchises and confirmed that all of the rights and obligations of Northland will continue to be observed after the shares are transferred from Northwestern to PNG (Exhibit 7, Question 1). In Exhibit 7,

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Northland stated that the franchise agreement for the City of Dawson Creek expired on December 31, 1992 and discussions to renew the agreement have commenced.

The Commission notes that in his written evidence, Mr. Dyce indicated that Northland will operate as a separate company and that amalgamation with PNG will be considered over the next several months (Exhibit 4, p. 4). Since an amalgamation would require another application, it is not an issue at this hearing and accordingly will not be addressed.

The Commission considers that the purchase of Northland's shares will not detrimentally affect the continuation of existing covenants.

(c) The Utilities' ability to maintain the required level of service into the future

In argument Mr. Sheard submitted that:

"... based on everything that has been filed and testimony given, as well as your previous knowledge of PNG, there is no doubt that in PNG there is a highly qualified, competent and experienced management group." (T. 70)

and that there will not be a negative service impact.

The Commission has looked at the entire transaction and recognized the importance that must be given to maintaining a quality of service that meets the needs of PNG's and Northland's existing and future customers and concludes that there are no detrimental effects to either the Utilities or their customers attributable to the quality of service issues.

d) Compliance of the Applications with pertinent legislation and regulation

On the basis of all the evidence filed and heard with respect to the foregoing issues and the tests applied as outlined in the argument of Counsel on behalf of Northland, the Commission concludes that the Application complies with pertinent legislation and regulation.

(e) Preservation of the public interest

The Commission considers there is a significant public interest inherent in safeguarding both Northland and the existing system of PNG, and the users of the services from any aspects of the

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sale which could impose a significant increase in rates on these users. The Commission also considers that the experience it has had with PNG as a regulated utility, the assurance given by PNG and the directions being given are sufficient to ensure that the Utilities and the users of the services of the Utilities will not be adversely affected by the proposed change in ownership. In the Commission's judgment, the following directions will provide a means to observe that this continues in the future. The Commission therefore directs that after the closing of the share purchase agreement, the Utilities:

1. file with the Commission records of contracted services provided by PNG to ensure that costs of services are in line with prices previously paid for such services when obtained from Northwestern.
2. report to the Commission in advance of purchases being made for proposed major computer upgrades.
3. set up a deferral account if Northland's debt is not refinanced, by December 31, 1993 to record the difference between the actual cost of debt and Northland's existing cost of long-term debt at 12.79 percent.
4. file a financial forecast for Northland for 1994 if a 1994 rate application is not submitted by December 1, 1993.
5. keep and file with the Commission records of outside services provided to Northland by Westcoast and outside contractors.
6. when negotiations are completed, file the Dawson Creek Gas Supply Agreement with the Commission.

The Commission further directs that the costs of these proceedings are to be shared equally by PNG and Northland.

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5.0 THE DECISION

In the Commission's judgment the conclusions reached with respect to the issues addressed in this Decision collectively indicate that there will be no significant detriment to the Utilities and their customers, or to the public interest attributable to the proposed purchase of the shares of Northland by PNG. The Commission further judges that the proposed acquisition by PNG satisfies the guidelines previously used by the Commission.

5.1 Acquisition by PNG

The Application by PNG, for an Order pursuant to Section 61(6) of the Act, approving the acquisition of all of the issued and outstanding shares of Northland owned by Northwestern, is approved.

5.2 Registration of Transfer

The Application by Northland, for an Order pursuant to Section 61(4) of the Act, approving the registration on its books of a transfer of shares in the capital Northland is approved.

5.3 Directions to PNG/Northland

The Commission considers it desirable in the public interest to direct the Utilities to follow the directions given in this Decision in order to avert potential detrimental effects to their customers in the future.

DATED at the City of Vancouver, in the Province of British Columbia this day of
May, 1993.

H.J. Page, P.Eng., Commissioner
and Chair of the Panel

K.D. Wellman, Q.C.
Commissioner

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District of Tumbler Ridge

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LIST OF EXHIBITS

	<u>Exhibit No.</u>
Pacific Northern Gas Ltd. Application to Acquire Shares of Northland Utilities (B.C.) Limited dated March 12, 1993	1
Pacific Northern Gas Ltd.'s Response to BCUC Staff Information Request No. 1	2
Pacific Northern Gas Ltd.'s Response to BCUC Staff Information Request No. 2	3
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Northland Utilities (B.C.) Limited's Application to Transfer its Shares to Pacific Northern Gas Ltd. dated March 15, 1993	6
Northland Utilities (B.C.) Limited's Response to BCUC Staff Information Request No. 1	7
BCUC Hearing Order No. G-23-93 dated March 24, 1993	8
Affidavit of Publication of Notice of Hearing	9

TAB 19

CAARS

West Kootenay Power Ltd. UtiliCorp - June 30/87

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I BACKGROUND

West Kootenay Power and Light Company, Limited ("WKPL") is an electric utility regulated under the provisions of the Utilities Commission Act ("the Act"). WKPL was incorporated by an Act of the British Columbia Legislature on May 8, 1897 and is authorized to generate, transmit and distribute power within a radius of 150 miles of Rossland, British Columbia. WKPL serves residential, commercial, irrigation, street lighting and industrial customers in an area roughly described as extending from Princeton in the west to Creston in the east and from the U.S. Boundary north to Kelowna and Kaslo. WKPL supplies wholesale power to electric utility operations conducted by the cities of Grand Forks, Kelowna, Nelson and Penticton and the District of Summerland. Princeton Light and Power Company, Limited, a privately- owned utility serving Princeton and vicinity, purchases its electric power requirements from WKPL.

WKPL is a wholly-owned subsidiary of Cominco Ltd. ("Cominco"), which owns all of the common shares and about 30% of the preferred shares outstanding. The balance of the preferred shares were held by Canadian Pacific Enterprises Limited, until October 1986 the controlling shareholder of Cominco, and itself a subsidiary of Canadian Pacific Limited. In October 1986 Canadian Pacific Limited sold its 52.5% interest in Cominco. A consortium headed by Teck Corporation acquired 31% of the outstanding Cominco shares and an underwriting group headed by Dominion Securities acquired 21.5% for subsequent resale to the public. The consortium, of which Teck controls 50%, comprises Teck Corporation, Metallgesellschaft Canada Limited, and M.I.M. (Canada) Inc. Thus, effective control of Cominco and thereby of WKPL, has passed from Canadian Pacific Limited to Teck Corporation.

Cominco is a world class industrial organization engaged in mining and smelting operations, primarily of lead and zinc, and is also a major producer of chemicals and fertilizers. The location of its operations in the West Kootenay region of British Columbia was partly a result of the availability of inexpensive and plentiful hydro-electric energy.

Cominco acquired control of WKPL in 1916. In 1947 WKPL sold Plants 2, 3 and 4 to Cominco. The related water licenses and permits were necessarily transferred to Cominco at that time. Shortly thereafter WKPL transferred the Waneta water license to Cominco. Cominco currently holds water licenses similar to those of WKPL, covering the use of specified volumes of water to produce electric power at Brilliant and Waneta, and the storage of water in Kootenay Lake. The storage license provides that Cominco must comply with the Order of the International Joint Commission ("I.J.C.") of November 11, 1938 and amendments, which govern water levels in Kootenay Lake. Several intervenors expressed serious concern over the prospect of foreign control of WKPL's water rights. Those concerns are considered as a separate and specific issue in Section VI, Subsection 8 of this Decision, under the heading "WKPL's water licenses".

The Sale of Surplus Power Service and Exemption Order (the "Exemption Order") issued by the Government of British Columbia in 1982 (Appendix I) exempted Cominco from regulation under most of the provisions in Part 3 of the Act, subject to certain conditions. Pursuant to those conditions, Cominco sold three of its existing five power plants, with the related water licences and permits, to WKPL for \$20 million; gave WKPL an option to construct additional generation at the remaining sites; undertook to provide WKPL 75 average annual megawatts on a firm basis to 1990; and gave WKPL the right of first refusal to buy the remaining power plants and any power generated which was surplus to Cominco's requirements, until the year 2005. The \$20 million for the three plants, was paid through the issue by WKPL of 200,000 Common Shares at a par value of \$100 each. Relating to its Exemption Order, Cominco also undertook to inform the Minister of Energy, Mines and Petroleum Resources of its long-term plans to reduce Cominco's equity in WKPL to not more than 50%.

In addition to generation from WKPL's own facilities and purchases from Cominco, the balance of WKPL's energy requirement is purchased primarily from the British Columbia Hydro and Power Authority ("B.C. Hydro").

Cominco has played a key role in the efficient, economical and effective development of the hydro-electric resource in this region of British Columbia and the benefits of its industry have been of significant value to its customers, employees, shareholders and the overall economy of the Province.

B.C. Hydro, a provincial Crown corporation, owns and operates the Canal Plant on the Kootenay River. B.C. Hydro is a public utility under the Act. The construction of the Canal Plant was undertaken to optimize the total generating capacity of the Kootenay River system. Under the Canal Plant Agreement entered into in August 1972, B.C. Hydro gave average peak and average energy assurances to Cominco and WKPL to the year 2005 as an entitlement in exchange for water rights on the Kootenay River.

The WKPL/Cominco integrated system consists of the following generation plants:

<u>Plant Name</u>	<u>Capacity</u> MW	<u>Energy Entitlement</u> GWh*	<u>Location</u>
Lower Bonnington	41.4	329.3	Kootenay R.
Upper Bonnington	59.4	429.6	Kootenay R.
South Slocan	53.2	422.9	Kootenay R.
Corra Linn	51.2	343.2	Kootenay R.
Brilliant **	128.9	853.4	Kootenay R.
Waneta **	373.9	2465.4	Pend d'Or.

* Source : Canal Plant Sub-Agreement

** Cominco facilities

UtiliCorp United Inc. ("UtiliCorp"), a Missouri corporation, is an integrated investor-owned utility listed on the New York and Pacific Stock Exchanges, engaged directly through its operating divisions in the sale and distribution of natural gas and electricity to both wholesale and retail customers. UtiliCorp's predecessor company, Missouri Public Service, has been engaged in providing utility services for over 70 years. In May 1985 the shareholders of Missouri Public Service approved the change in the company's name to UtiliCorp United Inc. At that time UtiliCorp served over 500,000 customers through three

operating divisions. Those included Missouri Public Service, headquartered in Kansas City, Missouri, providing electric and gas service throughout 222 communities covering approximately 12,500 square miles within Missouri; Kansas Public Service, acquired in 1984, headquartered in Lawrence, Kansas, providing gas service to 21,000 customers in Lawrence, Kansas; and Peoples Natural Gas, acquired in 1985 and headquartered in Council Bluffs, Iowa, providing gas service throughout 288 communities in the States of Iowa, Nebraska, Minnesota, Colorado, Kansas and a few customers in Michigan and South Dakota. As indicated by the Applicant during the hearings, two further acquisitions were in progress and pending at that time. These included Northern Minnesota Utilities, a gas utility headquartered in Cloquet, Minnesota (subsequently acquired in 1986), and West Virginia Power, an electric utility headquartered in Fairlea, Virginia (acquired in 1987).

At the time of the hearings UtiliCorp employed approximately 1,900 persons in its three divisions and 25 employees in the corporate offices located in Kansas City, Missouri. The family of Richard C. Green, President and Chief Executive Officer owned approximately 12% of the shares, with the balance being widely held.

As of August 31, 1986, UtiliCorp had assets of \$709,000,000 (U.S.) and operating revenues and net income for the 12 months ended August 31, 1986, of \$497,362,000 (U.S.) and \$29,610,000 (U.S.), respectively. Those assets included 13 generating units with electric generation capacity of 916,000 kilowatts, and more than 6,500 pole miles of transmission and distribution lines and 13,500 miles of gas mains.

II THE APPLICATIONS AND HEARING

This Decision is issued in response to two Applications, the first being the September 12th, 1986 Application of UtiliCorp United Inc. of Kansas City, Missouri, U.S.A. ("UtiliCorp") and UtiliCorp British Columbia Ltd. ("UtiliCorp B.C."), pursuant to Section 61 of the Act, requesting an Order approving the acquisition by UtiliCorp B.C. of all of the issued and outstanding Common and Preferred Shares of WKPL. UtiliCorp B.C. is a wholly-owned subsidiary of UtiliCorp. The second Application is that of WKPL dated September 16, 1986, seeking the approval of the Commission to register on the books of WKPL the transfer of Common and Preferred Shares from Cominco and the Preferred Shares from Canadian Pacific Enterprises Limited to UtiliCorp or UtiliCorp B.C.

The Commission ordered a public hearing into these Applications commencing on November 3, 1986 at Trail, B.C. The hearing reconvened at Penticton, B.C. and concluded at Kelowna, B.C. on February 6, 1987.

The Commission decided that the quality of the hearings and the evidence introduced thereto would be enhanced by the presence of an independent expert financial witness to respond to questions by all parties to the hearing and by the filing of his independent direct evidence. The Commission therefore requested Dr. W.R. Waters to "prepare and file direct evidence with respect to his assessment of the Application as filed and the financial impacts of the proposed purchase of WKPL by UtiliCorp United Inc. on WKPL, its customers, and on UtiliCorp Inc. itself" (Exhibit 28).

Dr. Waters received an M.B.A. degree in Business Administration from the University of Toronto in 1962, an M.B.A. in Economics and Finance from the University of Chicago in 1964 and a Ph.D. in Finance from the University of Chicago in 1976. He has been a full-time member of the faculty at the University of Toronto since 1965 and is currently Professor in the Faculty of Management Studies, specializing in studies of the financial markets, investment analysis and the economics of enterprise.

Since 1968 Dr. Waters has also been actively engaged in research and consulting on the regulation of public utilities and has made some 45 appearances before national and provincial regulatory boards and commissions. His full curriculum vitae is filed as Appendix 1 to Exhibit 29. Dr. Waters undertook a review of the evidence filed by the Applicants prior to the hearings. He attended the proceedings for several days, during which he was cross-examined on both his filed evidence (Exhibits 29 and 71) and on his testimony as expert financial witness. Both his evidence and his presence at the hearings were most helpful, and greatly appreciated by the Commission.

For the guidance of intervenors, in opening the hearing the Chairman of the Commission put on the record the six issues or criteria identified by the Commission as the appropriate basis for its decision with respect to the 1982 application by T.M.A. Western Resources Ltd. ("T.M.A.") to purchase Inland Natural Gas Co. Ltd. under Section 61 of the Act. It is important to note that such criteria, while a useful guide to the public interest, cannot be rigidly applied in every case since the circumstances may be significantly different in each case. The criteria applied in the T.M.A. case were as follows:

1. The Utility's current and future ability to raise equity and debt financing will not be reduced or impaired.
2. There is no violation of existing covenants the effect being detrimental to the customers.
3. The conduct of the Utility's business, including the level of service, either now or in future, will be maintained or enhanced.
4. The Application is in compliance with appropriate enactments and/or regulations.
5. The structural integrity of the assets will be maintained in such a manner as to not impair utility service.
6. The public interest is being preserved.

In reviewing these Applications, however, the Commission is guided by all relevant sections of the Act, with particular regard to Section 61(8) which provides, "The Commission may give its approval under

conditions and requirements it considers necessary or desirable in the public interest, but the Commission shall not give its approval under this Section unless it considers that the public utility and the users of the service of the public utility will not be detrimentally affected."

The Applications were made pursuant to Sections 61(6) and 61(4) of the Utilities Commission Act which are contained in Appendix A of this Decision. Section 61(6) provides "No person shall acquire or shall acquire control of such numbers of any class of shares of a public utility as in themselves or together with shares already owned or controlled by the person and his associates, cause him to have a reviewable interest in a public utility unless he has obtained the commission's approval."

Section 61(4) provides that a public utility shall not, without the approval of the commission register on its books a transfer of shares in the capital of the utility where the registration would cause any person to have a reviewable interest. Reviewable interest is defined by the Act to be an interest in excess of 20% of the outstanding voting shares of the utility.

The Commission interprets the provisions of Section 61 of the Act as requiring that the proposed acquisition not detract from WKPL's ability to provide ongoing service of the quality that its customers have the right to expect and at rates which are fair to those customers and to the utility itself. The Commission concludes that it is the intent of these sections, regardless of the ownership, to preserve the authority of the Commission to regulate WKPL effectively and in the public interest.

Absolute Commitments and Objectives of the Applicants

During the proceedings and as an integral part of their Applications, UtiliCorp United Inc. and UtiliCorp B.C. filed in Exhibit 66A a statement of the commitments and objectives to be undertaken by both companies in the event their Applications were approved. Exhibit 66A is attached to this Decision as Appendix B.

The purpose, effectiveness and enforceability of the commitments and objectives contained in Appendix B have been addressed by the Commission in the body of this Decision, in conjunction with its assessment of the particular issues to which they relate.

III FOREIGN OWNERSHIP

In the current Canadian scene there are no legislative measures or even guidelines, at either the federal or provincial level, prohibiting or limiting foreign investment in what are generally regarded as essential services such as public utilities. Such matters of policy, being clearly in the government domain, are outside the Commission's capacity or jurisdiction.

At the hearing of the Applications by UtiliCorp and WKPL the question of foreign ownership of Canadian public utilities, predictably and understandably occupied a central and overriding concern of almost all of the participants, numbering at times up to 700. Throughout the hearing this issue, which was invariably expressed as "pro-Canadianism" rather than "anti-Americanism", formed the focal point of opposition to the Applications under review. To deal effectively with these Applications it has therefore been necessary for the Commission to determine to what extent the nationality of the proposed purchaser, UtiliCorp United Inc., should be a factor in this Decision.

It is clear that in British Columbia a foreign corporation seeking to purchase a reviewable interest in a public utility must obtain approval from both the federal agency, Investment Canada, and the British Columbia Utilities Commission. It is important to recognize that the federal and provincial agencies responsible for reviewing foreign ownership of a provincial public utility have separate and unique mandates. In the present case the jurisdiction to control foreign investment solely on the basis of nationality clearly resides with the federal government and the federal agencies charged with that responsibility.

UtiliCorp has sought and by letter dated December 24, 1986 has received from Michel Cote, Minister responsible for Investment Canada, the necessary federal approval to acquire control of West Kootenay Power and Light Company, Limited. In that letter, attached as Appendix C to this Decision, the Minister concludes that UtiliCorp's investment in WKPL is "likely to be

of net benefit to Canada". He noted that the Commission was engaged in public hearings concerning the same Application and recognized the dual but distinct federal and provincial mandates with the observation that ". . . my decision under the Investment Canada Act has a different basis than that which governs the B.C.U.C., and has, therefore, no bearing on the ultimate decisions of the Commission pursuant to its legislation".

Commission Jurisdiction with Respect to Foreign Ownership

The jurisdiction of this Commission in the Applications before it in this case is set out in Section 61 of the Utilities Commission Act. In the Commission's view, while the foreign origin of a proposed purchaser of a reviewable interest in a domestic public utility is clearly the exclusive concern of the federal government, Section 61(8) of the Act indicates that any detrimental effects arising from whatever source including, in this case, the foreign origin of the proposed purchaser and which are reasonably attributable to such ownership, are proper matters for review and decision by this Commission.

Accordingly, in approaching this Decision the Commission has focussed its consideration of the foreign ownership question on an evaluation of the potential detrimental effects, if any, on WKPL and its customers arising from the proposed ownership by UtiliCorp. The test for detrimental effects attributable to the American ownership factor has accordingly been applied by the Commission where appropriate, to each of the issues raised by the UtiliCorp Application. The Commission would note that it is only one of a number of government agencies collectively involved in and responsible for the protection of the public interest in this case. Also involved are the provincial Comptroller of Water Rights and such Ministries as Energy, Environment, Agriculture and Attorney General.

IV THE BIDDING PROCESS

A major cause for the strong expressions of concern and opposition to the sale of WKPL by members of the Electric Consumers Association ("E.C.A."), an organization with over 7,100 paid-up members as at February 4, 1987, and indeed all of the intervenors at the hearing was the bidding process undertaken by Cominco through the auspices of Burns Fry Limited. The latter was retained as Cominco's exclusive financial advisor and intermediary. The Commission views the failure of Cominco and Burns Fry to adequately inform and prepare the members of the affected public for the introduction of a process that was predictably sensitive and entirely foreign to them, as a serious if not inexcusable oversight and lack of judgement. It was, in the Commission's view, largely responsible for the understandable but time-consuming opposition that prevailed throughout the proceedings.

The hearings produced no evidence that the bidding process, as prepared and circulated to all prospective bidders was illegal. There was, however, ample evidence of widespread lack of public knowledge of critically important features of the bidding process. In particular, Burns Fry failed to ensure public understanding that the second stage of the planned two-stage process would not be mandatory. The public clearly did not realize that if Cominco found the spread between the highest first stage bid and any other bids to be so great as to render, in Cominco's judgement, the more refined second stage unproductive and unjustifiably costly to the other bidders, then there would be no second stage.

Cominco's decision to execute that right and omit, for all bidders except UtiliCorp, the expected second stage, together with the appearance of undue haste in the process, gave rise to the genuine and in the circumstances understandable public outrage that emerged at the hearings, largely on the basis of subsequently unsubstantiated rumours that UtiliCorp's bid had been both pre-emptive and late.

In the absence of any evidence of illegalities, however, and in the face of the reality that the Commission was confronted with only the UtiliCorp application, upon which it is required by law to hear and rule, the Commission proceeded with the hearings as planned. Accordingly, the bidding process and possible alternative bids are not issues in this Decision.

V THE SCOPE OF COMMISSION JURISDICTION

The Applications of UtiliCorp and WKPL raise some fundamental issues for British Columbia and indeed for Canada. A number of these fall directly within the jurisdiction of the Commission and are discussed in more depth below. It is important to note, however, that there are a number of issues which at times were addressed openly in the hearing over which this Commission has no jurisdiction.

Perhaps the most important of these is the general question of foreign ownership in Canada. As is noted elsewhere in this Decision, the Federal Government, and, in particular, Investment Canada, have the responsibility for establishing policy with respect to the extent to which foreign ownership in general and in the energy sector in particular are compatible with Canada's interests. Closer to home, the Provincial Government has the overriding responsibility to take whatever policy initiatives it feels are necessary to ensure that the application of Canada's policies in British Columbia are consistent with the economic objectives of British Columbia. It is not for this Commission to determine policy with respect to such fundamental issues.

There exist no provincial policies nor legislation which allow the Commission to conclude that it should have regard to significantly different considerations in assessing these applications than it has in assessing applications in the past. If the applications in this case raise issues which require fundamentally different treatment than has been the Commission's practice in the past, the Government or the Legislature should act to ensure that any shift in policy direction is spelled out clearly for the benefit of the Commission, the utilities it regulates, and the customers of those utilities.

Bearing these comments in mind, the following sections outline the Commission's specific jurisdiction under the provisions of the Act.

1. Jurisdiction to Preserve the Public Interest
2. Jurisdiction Over Cominco Ltd.
3. Jurisdiction Over UtiliCorp United Inc.
4. Jurisdiction Over UtiliCorp B.C. Ltd.
5. Jurisdiction Over WKPL

1. Jurisdiction to Preserve the Public Interest

The Commission is expressly directed to consider the public interest in Section 61(8) of the Act which provides as follows:

"61(8) The Commission may give its approval under this section subject to conditions and requirements it considers necessary or desirable in the public interest, but the Commission shall not give its approval under this section unless it considers that the public utility and the users of the service of the public utility will not be detrimentally affected."

In addition to this section, the Act read as a whole clearly charges the Commission with a responsibility for ensuring that in a utility context, the actions of the companies regulated by it are consistent with the public interest. For these reasons, the Commission believes that it has broad jurisdiction under the Act to ensure that, from the perspective of present utility regulation in British Columbia, the proposed acquisition is not detrimental to the public interest. The Commission has considered whether, in defining the public interest, it should restrict itself to the public in the service area or consider the province as a whole.

Because of the Commission's view of the facts in this case, the Commission's conclusions would not be materially different if the reference area were limited to the service area of WKPL or expanded to include the broader public interest of all citizens of the province. Accordingly, the Commission has approached the problem by considering all potential detriments, whether localized or of a broader nature, and dealt with each in turn.

2. Jurisdiction Over Cominco Ltd.

The Commission's jurisdiction over Cominco was addressed in detail in a number of the final submissions, particularly those of counsel for Cominco, UtiliCorp, and the Commission. These arguments addressed whether or not Cominco can be considered a public utility as that term is defined in the Act and also whether Section 61(8) authorizes the Commission to impose terms and conditions on or affecting Cominco should it decide to approve this sale.

A detailed discussion of the relationship between Cominco and WKPL is found in Section VI, Subsection 5 of this Decision. In view of the Commission's conclusions in connection with this relationship, it is not necessary to determine Cominco's precise status under the Act. For the reasons set out in those sections, the Commission does not believe that it is necessary to impose conditions upon Cominco or WKPL and, in light of the Sale of Surplus Power Service and Exemption Order made by the Lieutenant Governor in Council in 1982, accepts that it cannot directly regulate the joint use of facilities between Cominco and WKPL. The Commission does note, however, that in its view, Section 32 of the Act will apply to Cominco and WKPL if the Lieutenant Governor in Council accepts the Commission's recommendation in Section VI, Subsection 5 and amends the Exemption Order to include that section of the Act.

The Commission also notes that it has no jurisdiction whatsoever over the manner in which Cominco chose to sell its interest in WKPL. Thus, the bidding process entered into by Cominco was entirely of its own design. There is nothing in the Act which allows the Commission to set standards or procedures which owners of public utilities should adopt before selling a reviewable interest in those public utilities. Thus, the Commission had no direct control over the bidding process.

3. Jurisdiction Over UtiliCorp United Inc.

The Commission has no general jurisdiction over the owners of utilities it regulates and would acquire none if UtiliCorp United became the direct or indirect owner of WKPL. The Commission depends upon its jurisdiction over the utility itself to ensure that the utility is run in the public interest in a responsible and efficient manner.

UtiliCorp United Inc. would come within Commission jurisdiction, of course, to the extent that it had a "reviewable interest" in WKPL and wished to dispose of that reviewable interest in total to another entity. Because of the undertakings given with respect to jurisdiction over UtiliCorp B.C., that jurisdiction extends to UtiliCorp United's shareholdings in UtiliCorp B.C. Accordingly, the Commission has sufficient control over UtiliCorp United Inc. to ensure that control of WKPL will not fall into third party hands without Commission review.

In summary, the absence of direct control over UtiliCorp United is not a change from the present circumstances nor different from that which exists in the context of other utilities under the Commission's control. Legislative change would be required, if it was determined to be desirable for the Commission to have further control over owners of utilities.

4. Jurisdiction Over UtiliCorp B.C. Ltd.

UtiliCorp B.C. Ltd. is a British Columbia company incorporated in 1986 for the purpose of holding the shares of WKPL if the sale of those shares by Cominco is approved. Accordingly, the proposed transaction would establish UtiliCorp B.C. as the actual shareholder of WKPL.

The Commission's jurisdiction over UtiliCorp B.C. Ltd. is on the face of it no different than its current jurisdiction over Cominco. That is, the Commission's primary jurisdiction is over the utility, WKPL, and not over its shareholder.

Nevertheless, UtiliCorp B.C. would be subject to the same types of control as Cominco. That is, if UtiliCorp B.C. wishes to sell its interest in WKPL, anyone acquiring a "reviewable interest" would have to obtain the approval of the Commission pursuant to Section 61(8) as is being done in the present case and WKPL itself would have to seek the approval of the Commission pursuant to Section 61(4) in order to register the transfer of the shares on its books. Accordingly, the Commission would continue to exercise control of the ownership of the shares of WKPL.

Because UtiliCorp B.C. is a wholly-owned subsidiary of UtiliCorp United, concern was expressed that the character of the ownership of WKPL could effectively be changed if UtiliCorp United were to sell its holdings in UtiliCorp B.C. to an unknown third party. To alleviate this concern, Counsel for UtiliCorp placed on the record his view that acquisition of a reviewable interest in UtiliCorp B.C. would be subject to Commission approval under Section 61 of the Act and his assurance that UtiliCorp United would willingly participate in such an approval process (Transcript pp. 2853 and 4746 - 4748).

The Commission believes that it should ensure that the ultimate control of WKPL is maintained by an entity which the Commission has had an opportunity to assess. This can be achieved by providing, as a condition of approval, that the sale of a reviewable interest in UtiliCorp B.C. is precluded without the prior approval of the Commission.

5. Jurisdiction Over WKPL

WKPL is a fully regulated public utility in the Province of British Columbia by virtue of the Act. The Commission is unable to conclude that the outcome of the present applications will in any way interfere with the ability of this Commission to regulate WKPL. WKPL will remain fully subject to regulation irrespective of who controls the majority of its shares.

VI THE ISSUES

The Commission has based its Decision on its conclusions drawn from the evidence filed and examined at the hearings, on each of the following issues:

1. UtiliCorp's Financing Ability
2. UtiliCorp's Acquisition Strategy
3. The Acquisition Valuation
4. Management Control of WKPL
5. The Cominco/WKPL Relationship and Ongoing Operating Agreements
6. WKPL's Rates and Intercompany Charges
7. WKPL's Potential for Exports
8. WKPL's Water Licenses
9. WKPL's Financial and Capital Plans
10. WKPL's Quality of Service
11. Economic Development
12. Public Opposition

As noted heretofore, in its conclusions with respect to each issue the Commission indicates whether or not, in the Commission's judgement, there is potential for detrimental effects to WKPL, its customers and, in the broader sense, to the public interest.

1. UtiliCorp's Financing Ability

Several intervenors questioned the ability of UtiliCorp to finance further planned acquisitions because of the substantial acquisition program already accomplished since formation of UtiliCorp in 1984. They expressed concerns that UtiliCorp may already be financially overextended and thereby exposed to levels of financial risk that might lead to detrimental effects on the financial integrity of WKPL. A further concern was expressed that, following acquisition of WKPL, UtiliCorp might suffer economic difficulties leading to

inability or unwillingness to support the ongoing financial needs of WKPL for the future equity infusions required to maintain an efficient capital structure in that utility.

Counsel for UtiliCorp, Mr. Macintosh, in his opening statement stressed that although UtiliCorp itself was a relatively new company, its corporate predecessor Missouri Public Service, has been a successful electric utility operator for over 70 years. He further noted that although UtiliCorp has expanded at a relatively rapid rate since 1984, it has confined its acquisitions to utilities, and in financing those acquisitions has demonstrated responsible financial planning that has enabled the company to preserve an efficient capital structure (Transcript p. 26). He noted that UtiliCorp's capital structure as of August 1986 comprised 43.3% long-term debt, 6.5% preferred stock and 50.2% common equity and that the company planned to achieve a 45-10-45 capital structure following acquisition of WKPL.

In support of its Application, UtiliCorp filed in Exhibit 2 a letter dated October 22, 1986 from its investment bankers and financial advisors, Drexel Burnham Lambert. This evidence addressed the question of the financial integrity of UtiliCorp and its ability to finance the purchase of WKPL. The letter says in part "It is our opinion that UtiliCorp United has sufficient access to the capital markets to prudently finance the acquisition of West Kootenay Power and Light Company and to guarantee the long-term capital expenditures program of West Kootenay Power and Light."

The letter further states that "UtiliCorp United is a substantial corporation" and that "the Company's debt and preferred stock instruments are investment grade, which qualifies the Company's securities for investment by all insurance companies, pension funds and financial institutions as well as the other elements of the institutional investment community".

With respect to financial risk, the Drexel Burnham Lambert opinion is that

". . . it would take a serious and unforeseen business reversal to lower UtiliCorp's coverage ratios to non-investment grade credit levels. The Company has helped to protect itself against such a major reversal through its diversification program. The Company operates in many regulatory jurisdictions, which spreads regulatory risk and reduces the effects of adverse weather and adverse economic conditions." Drexel Burnham Lambert conclude that "The Company's management and the business strategies are highly regarded. The Company's common stock has outperformed the utility industry's indices. The Company has good cash flow and very modest construction requirements."

In further support of the Application, UtiliCorp filed as Exhibit 4 a letter dated October 30, 1986 from Dominion Securities Inc., a major Canadian investment dealer. That letter sets out Dominion's findings as derived from a review of public information on UtiliCorp and West Kootenay, reports from the Canadian bond rating agencies on Cominco, and discussions with the management of UtiliCorp. This led Dominion Securities to conclude that "Based on our review of the above information and on our experience and knowledge of Canadian capital markets, it is our opinion that the support of West Kootenay's debt issuances with the full faith and credit of UtiliCorp, together with UtiliCorp's financial plans for West Kootenay, will result in a lower cost of debt for West Kootenay than would otherwise have been possible under Cominco's ownership or by West Kootenay on a stand-alone basis." Mr. Macintosh suggested that this Dominion Securities conclusion was reached because UtiliCorp's credit rating is higher than Cominco's and because UtiliCorp is prepared to unconditionally guarantee WKPL's debt, whereas Cominco is not.

In cross-examination Mr. R.C. Green, Jr., President and Chief Executive Officer and Mr. J.R. Baker, Senior Vice-President, Corporate Development, were questioned by Mr. Bauman on the reduction in UtiliCorp's credit ratings on its commercial paper and preferred and preference stock following UtiliCorp's acquisition of People's Natural Gas ("PNG"), as reported in

UtiliCorp's 1985 Annual Report. Mr. Green explained that the rating reductions had been limited to UtiliCorp's commercial paper and preferred and preference shares and were in reaction to the sizeable increase in UtiliCorp's short-term debt, incurred to finance the acquisition of the gas utility. He testified that this had not affected UtiliCorp's long-term securities (first mortgage bonds), which continued to carry a triple B rating. He stated that there had not been any noticeable difference in UtiliCorp's cost of short-term borrowing because of the reduced credit ratings, and that those ratings should recover in the near future because UtiliCorp has redeemed all of the preferred shares (Transcript p. 109). Mr. Baker stressed that the rating of commercial paper is short-term by nature and that it is not uncommon, when companies incur substantial short-term debt to finance acquisitions, to see a temporary downgrading of their credit rating on their commercial paper pending refinancing with long-term securities (Transcript p. 111).

When asked by Mr. Bauman if the further projected \$100 million short-term financing required for the planned acquisitions of WKPL, West Virginia Power and the Minnesota division of InterCity Gas would incur further reductions in UtiliCorp's credit ratings, Mr. Green testified there should be no further reduction because the amount involved is small compared to the \$250 million impact of the PNG acquisition and because that transaction has since been fully funded and UtiliCorp has experienced a net positive cash flow over recent months (Transcript p. 112).

In cross-examination by Mr. Scarlett, spokesman for the E.C.A., the Vice-President Finance for UtiliCorp, Mr. Wolf, testified that when the company's audited financial statements for the year 1986 were completed and available, he would be taking them to the rating agencies with a view to having UtiliCorp's credit ratings restored (Transcript p. 2193). In response to Mr. Scarlett's questions on UtiliCorp's ability to finance the remaining planned acquisitions, Mr. Wolf explained that "At the present time UtiliCorp has about \$16 million in short-term investments and we have no short-term debt outstanding at all." He indicated that the approximately \$40 million in

short-term borrowings required to complete the remaining two acquisitions had not yet been undertaken (Transcript p. 2194). The Mellon Bank, however, has agreed to provide the \$60 million (\$80 million Cdn.) funds required for the WKPL acquisition.

During his testimony Dr. Waters, the independent expert witness retained by the Commission, was asked by Mr. Sanderson, Commission Counsel, what would happen to UtiliCorp's plans to sell its common shares and permanently fund the WKPL acquisition, if the market-to-book ratio of the UtiliCorp shares were to drop significantly below the 1.7 to 1 ratio underlying the \$80 million price for WKPL. Dr. Waters indicated that in such a "worst case" situation, UtiliCorp would probably abort the proposed sale of its shares and continue to rely on the line of credit with the Mellon Bank. He pointed out, however, that the interest cost of so doing would be almost entirely offset by the return on equity provided by UtiliCorp's investment in WKPL (Transcript p. 4449). He further anticipated that, under such "worst case" conditions, UtiliCorp would pull back from any further acquisition intentions and concluded that while its capital structure would be weakened thereby, it would not be imperilled and would improve over time (Transcript p. 4450). Dr. Waters also pointed out that, in the formal accounting sense, there would be no impairment of the UtiliCorp book value or the investment by UtiliCorp's shareholders, as long as the market-to-book ratio is something above 1.0 to 1 (Transcript p. 4462).

The Commission believes that, on the evidence before it, there is no reason to doubt UtiliCorp's present ability to finance the remaining planned and as yet outstanding acquisitions including WKPL, and to do so without detriment to its capital structure and financial integrity. Some intervenors, however, expressed serious concerns that UtiliCorp's stated intention to continue its aggressive program of expansion by acquisition would involve financial requirements and risks that would jeopardize the UtiliCorp support required to meet WKPL's own financial needs. They argued that this would have detrimental effects on WKPL.

Much evidence and testimony has been given during the hearing with respect to the importance of maintaining an efficient capital structure as a prerequisite for effective financing at minimum cost, particularly for companies pursuing an aggressive expansion strategy. This was acknowledged by Mr. Baker during his testimony early in the proceedings and subsequently by Dr. Waters, who commented that UtiliCorp management had shown an awareness of that need (Transcript p. 4508).

In recognition of the role of capital structure in meeting WKPL's future financial needs, UtiliCorp has made an absolute commitment to "maintain an efficient capital structure for WKPL and provide equity for that purpose within three months of any request from the B.C.U.C. to that end." In support of WKPL's future financial needs and in recognition that WKPL will not be capable of generating, from its earnings alone, the projected \$92 million in its five-year capital plan (if approved), UtiliCorp has volunteered further absolute commitments; namely, to guarantee WKPL's debt, thereby providing WKPL with UtiliCorp's financing strengths, and to reduce WKPL's dividend payment ratio to UtiliCorp B.C. to 44% of earnings for a five year period, and to retain those dividends in Canada during that period (Appendix B). Counsel for UtiliCorp, Mr. Macintosh, made it clear on the record that both UtiliCorp United Inc. and UtiliCorp B.C. would recognize that these and their other absolute commitments as recorded in Appendix B to this Decision could, if the Commission so required, become conditions to be met by the Applicants (Transcript p. 658).

With respect to the impact of UtiliCorp's guarantee on the cost of borrowed funds to WKPL, Mr. J.A. Macdonald of Dominion Securities advised UtiliCorp's counsel that in his opinion "the minimum reduction in the cost of borrowing would be 25 basis points, or a quarter of a percent" (Transcript p. 2082). It was Dr. Waters' testimony that "if the guarantee has any effect it will be beneficial, but by Canadian standards UtiliCorp and WKPL would probably receive the same credit ratings (Transcript p. 4429). While the opinions of these two experts differ, the Commission is satisfied that, although the

potential benefit of the guarantee may be in doubt, there would be no detrimental effects attributable to this aspect of the UtiliCorp/WKPL financial relationship.

The Commission would note that, in cross-examination by Mr. Bauman, Mr. Baker acknowledged that UtiliCorp's own consolidated five-year capital program involves some \$260 million (Transcript p. 2497) but reiterated UtiliCorp's previous testimony that "the acquisitions program will be made only in light of the ability of the Company to adequately finance and maintain a strong financial position in the marketplace". Mr. Baker further acknowledged that "the check on the Company that keeps you on an even keel financially speaking is an efficient capital structure" (Transcript p. 2499). Those Commissions regulating UtiliCorp would also act to ensure such conditions are maintained.

With respect to WKPL's ability to finance its own ongoing requirements for funds following acquisition by UtiliCorp, the Commission has considered a number of factors upon which WKPL's financial capacity to do so would depend. Supplementing the commitments by UtiliCorp to guarantee WKPL's debt, reduce the dividend payout ratio and retain all dividends for reinvestment in Canada, there would appear to be no major obstacles that would preclude the sale of additional WKPL shares on the open market. UtiliCorp is committed to inject any equity required by the Commission to maintain an efficient capital structure in WKPL, even if UtiliCorp's own financial position were to deteriorate to the extent that it was unable to provide the funds from its own resources. Under such circumstances WKPL could issue shares to the public at large, without necessarily jeopardizing UtiliCorp United's control through UtiliCorp B.C.

The Applicant's chief policy witness, Mr. Green, testified that UtiliCorp's shares are currently traded on the New York Stock Exchange and, upon acquisition of WKPL the shares of UtiliCorp would also be listed on the Toronto Exchange (Transcript p. 54). This did not satisfy some intervenors, who attributed great significance and benefits to local ownership by members of the public in WKPL's service area. In his cross-examination of Dr. Waters, Mr. Gilmour expressed interest in a possible public "float" of WKPL shares to

permit public participation in what he described as "the public interest process". Having previously raised this possibility with the UtiliCorp witness and having received a negative response, he questioned Dr. Waters at length on the position taken by the Ontario Energy Board ("O.E.B.") with respect to such a float in the case of Gulf Oil, filed as Exhibit 120. Dr. Waters, conceding that UtiliCorp B.C. would not have to own 100% of WKPL's shares to protect UtiliCorp's overall interests, testified that although the O.E.B. had a clear preference for a public float of the shares of a utility under its jurisdiction (Transcript p. 4544) they did not require such a float in every case. Mr. Gilmour asked Dr. Waters if in his opinion it was constructive or desirable to maintain a float when, in all matters relating to regulated utilities, the public interest is involved and it is desirable to have public participation and input in the deliberation of (utility) policy (Transcript p. 4541).

In his responses Dr. Waters concluded that, if circumstances permit, it is certainly preferable for the shares of a public utility to be widely held, and that such ownership provides additional financing options. He was unable to conclude, however, that in the present (WKPL) circumstances, there is that urgency or need (Transcript p. 4540). With respect to the public interest process and the question of public participation in policy-making, Dr. Waters concluded that in this (WKPL) situation the public interest aspects are, for the most part, the concern of the regulatory board and that the additional opportunity for public input from shareholders meetings, is probably of secondary importance to direction of the utility in the public interest (Transcript p. 4542).

In its T.M.A. Decision (page 27) the Commission stated that it believed "that it is in the public interest that the shares of a public utility be widely held, notwithstanding current trends and practices. This is not to say that a change in shareholders from a wide to a narrow base automatically precludes an approval under Section 61". The Commission continues to hold that view. In the T.M.A. case the Commission's concerns centered on the narrow shareholder base in combination with the extent of the Applicant's non-utility

activities and experience. Such is not the situation in this case, where WKPL is and would remain the subsidiary of a widely-held parent company.

While the Commission agrees with Mr. Gilmour that a public float of WKPL shares might prove beneficial to the public interest, the Commission also concurs with Dr. Waters' view that there is no evidence suggesting urgency or need at this time. Since difficulties might emerge in the implementation of UtiliCorp's plans for the future financing of WKPL, the Commission requires such an option as a condition for approval of the proposed acquisition.

Commission Conclusions

On the basis of the foregoing and the evidence filed by Drexel, Burnham Lambert, Dominion Securities, Shearson Lehman and the bond rating agencies, together with the record of UtiliCorp's actual financing accomplishments since the company was formed in 1984, the Commission concludes there is no basis for assuming that UtiliCorp's proposed ownership of WKPL would jeopardize the ongoing financial integrity of either company. In the Commission's view such an assumption would require, as a prerequisite, the further assumptions that the commitments by UtiliCorp are unlikely to be honoured and impossible to enforce, and that both the U.S. and Canadian economies are likely to suffer significant declines. On the basis of the evidence, the Commission finds that such assumptions have not been supported. Cross-examination by some intervenors with respect to such possibilities understandably involved more speculation than fact. It proved useful to the Commission, however, by ensuring that most if not all pertinent and potentially adverse factors were explored at the hearings.

Towards the end of his testimony Dr. Waters, the only independent financial expert present, was asked if, on the assumption that UtiliCorp's undertakings could be made binding and enforceable, his financial analysis of the proposed acquisition had identified any realistic adverse effects on WKPL or its ratepayers if the proposed acquisition were to proceed. His response to that question was "No, I did not identify any such effects" (Transcript p. 4473).

From a purely financial or economic perspective the infusion of \$80 million of foreign capital into British Columbia would normally be regarded as a benefit to the province, since it relieves sources of capital within the province or other parts of Canada from providing that capital. An equivalent amount from such domestic sources is thereby available for other investment opportunities.

From other than that purely financial perspective, most Canadians would argue that Canadian funding and ownership would be preferable and more in the public interest in this case. The Commission, however, concludes that the decision to selectively permit or bar foreign investment in British Columbia is outside the jurisdiction of the Commission and is clearly a matter of federal government policy. The Commission has therefore focussed on the quality rather than the nationality of the funds.

Accordingly, and in light of all of the testimony and filed evidence with respect to UtiliCorp's financial plans and capabilities, the Commission concludes that there is no significant probability of detrimental effects that can be reasonably attributed to the proposed financing.

2. UtiliCorp's Acquisition Strategy

The reasons given by UtiliCorp for selecting WKPL as a desirable acquisition, and for UtiliCorp's overall acquisition strategy, formed an important part of the evidence tested at the hearing. Those reasons were summarized in the filed evidence supporting the Application as follows:

"UtiliCorp has a corporate objective of balancing its services by product, region, climate, and regulatory jurisdiction. The Company has moved toward this objective by acquiring financially sound, well-managed operating utilities. West Kootenay meets these criteria and the acquisition furthers UtiliCorp's objectives by diversifying in all four areas. West Kootenay Power is winter- peaking which should contribute to more levelized earnings and cash flow in winter months. Additionally, as UtiliCorp broadens its base, fluctuations in weather and regulatory factors should have a less significant impact on earnings."
(Exhibit 1, Tab A, p. 4)

In his testimony given at the hearing Mr. Green elaborated on that evidence as follows:

"UtiliCorp, for the last couple of years, has had a very specific plan to expand and grow in the electric and gas utility business. This expansion will allow us to spread some of our risks, balance our product, gas and electricity, spread geographically so we're susceptible to different weather patterns, be in different regulatory jurisdictions, and spread our assets out." (Transcript p. 45).

Mr. Green went on to say that the purchase of WKPL would meet each one of those objectives.

In the 1970's, as Missouri Public Service Company, management felt they had experienced high interest rates, high inflation and an unrealistic regulatory climate and wanted to be prepared in case those conditions returned (1985 Annual Report, Exhibit 7). In cross-examination by Mr. Bauman, Mr. Green testified that the policy of reducing risks through investment in utilities as opposed to other industries was formulated by management two years before UtiliCorp was incorporated, after seeing significant signs of deregulation and non-utility investors willing to buy utility properties (Transcript p. 84). Mr. Green emphasized that UtiliCorp's expansion has been confined to the utility industry and that the transactions have been flexible, to react to the seller's needs. He gave as examples the acquisitions of Peoples Natural Gas (an assets purchase) and Kansas Public Service (a stock purchase) (Transcript p. 62). Two other acquisitions under negotiation during the hearing were the U.S. operations of InterCity Gas, a Canadian company (completed in December 1986) and West Virginia Power (closing in February 1987).

In further cross-examination Mr. Bauman questioned UtiliCorp witnesses Green and Baker on their investment decision criteria, as applied in the WKPL decision (Transcript p. 131). In response Mr. Green testified that UtiliCorp first looked at the fundamentals -- "that it was electric, its cost of power, when did it peak, how was it regulated, and some evidence of the calibre of management". Once satisfied with these factors, they reviewed their

own resources, to see what it might cost and whether or not UtiliCorp would be able to pay that cost. They then considered the question of specific pricing, in relationship to what the market was paying for this kind of utility and whether such a price could be justified from the values found. They made certain assumptions about the sale, including that WKPL's management would remain, that utility regulation was comparable to that experienced in the U.S., and that WKPL's tax treatment would be unchanged. Mr. Green stressed that this investment decision by UtiliCorp was made on the fact that WKPL is a well-run utility and that this will be continued. He added that whatever changes the utility business brings them would be coped with, and that even if the current favourable conditions were to change, UtiliCorp was prepared to deal with that and still justify the investment (Transcript p. 136).

In final argument Mr. Scarlett took the position that UtiliCorp's primary activity is not running efficient utilities with earnings tied to productivity, but growth and speculation on existing utility operations. He argued that UtiliCorp's growth was too rapid, with insufficient time for the company to assimilate its takeover targets and that this would increase the risk to WKPL (Transcript p. 4996). In his cross-examination of Dr. Waters, Mr. Scarlett questioned UtiliCorp's future growth possibilities (Transcript p. 4484). Dr. Waters' opinion, however, was that UtiliCorp's strategy was plausible and that such rapid growth does not necessarily lead to instability or high risk, when accomplished by acquiring existing operations in fields of activity in which you already have experience. Dr. Waters further stated that he believed that UtiliCorp had shown an awareness of the need for maintaining a viable capital structure in the circumstances of an aggressive expansion strategy (Transcript p. 4508).

In final argument Mr. Bauman noted that UtiliCorp's acquisition track record is short, and that both UtiliCorp and Dr. Waters agreed that there are new competitive challenges and risks as well as benefits attached to undertaking an

aggressive acquisition policy, during a period of progressive deregulation of natural gas in both the U.S. and Canada. He argued that the Commission should insulate WKPL from these risks by imposing conditions in any approval it might decide to give to the UtiliCorp Application (Transcript p. 4863) and specifically proposed the following three conditions:

- First, that UtiliCorp and UtiliCorp B.C. be required to seek BCUC approval of any future acquisition involving over \$25 million,
- Second, that UtiliCorp B.C. not pledge its shares in WKPL without BCUC approval,
- Third, that UtiliCorp B.C. be deemed to be a public utility for the purposes of Section 61 of the Act.

In cross-examination by Commission Counsel, Mr. Baker testified that UtiliCorp would agree to the second (Transcript p. 3052) and, as filed in Exhibit 66A, has volunteered the third, as possible conditions. UtiliCorp was not prepared, however, to accept the aforementioned first condition and in response to Mr. Bauman's argument, Mr. Macintosh argued that, with three U.S. jurisdictions already having powers to review UtiliCorp's acquisitions, the public interest in this province was unlikely to be served by having this Commission devote its time to reviewing UtiliCorp's acquisitions elsewhere. Dr. Waters was reluctant to say such a condition was warranted unless UtiliCorp had violated some other conditions (Transcript p. 4479). He added that he did not feel that this was an element that was critical to the matter before this Commission (Transcript p. 4480).

In its review and order with respect to UtiliCorp's Application to acquire WKPL (filed as Exhibit 75 in the present proceedings), the Missouri Public Service Commission staff found no evidence that the proposed acquisition would be detrimental to the Missouri ratepayers. It concluded, however, that to prevent such a possibility future acquisitions by UtiliCorp might take more time to review, and put UtiliCorp on notice that any adverse financial impacts resulting from imprudent acquisitions would be borne by the company's

shareholders and not by its ratepayers. Mr. Johnson for Cominco argued that the Commission has never examined the acquisitions or activities of other parent companies and should therefore not single out UtiliCorp for such treatment now (Transcript p. 4906). The Commission concurs with that view.

In his final argument Mr. Anderson provided a useful summary of UtiliCorp's acquisition policy, its possible motivation to build rate base, and the implications for WKPL and its rates in future (Transcript pp. 5094 - 5104). Mr. Anderson was concerned that UtiliCorp would make all possible efforts to maximize its return (by building WKPL's rate base, etc.) before discovering whether the service area could bear the resulting rate increases. His concern was heightened by the fact that UtiliCorp had indicated that "there was room to move" relative to the current low level of rates in comparison to other sources of energy. The Commission agrees with Dr. Waters, however, that what the utility shareholder sees as advantageous investment is not necessarily a detriment to the ratepayer, because "their interests are joined with respect to the efficient and profitable operation of WKPL" (Transcript p. 4512).

Commission Conclusions

The expressed concerns and extensive cross-examination by intervenors with respect to the Applicant's acquisition strategy was, in the Commission's view, well presented and very useful in ensuring that no reasonable basis for concern would be overlooked.

In the Commission's view, the history of UtiliCorp's actual performance to date in the implementation of that strategy is too brief to support complete confidence that its apparent successes will necessarily continue in the future. In light of that initial brief but impressive record of success, however, the favourable reaction of the U.S. financial community thereto, UtiliCorp's awareness of the risks involved and of the importance of maintaining an efficient capital structure to which UtiliCorp is prepared to commit, the

Commission concludes that barring a serious and currently unforeseen economic decline, UtiliCorp's prospects for the continued success of its acquisition strategy are good and should be so recognized.

The Commission further concludes that even if, under adverse economic conditions, UtiliCorp were to be motivated to transfer any adverse impacts on its U.S. operations to the WKPL ratepayers, the careful regulation of WKPL by this Commission would preclude the transfer of any unjustified costs to that utility.

With three U.S. jurisdictions already responsible for reviewing and testing UtiliCorp's acquisition applications in the public interest, using criteria similar to that applied in the B.C. regulatory process, such as efficient capital structure, this Commission concludes that it is neither necessary, appropriate or in the public interest in B.C. to attempt to impose, as a condition for approval proposed by Mr. Bauman, a requirement that UtiliCorp seek the prior approval of this Commission for all future acquisitions involving more than \$25 million. That proposal is accordingly rejected.

The Commission concludes that there is no supportable basis for attributing a net detriment to either WKPL or its customers arising from the acquisition strategy as presented by UtiliCorp.

3. The Acquisition Valuation

The purchase price that UtiliCorp will pay to Cominco for the outstanding common shares of WKPL is specified, in Clause 1.2 of the Share Purchase Agreement (Exhibit H of Exhibit 7), as equivalent to 1.7 times the book value of the common equity of WKPL on the Closing Date of the transaction. Based on the WKPL five-year capital plan, the December 31, 1986 book value (consisting of common equity and retained earnings) was estimated to be \$47.8 million [Exhibit 3, Response to Information Request No. 5(a)]. The expected purchase price will therefore amount to 1.7 times \$47.8 million or approximately \$80 million (Canadian).

UtiliCorp's response to Information Request No. 1 (Exhibit 3) with respect to its bid price for the WKPL shares, indicates that the price was not the result of a formula but was comparable to the prices involved in similar transactions for electric utilities across Canada and the U.S. The multiplier ratio of 1.7 is also comparable to the open market trading multiples (market/book ratios) of other utilities listed in the response. In cross-examination by Mr. Bauman, Mr. Baker concluded that this was an indication that the marketplace had determined that it was a prudent value for WKPL. Mr. Baker further testified that UtiliCorp had just recently placed a one million share offering of its shares at 1.64 times its book value (Transcript p. 144).

Despite this, many people felt the bid was excessive and made reference to a premium of \$20 million, being the difference between a bid of \$60 million reportedly made by the Regional Districts, and UtiliCorp's offer. Reference to that premium is made in the prepared speech used by Mr. G. Abele at meetings organizing the Electric Consumers Association (filed by the ECA as Exhibit 60) as well as by Mr. Scarlett in his submission at the hearing as spokesman for the Kaslo Chamber of Commerce and Kaslo Chapter of the E.C.A. (Transcript p. 792).

When questioned by Mr. Macintosh (Transcript pp. 1943-1944), Mr. Abele acknowledged that his basis for advising potential members of the E.C.A. that the UtiliCorp bid was excessive was that the Canadian bids were significantly lower. He further acknowledged that just because a bid reflects a premium over book value does not mean it is excessive. As noted by the Cominco Panel at Transcript page 3487, the next highest bid had an upper range of \$77.5 million. Mr. G. Cady, Chairman of the Regional District of Central Kootenay, stated that their advisors suggested that the \$60 million figure was a good one to start with and that one of their more respected administrators came up with a figure of \$100 million (Transcript p. 588).

In cross-examination by Mr. Scarlett, Mr. Baker testified that the magnitude of the indicated acquisition premium would not be significant in terms of UtiliCorp's consolidated balance sheet, and that there would not be a financial impairment of Utilicorp, if in future it should turn out that the premium paid for WKPL was excessive (Transcript p. 2598).

Exhibit 12 illustrates the intended transaction. UtiliCorp will borrow \$60 million (U.S.) short-term at about 7.5%, restructure as permanent equity, and transfer the funds to UtiliCorp B.C. (the Canadian subsidiary of UtiliCorp United) in exchange for preferred shares of that subsidiary. UtiliCorp B.C. will then give the funds to Cominco and receive WKPL shares in return. UtiliCorp B.C. expects to receive dividends from WKPL, but will reduce the payout to 44% of earnings. These dividends will not attract taxes as long as they remain in Canada and, as noted in Exhibit 66A (Appendix B), within the foreseeable future, are to be reinvested in WKPL.

Intervenors were concerned as to why UtiliCorp B.C. made the investment if it really intended to keep the dividends in Canada. In answer to a question at Transcript page 139, Mr. Green noted: "Really our return on investment is going to be the earnings of WKPL, and again it physically doesn't have to flow down to Missouri. It will show that return just when we consolidate our statements. So that's our return on our investment. Now over a time we hope that earnings will increase here. The premium we are paying will be amortized and paid off over time, so that there is a growth in return in the investment over the years, so there is no need to physically have cash to pay on \$60 million. That earnings gives us the benefit we need to continue." Mr. Baker added: "It's in essence as though you make an initial investment and that investment is such that it has an adequate return and you keep plowing back all of that return, or dividends, if you will, to increase your investment."

The premium mentioned by Mr. Green is the difference between the historical cost book value upon which UtiliCorp will be allowed to earn a return and the current market value of WKPL and is more generally known as an acquisition premium. The premium will not actually be recorded on WKPL's books --- only on UtiliCorp B.C. books as a component of its investment in WKPL, to be amortized over 35 years.

A major issue in the hearing was whether UtiliCorp would attempt to recover the acquisition premium through WKPL rates. UtiliCorp has stated in its evidence [Exhibit 3, Response to Information Request No. 5(b)] that it will not attempt to recover on the premium and has included this as an absolute commitment in Exhibit 66A. One rationale for the premium paid, and the statement that UtiliCorp would never attempt to earn on it, was given by Mr. Baker at Transcript page 156. "If we should sell our common stock at 1.7 times its book value it would be the same as though we had purchased West Kootenay at book value and sold our common stock at book value." Mr. Baker then agreed that, to the extent that the contribution of West Kootenay's earnings to the consolidated earnings of UtiliCorp have the effect of increasing the earnings per share and thereby the stock market value of those shares, the shareholders are compensated for this.

Dr. Waters' opinion at Transcript pages 4420-4424 was that the transaction will have no impact on the WKPL rate base and that, from a financial and accounting point of view, there is no reason to recover the premium from the ratepayers of WKPL.

It should be noted that UtiliCorp paid a \$30 million premium over book value when it acquired Peoples Natural Gas and gave assurances to the regulatory commissions involved that it would not attempt to recover the premium in the rates. The Decisions of the various commissions [Exhibit 3, Response 3(a)] approved that purchase without making those assurances a condition of their approvals, and agreed that the proper treatment of the premium was not an issue for the acquisition proceedings and should be deferred to the first

subsequent rate case. Accordingly, when UtiliCorp later filed for rate increases in Iowa and Minnesota, it again did not ask for recovery of the premium.

During cross-examination by Ms. Irvine at Transcript page 2174, Mr. Baker acknowledged that it is fairly well established that it is not considered appropriate to recover a premium over book value --- only the original cost of a property when it's first devoted to public service.

The Commission would emphasize that regulatory boards in general in both Canada and the U.S.A., and this Commission in particular, do not allow companies to include such premiums in rate base or cost of service.

Commission Conclusions

Unless and until actual events suggest otherwise, the Commission accepts the Applicant's assurances and commitment that UtiliCorp will not seek in any way to recover the acquisition premium through the WKPL rates, and is prepared to make this a condition for approval. While recognizing its lack of direct jurisdiction or power of enforcement over UtiliCorp, the Commission concludes that, with its regulatory powers over WKPL undiminished under UtiliCorp ownership, the Commission's powers of determining the rate of return on equity to the owners of WKPL is sufficient to ensure compliance with such a commitment, in the interests of both UtiliCorp's shareholders and the customers of WKPL.

The Commission accordingly concludes that the indicated acquisition premium would not in any significant way lead to detrimental effects on WKPL or its customers.

4. Management Control of WKPL

Although the reasons given by intervenors for their opposition to approval of the proposed sale of WKPL differed, most intervenors were particularly concerned that control of their electric utility would leave the service area. It was this that prompted the cities of Trail and Castlegar to urge the Commission to hold hearings on the issue when they first heard of the agreement. In its brief to the Commission (filed as Exhibit 24) the City of Castlegar clearly opposed the sale while Trail simply withheld its support (Transcript p. 840). Both cities recognize the assurances and commitments made by WKPL and UtiliCorp in response to these concerns, and requested that the Commission include them as commitments or conditions for approval in its Order, if the decision was to approve the Application. Other intervenors discounted the usefulness of the commitments either because they felt changing circumstances would negate them or because they doubted the Commission's ability to enforce them.

With respect to control of WKPL, as recorded in Appendix B to this Decision (Exhibit 66A), UtiliCorp has made an absolute commitment to enlarge the present Board of Directors from seven to nine, comprising a majority of five independent local residents, two employees of WKPL and two representatives from UtiliCorp. The present three local directors have agreed to stay on (Transcript p. 51). Mr. Scarlett argued that, notwithstanding this commitment, the ultimate decision-making powers would lie in Missouri and that the five local directors would be quickly replaced if they attempted to act for the interests of the community against those of UtiliCorp (Transcript p. 789). When that possibility was put to him, Mr. Franklin, Executive Vice-President at Missouri Public Service, responded that such behaviour would be extremely damaging to UtiliCorp because the company has to rely on the goodwill of its customers for its well-being and success (Transcript p. 2203).

In cross-examination by Mr. Gathercole, Mr. Drennan, President and Chief Executive Officer of WKPL, testified that there had not been a problem operating with the present WKPL Board, comprising three outsiders, two Cominco and two WKPL employees. As indicated in Exhibit 9, WKPL anticipated that UtiliCorp would have a greater understanding of and sensitivity to problems unique to utilities because of its utility experience in the United States.

UtiliCorp takes the position that control is focussed in the operating policy and decision-making function and that it does not intend to manage WKPL or become involved in day-to-day decision-making (Exhibit 3, Question 6a). The Applicant has also made an absolute commitment to keep WKPL's head office and management function in Trail for 10 years and to maintain them within the service area for as long as UtiliCorp owns the utility (Exhibit 66A).

In cross-examination by Mr. Bauman, Mr. Green testified that to keep overhead down, UtiliCorp's head office employs only 25 people full-time and that he considered the role of that staff to be one of consulting and monitoring (Transcript p. 63). In later cross-examination Mr. Green acknowledged that his belief in the adequacy of his existing head office staff was based on the premise that UtiliCorp will not have to spend a significant amount of time dealing with WKPL problems --- the remedy would always be with WKPL management (Transcript p. 436).

UtiliCorp's declared objective is to retain WKPL's present management personnel and to give them a large degree of autonomy. In response to a question by Mrs. Slack, Mr. Baker defined the term "objective" as, in his view, a commitment without any specific term or duration because the future circumstances might require a change (Transcript p. 2166).

Mr. Green explained that UtiliCorp's input would come from having two people on the WKPL board on major policy decisions, an annual budget review, and the review of significant projects where their expertise was needed (Transcript p. 51). He further testified that UtiliCorp had always assumed WKPL management would remain.

It was Dr. Waters' opinion that WKPL's personnel would be independent, although undoubtedly vetted by UtiliCorp as to their competence (Transcript p. 4447). He was not concerned by UtiliCorp's lack of hydro-electric experience, since they would essentially be overseeing the activities of WKPL's operating management at a strategic and policy level. Dr. Waters agreed with Mr. Scarlett that the shareholders and management of one company could conceivably identify a course of action for another (subsidiary) company that might be different from that identified by the shareholders and management of that company (Transcript p. 4511). He stated, however, that in this case the interests of ratepayers of WKPL and the shareholders of UtiliCorp are joined with respect to the efficient and profitable operation of WKPL and are unlikely to diverge meaningfully. He further stated that, to the extent that their interests might diverge, it would probably be on strategy for future expansion, which is an issue typically dealt with by a utilities commission.

Mr. Gathercole raised the matter of the distance of UtiliCorp's head office from WKPL's service area as a potential disadvantage. Mr. Drennan noted that he has been reporting for many years to the head office of Cominco, 400 miles away in Vancouver, and that electronic mail and the telephone should suffice to handle the expected infrequent contacts with UtiliCorp (Transcript p. 1189). Mr. Green agreed that would be the case (Transcript p. 281).

WKPL's status as a subsidiary rather than a division also is an important factor in keeping control in local hands. WKPL would incur none of the overhead or general expenses of UtiliCorp, it would maintain its own records, it would be in a position to issue its own debt and equity, it would remain incorporated under the laws of B.C., and it remains a public utility subject to regulation by the B.C. Utilities Commission and other regulatory agencies. It was Dr. Waters' evidence that the maintenance of WKPL as a separate corporation and the appropriate undertakings by UtiliCorp should insulate WKPL from any changes in UtiliCorp's business risks (Transcript p. 4428).

During cross-examination Mr. French, Office of Public Counsel for Missouri, acknowledged that he did not know of any jurisdiction or powers possessed by the Missouri Public Service Commission which would cause it to put pressure on UtiliCorp to affect its operations in B.C., in an effort to somehow protect the interests of its Missouri customers (Transcript p. 4258).

Commission Conclusions

The Commission is satisfied that the Applicant's commitments with respect to the planned makeup of the WKPL Board of Directors, the retention of the WKPL head office in Trail and its declared objectives of retaining and providing maximum autonomy for WKPL management, would permit adequate local input and control to ensure that the utility continues to operate in the interest of the utility's customers and the Kootenay and South Okanagan regions at large. The Commission's direct jurisdiction and powers of enforcement with respect to WKPL will remain undiminished.

The Commission accordingly concludes that there is unlikely to be any reduction in WKPL's management control and autonomy from that which has prevailed under Cominco ownership, that can be reasonably attributed to the proposed sale of the utility. UtiliCorp's interest and activity being entirely in the utility business as distinct from mining and smelting or other non-utility business, the proposed new ownership could, in the Commission's view, lead to a greater degree of understanding and appreciation of utility needs and problems than that experienced during the Cominco regime.

5. The Cominco/WKPL Relationship and Ongoing Operating Agreements

As indicated heretofore in the Background section to this Decision, the relationship between Cominco and WKPL has been of long-standing and fundamental importance to the growth and development of both companies and the economy of the region. Cominco has been able to depend upon WKPL

initially as the supplier of the low-cost hydro-electric energy essential to its smelting operations, and subsequently for the management and operation of Cominco's much larger hydro-electric facilities involved in the Waneta and Brilliant plants. For its part WKPL has been able to depend upon Cominco for an important part of its energy requirements in excess of its own generating capacity, in order to meet the needs of its customers, and at a significant cost advantage over power obtained from B.C. Hydro.

The intervenors as well as the Commission itself recognize the public importance to both Cominco and WKPL of maintaining their ongoing operating arrangements and understandings on a formal basis, following any proposed sale of WKPL. In cross-examination by Mr. Bauman, Mr. Baker testified that "any of the agreements and understandings that have been in existence between WKPL and Cominco will be reduced to contract language" (Transcript p. 238). Mr. Bauman then requested that a list of those arrangements and understandings be provided by either Cominco or WKPL (Transcript p. 238). On November 12, 1986 Counsel for WKPL filed that list as Exhibit 39 (Transcript p. 989) a copy of which is attached to this Decision as Exhibit E.

In its Decision of May 31, 1983 the Commission directed that all future agreements between the utility and Cominco be submitted to the Commission for approval. Pursuant to that direction, on January 9, 1987 WKPL filed draft copies of three operating agreements that were still in the process of negotiation with Cominco at that time. These comprised the Interconnection Agreement, the Facilities Sharing Agreement and the Management Agreement. All were dated January 1, 1987 and filed at the hearing as Exhibits 81, 82 and 83 respectively. These agreements were designed to replace and cover the same operating arrangements contained in the "Omnibus" Agreement, which had been in place between Cominco and the utility since January 1, 1975.

It is important to note that these three new agreements, together with the previously approved Sale of Surplus Power Agreement, had been in place or under negotiation between the companies for some time and were in no way initiated or affected by Cominco's subsequent decision to sell the utility. Following conclusion of the hearings in Kelowna, WKPL filed with the Commission for review and approval, duly executed copies of the aforementioned three operating agreements. A copy of the letter of February 11, 1987 covering that filing is attached to this Decision as Appendix D.

In cross-examination of Mr. Deane, Mr. Bauman questioned the duration or term of the Facilities Sharing Agreement (Transcript p. 3577). Cominco's Counsel Mr. Johnson explained that this agreement does not contain a specific termination date and continues to run as long as the parties continue to nominate the use of the share facilities. He further explained that the only change in the termination provision in the Facilities Sharing Agreement from that in the Omnibus Agreement is an increase in the notice requirement from six months to three years. The Commission notes that this change provides a significant improvement in the opportunity for successful negotiation or, if necessary, provision of alternative facilities in the event of notice of termination by either party.

Another ongoing agreement affecting the relationship between Cominco and WKPL is the Sale of Surplus Power Agreement. That Agreement (filed as Exhibit 15 in these proceedings) provides WKPL with access to Cominco's surplus power supply until September 30, 2005. By letter of May 30, 1986 Cominco offered to firm-up the amount of power available to WKPL under that agreement on a three-year rolling nomination basis. That offer was made as a result of issues arising during the preceding Commission hearing dealing with WKPL's long-term purchases of power from B.C. Hydro. During the UtiliCorp proceedings, however, and as a result of the Commission's October 1986 Decision with respect to the terms and conditions pertaining to WKPL's purchases from B.C. Hydro, Cominco increased its offer to firm-up WKPL's

access to its much cheaper surplus power supply, from a three-year to the five-year nominating basis (Transcript p. 3941).

During cross-examination by Commission Counsel, Mr. Deane volunteered that Cominco was prepared to remove from the Sale of Surplus Power Agreement an important restriction affecting WKPL's access to Cominco surplus interruptible power (Transcript p. 3956). He explained that under the then prevailing arrangement the interruptible energy sold to WKPL must be for immediate resale by WKPL within its service area and that by removing that requirement WKPL will be able to store energy or equichange it for later use in serving its customers. The letter dated March 18, 1987 from Cominco to WKPL confirming the foregoing important changes, is attached to this Decision as Appendix F.

During the proceedings it was suggested that the proposed change in ownership of WKPL would inevitably introduce a "profound change" in the Commission's ability to influence or control the important ongoing relationship between Cominco and WKPL. This argument, which pertained to the Facilities Sharing Agreement, suggested that if Cominco in its own interests gave notice of termination and reclaimed its portion of the integrated facilities, WKPL would be compelled to invest in the replacement facilities required to maintain service to its customers and that this would inevitably lead to higher rates. Arguably, under continued Cominco ownership the Commission could influence such a result by refusing to recognize such facilities in WKPL's rate base. The Commission's power to exert such influence would clearly be lost with any change in ownership of the utility.

The Commission believes that in such circumstances established regulatory practices and tests must be applied to determine the appropriate makeup of rate base. Accordingly, in the Commission's view it would be improper to exclude "used and useful" facilities from rate base in order to achieve a measure of control over the owner of the utility which is otherwise unavailable.

Mr. Deane, Energy Manager of Trail Metals for Cominco, argued that under Cominco's Exemption Order (Appendix I) it is required to have agreements with WKPL for the common use of facilities and in effect to operate those facilities as an integrated system. He further suggested that if the Facilities Sharing Agreement were to be terminated abruptly and not replaced with an equivalent, Cominco would be breaching the Exemption Order and would become subject to regulation as a utility under Part 3 of the Act. Commission Counsel suggested that such a drastic outcome could be avoided by adding Section 32 to the three Sections 45, 51 and 53 of the Act already applicable to Cominco in the Exemption Order. He noted that this would give the Commission the power to arbitrate and if necessary resolve any failure by Cominco and WKPL to negotiate the future ownership of and access to the integrated facilities involved (Transcript pp. 3974 - 77).

Commission Conclusions

The Commission concludes that there is a significant public interest inherent in the successful renegotiation of the Shared Facilities Agreement in the event of termination by either party in the future. Exercise of the three-year termination option by Cominco could indeed compel WKPL to invest in the facilities necessary to replace those reclaimed by Cominco for its own purposes. This in turn could impose upon the WKPL ratepayers a significant increase in rates. At the time Cominco's existing Exemption Order was proclaimed, the sale of WKPL by Cominco was not contemplated and no provisions for that eventuality are therefore contained in that Order.

As noted on page 2 of this Decision the supply of energy by Cominco to WKPL is governed until the year 2005 by the terms of the Sale of Surplus Power Service and Exemption Order. The Commission notes, however, that ever since the Exemption Order was issued, the Commission has not had jurisdiction over the actions of Cominco with respect to those facilities which they share with WKPL. As a practical matter this has not proven to be a problem,

presumably because of the community of interest between Cominco and WKPL in the most effective use of those facilities. The Commission's concern is that compatible joint use might emerge as a problem once Cominco ceases to have a vested interest in the financial welfare of WKPL and its customers.

Accordingly, in order to provide the means to introduce additional safeguards for the WKPL customers and the public at large in the event the parties are unable to agree, the Commission will therefore recommend to the Minister of Energy, Mines and Petroleum Resources that the Exemption Order be amended to include Section 32 of the Act. A copy of Section 32 is attached to this Decision as Appendix G.

In summary, the Commission recognizes that all of the foregoing agreements have been freely negotiated between the parties and, in one form or another, have been in place and effectively governing the ongoing relationship between Cominco and the utility. As noted heretofore, they were undertaken well before the decision by Cominco to sell and the subsequent Application by UtiliCorp.

With the exception of the indicated problem with respect to the Facilities Sharing Agreement, the Commission concludes that the existing agreements and understandings between Cominco and WKPL would not be significantly altered or adversely affected by the proposed change in ownership of the utility. Indeed, in the absence of any evidence of concerns by the Applicant in that regard, and in the light of UtiliCorp's commitments to retain and give maximum authority to the management of WKPL, the Commission concludes that existing intercorporate dependencies and relationships would continue as in the past.

Accordingly, in the Commission's judgement no detrimental effects on either the utility, its customers or in the larger sense on the public interest, are likely to arise from the ongoing agreements and relationships as a result of the proposed change in ownership. The recommended addition of Section 32 of the

Act to the existing Cominco Exemption Order would provide reasonable means to ensure that this proves to be so. The Commission concludes that its jurisdiction under the Act with respect to utility operating agreements, is otherwise sufficient to protect the public interest, regardless of ownership.

With respect to the required approval of the three operating Agreements, the Commission will give them careful consideration on their own merits and outside the confines of this Decision, as part of its normal responsibilities under the Act.

6. WKPL Rates and Intercompany Charges

A major and widely-shared concern of the intervenors and the public at large was the possible impact of the WKPL sale on future customer rates. The Share Purchase Agreement between UtiliCorp and Cominco includes a covenant that the financing of the purchase price by UtiliCorp will not result in any increase in rates to the customers of WKPL. In his cross-examination of Mr. Green and Mr. Baker (Panel 1), however, Mr. Bauman pointed out that this and the other covenants provided in that agreement are covenants between two private corporations, neither of which is subject to the jurisdiction of this Commission. Mr. Green concurred in Mr. Bauman's conclusion that the only party that could sue UtiliCorp in the event UtiliCorp failed to live up to them, would be Cominco itself. In response, however, Mr. Green testified that UtiliCorp was prepared to give the Commission the same assurances and that UtiliCorp was prepared to live by them (Transcript p. 213).

In subsequent cross-examination by Commission Counsel, these and other covenants were expanded and refined and were categorized by Counsel as either absolute commitments or expressions of specific corporate objectives. The resulting list was accepted by UtiliCorp and with subsequent revisions was filed by the Applicant as Exhibit 66A.

In the Application (Exhibit 1, p. 16) UtiliCorp states "In the longer run we believe that customer rates would be lower as a result of this sale." In cross-examination by Mr. Gathercole, Mr. Baker explained that this did not mean that the rates would decline from present levels, but that WKPL's access to lower financing costs and to UtiliCorp's expertise could keep any required rate increases lower than they might otherwise be under continued ownership by Cominco (Transcript p. 264). As became apparent from subsequent cross-examination by Commission Counsel, significant load growth and implementation of WKPL's 5-year capital plan (if approved) involving expenditures of \$92 million, would inevitably lead to rate increases no matter who owns the utility (Transcript p. 504).

A number of intervenors were concerned that UtiliCorp might attempt to recover the acquisition premium by inflating intercompany charges by UtiliCorp to WKPL. In his submission, Mr. G. Clark, spokesman for the provincial N.D.P. Caucus on energy matters, described this as a potentially convenient way to increase UtiliCorp's return from WKPL (Transcript p. 3298). He believes that such charges would be complex and difficult if not impossible to verify. Mr. Clark concluded that, at very least, the costs of regulation to prevent unreasonable charges would increase. In cross-examination by Mr. Macintosh, however, he acknowledged that since it is WKPL that is regulated, the difficulties would exist with respect to any unregulated owner. He maintained, however, his belief that this was one reason that private utilities were more difficult than public utilities to regulate. Mr. Clark acknowledged that he had no specific knowledge as to whether it is in fact easier for the Commission to regulate public utilities and that he had "made an inference based on extensive academic literature." (Transcript p. 4067).

UtiliCorp has repeatedly testified that any such charges would be for specific services rendered and that no overhead costs would be allocated to WKPL, since it is and will continue to be a separate corporate entity and not a division of UtiliCorp (Transcript pp. 223-224). UtiliCorp is also aware that any

attempt to recover the premium by such methods would be fraudulent and that all such charges are subject to review by this Commission. With regard to the difficulty or complexity of such reviews, pursuant to Section 56 of the Act and to Commission Order G-28-80, all regulated utilities in B.C. are required to maintain their records in conformity with this Commission's Uniform System of Accounts, thereby facilitating the review process.

In response to an information request from the Commission staff (Exhibit 9, question 2) WKPL concluded that access to UtiliCorp's expertise and experience would provide benefits. Mr. Drennan testified that WKPL will not undertake to pay for services by UtiliCorp until it is apparent that there is a benefit to be gained (Transcript p. 1339). Moreover, in cross-examination by Commission Counsel, Mr. Baker, committed UtiliCorp to assist WKPL in the preparation of a document which, if the acquisition of WKPL is approved, will be filed with the Commission, setting out the principles on which intercorporate charges will be based (Transcript p. 511). Moreover, Mr. Baker later confirmed that UtiliCorp would not charge WKPL for services unless they had been requested on a consulting basis by WKPL. Such charges would comprise actual UtiliCorp employee wages and fringe benefits without either administration or facilities fees (Transcript p. 2106).

Commission Conclusions

As indicated in its conclusions with respect to UtiliCorp's valuation of the WKPL acquisition and treatment of the indicated acquisition premium, the Commission accepts the Applicant's commitment with respect to recovery of that premium as an appropriate basis for a condition of approval.

With respect to intercorporate charges, the Commission will continue to exercise due diligence in its review of all such charges and will not anticipate or accept any lack of cooperation from UtiliCorp in that respect. Moreover,

the Commission does not foresee any significant increase in regulatory cost attributable to such reviews, or a change in ownership from Cominco to UtiliCorp.

Accordingly, the Commission concludes that the acquisition of WKPL by UtiliCorp will not adversely affect the utility's rates or the level of intercorporate charges currently experienced under Cominco ownership and that there will be no detrimental effects on the utility or its customers attributable to either customer rates or intercorporate charges.

7. WKPL Potential for Exports

WKPL is currently a net purchaser of power and has no surplus power for export. A number of intervenors speculated, however, that with the additional generation possibilities mentioned during the hearing, surplus power could and would be exported to the U.S. (Transcript p. 1265). There was some suggestion that this would not be in the public interest and indeed would be detrimental to Canadian interests. Mr. Scarlett concluded that UtiliCorp's testimony that as long as WKPL was short of power it would not apply to export electricity constituted a contradiction. This was because underutilization of generation facilities costs money, and sensible management would dictate a plan to transfer power seasonally. He argued that UtiliCorp would inevitably undertake power trading arrangements with Bonneville Power Authority ("BPA"), and use WKPL's excess summer power to its own advantage (Transcript p. 795).

In his testimony, however, Mr. Drennan stressed that additional generation does not necessarily make surplus power available for export, as it depends on the timing of construction and whether the additional power could be fully utilized in Canada (Transcript p. 1265). Mr. Green testified that any option to produce surplus power would be undertaken only if the benefits could flow back to the customers of WKPL (Transcript p. 50). Under cross-examination by Commission Counsel he further testified that, even under circumstances

where there appeared to be a very healthy export market, UtiliCorp would not require WKPL to build generating plant specifically for export needs (Transcript p. 447). The UtiliCorp commitment not to divert power from WKPL for UtiliCorp's own use for any export or non-utility purpose was later filed in Exhibit 66A.

Mr. Green suggested that one option might be to have the generating capacity required to meet WKPL's expanding domestic market constructed by some independent company and the power sold to WKPL by long-term contract. He observed that such a situation would mean WKPL would not have to raise the millions of dollars it takes to build the plant and any excess capacity within that unit would not cost the customers money. He acknowledged, however, that under this option WKPL's customers would not get the benefits of any sales of the surplus power (Transcript pp. 450-452), and that any such separate generation company would be a public utility with its operations and rates under the control of the Commission (Transcript pp. 499, 643).

As noted by Mr. Drennan exports of electricity are regulated by both the Federal and Provincial governments and WKPL has no export licenses other than very minor ones needed to supply U.S. Customs houses at the border. He agreed that nothing would change as a result of the proposed sale of WKPL (Transcript p. 1144).

Commission Conclusions

The Commission concludes that the control of exports by both levels of government and in particular the fact that export licenses are not issued unless or until domestic Canadian requirements are covered, is sufficient to protect Canadian interests. Moreover, any expansions of WKPL's generating capacity, or the creation of an independent company with such capacity, will continue to require the scrutiny, approval and certificate of public convenience and necessity from this Commission, regardless of who owns the utility.

Accordingly, the Commission finds that no detrimental effects on the utility, its customers or on the public interest at large can be attributed to any future WKPL potential for power exports which, if properly timed and executed, could in fact prove to be a benefit and very much in the public interest.

8. WKPL's Water Licenses

The issue of WKPL's water licenses and the fears of some intervenors and many people attending the hearings that the proposed sale of the utility to foreign owners constituted a threat to Canadian sovereignty of a major resource, were the subject of an extensive review and examination at these proceedings.

In cross-examination by Mr. Woodward, Mr. Baker testified that UtiliCorp had assumed that, because this was a stock purchase rather than an asset purchase, the acquisition would not change the likelihood of WKPL water licenses being renewed (Transcript p. 340). Mr. Macintosh, in response to a question by Mr. Woodward later explained that during the contract negotiations, UtiliCorp's solicitor had spoken with the Water Comptroller, reviewed the relevant legislation and correspondence and was satisfied that the sale had no impact on those licenses (Transcript p. 388).

Mr. R. Brisco, MP in his submission (Exhibit 22), stressed that utilities are controlled and audited by the Commission, regardless of ownership, and that the water levels in Kootenay Lake and the River will not be controlled by U.S. interests. He stated that the WKPL license allows for utilizing the full capacity of the generating facilities and that these do not operate at the capacity 24 hours/day. He also noted that the Kootenay Lake and River are Canada-U.S. Boundary waters under control of the International Kootenay Lake Board of Control and that the utilities must report to the Board. He stated that the ultimate authority is the International Joint Commission and the IJC is familiar with the issues affecting Kootenay West (Transcript p. 682).

Early in the proceedings UtiliCorp recognized the potential for public concern and made an absolute commitment to not play a role in changing the manner of determining water levels in the Kootenay Lake systems or in the River systems (Exhibit 66A). Nevertheless, much time was spent in the hearing on publicly-expressed concern that the sale would transfer control over B.C. water resources to U.S. interests. Mr. Shannon, on behalf of the B.C. Wildlife Federation proved to be very well informed not only with respect to the water licenses, but also the provisions of the Columbia River Treaty. Although especially concerned, he agreed with Mr. Johnson that ". . . the licenses have value to UtiliCorp only because they entitle WKPL to generate electricity but they can't do anything else with them." (Transcript p. 1388). The Commission notes that the penalty for failure to comply with the licenses can be revocation of those licenses. Revocation would leave UtiliCorp with no access for the generation of power (Transcript p. 1390).

In a letter written on behalf of the Commission, Mr. Sanderson addressed certain questions to the Water Rights Branch. The reply from the Water Comptroller (Exhibit 69) states that Mr. Shannon's concern about new owners creating artificially low water levels is not warranted, due to the International Joint Commission and Columbia River Treaty ("CRT") Agreements and operation by B.C. Hydro under the Canal Plant Agreement (Transcript p. 3024).

In his testimony and subsequent cross-examination Mr. Drennan laid out the following facts:

- (i) WKPL holds water licenses for the operation of its hydro plants under the control of the Water Comptroller. They will remain in WKPL hands and under regulation (Transcript p. 1143).
- (ii) WKPL holds a 1938 IJC order for the operation and control of six feet of storage in Kootenay Lake because the Corra Linn dam affects U.S. water levels. The order sets maximum flood levels only (Transcript p. 1175).

- (iii) B.C. Hydro has responsibility for the Duncan and Libby dams which are upstream of Kootenay Lake and discharge into the Lake and river. They operate the gates in consultation and agreement with the U.S. entities for the release of Columbia River storage. There would be no change if the ownership of WKPL changes (Transcript p. 1176).

- (iv) The Canal Plant Agreement of 1982, like the Sale of Surplus Power Agreement does not expire or become subject to renegotiation until 2005. This Agreement integrates the WKPL and Cominco facilities with the B.C. Hydro grid, partly because of water regulation required by the Columbia River Treaty and partly because of the construction of the Kootenay Canal plant by B.C. Hydro. To provide maximum efficiency in the use of the water resource at the Canal plant effective control of Kootenay River water flow rests with B.C. Hydro and the power available to WKPL and Cominco is no longer relative to the production of their respective power plants. Agreements determine their monthly capacity and energy entitlements. WKPL personnel control the Corra Linn dam from the South Slocan centre but essentially B.C. Hydro determines the actual generation at the plants (Transcript p. 1180).

By letter of January 14, 1987 the Commission requested B.C. Hydro's advice on the impact, if any, of the proposed sale of WKPL on the extensive ongoing business dealings between the two utilities. By letter of the same date, B.C. Hydro responded in part "It is therefore B.C. Hydro's view that its contractual and operating concerns and relationships, including electricity exports, with WKPL will be unaltered by the change in ownership". A copy of that letter was filed at the hearings as Exhibit 70 and is attached to this Decision as Appendix H.

The Columbia River Treaty gives Canada, after 20 years, the right to divert some water from the Kootenay River near Canal Flats to the Columbia River headwaters. This would reduce generation on the river between Nelson and Castlegar but WKPL's water licenses predate the CRT so the Canal Plant Agreement has been taking the Duncan, Libby and CRT effects out of the flows. The historical rights to flow and Kootenay Lake storage remain and the entitlement under the Canal Plant Agreement would not be affected by the diversion (Transcript p.

In their evidence and subsequent cross-examination the Cominco Panel put on the record their understanding of the water licenses arrangements. Cominco, as does WKPL, holds two types of water licenses; one for the production of power at Brilliant and Waneta and the other for the storage of water in Kootenay Lake. The Comptroller of Water Rights in the Ministry of Environment issues and administers all water licenses, which are issued for specific purposes such as irrigation, domestic use, mining, power generation and water storage (Transcript p. 3336). The licenses are non-consumptive and the water, after flowing out of the Kootenay Lake and down the Kootenay River, joins the Columbia River near Castlegar and enters the U.S. about 25 miles south (Transcript p. 3337).

The storage license provides for compliance with the IJC Order of November 11, 1938 (Exhibit 48) and amendments, covering Kootenay Lake water levels. The Columbia River Treaty optimizes generation and flood control on the Columbia to an extent that would have been impossible if Canada and the U.S. had developed their own portions of the River independently. WKPL and Cominco dams are on the Kootenay River and are not directly governed by the Treaty but the Treaty dams upstream do affect and actually improve the water flows (Transcript p. 3339).

Mr. Deane testified that WKPL will continue to hold its existing licenses so UtiliCorp would only indirectly acquire the rights. He emphasized, moreover, that those licenses are strictly limited to power production and storage and cannot divert or use the water in any other way. Mr. Deane concluded that, in a practical sense, while the Canal Plant Agreement remains in place, neither WKPL nor UtiliCorp can directly exercise their water rights (Transcript p. 3340).

The Columbia River Treaty was negotiated in 1964 for a term of 60 years although the flood control provisions continue. A portion of the storage created in Canada is used to create power in the U.S. facilities which is then

split 50/50 between Canada and the U.S. The benefits over a 30-year period were calculated and then Canada sold its portion to the U.S. (Transcript p. 3342). The first project completed under the Treaty was the Duncan Dam in 1968 so renegotiation by the Canadian government will start in 1998. WKPL will not have a role in those negotiations as they have no Treaty facilities (Transcript p. 3344).

Commission Conclusions

The Commission concludes that the proposed sale and foreign ownership of WKPL does not constitute a threat to Canadian autonomy over our water resources. The fact is that WKPL's water licenses will remain the exclusive property of the utility (a British Columbia company), applicable only to the use of Canadian water in Canadian generating plants, and limited to the production of electricity and storage of water in Canada.

Barring any regulatory changes at either the federal or provincial level, the Commission, on the evidence, further concludes that the ongoing functions of the provincial Water Comptroller, the International Joint Commission and the provisions of the Columbia River Treaty and Canal Plant Agreement, are such as to preclude any significant detrimental effects on either WKPL or its customers attributable to the proposed change in ownership.

9. WKPL Financial and Capital Plans

One of the criteria applied in the aforementioned T.M.A. Decision was that the structural integrity of the utility's assets must be maintained in such a manner as to not impair the utility's service to its customers. UtiliCorp stated in its Application that it would take all reasonable steps to ensure this and, in addition, that it would cause WKPL to improve existing assets or acquire such new assets as may be appropriate to maintain or enhance service to customers. To aid the Commission in reviewing this issue, WKPL filed its load forecast and five-year plans as Exhibit 11.

The capital plan sets out \$92 million in capital projects expected to be required over the five-year period 1987 - 1991, but excludes the resource generation projects to be evaluated in a study expected to be completed by WKPL in 1987. An earlier version of this plan had been given to prospective bidders as a part of the Information Package distributed by Burns Fry (Exhibit 9).

Although Mr. Franklin had discussed these plans with WKPL and accepted them as reasonable, (Transcript p. 3029), Mr. Baker testified that UtiliCorp had no input into their preparation or the quality of service levels implied by those plans (Transcript p. 478). In cross-examination by Commission Counsel, Mr. Franklin acknowledged that he was not aware that WKPL required BCUC approval for capital projects under Section 51 of the Act (Transcript p. 3030). Mr. Baker, however, stated that this did not diminish UtiliCorp's enthusiasm for the proposed acquisition and that they had no objection to a requirement that WKPL file annually a report on proposed system extensions.

The five-year financial plan reflects the assumptions made in both the load forecast and the capital plan and sets out how WKPL expects to finance the projected expenditures. Exhibit 40, filed by WKPL, forecasts annual savings of \$200,000 to \$500,000 under UtiliCorp ownership. The savings reflect the reduced dividend payment and a lower cost of financing attributed to the UtiliCorp guarantee, both of which stand as absolute commitments by the Applicant as recorded in Appendix B. Exhibit 40, however, also reduced the planned number of preferred shares to be issued, reflecting UtiliCorp's belief that more common shares would strengthen the capital structure. When suggested by Commission Counsel that, for WKPL and other Canadian utilities, preferred shares might be more attractive, Mr. Baker reiterated that if such were to prove to be the case, UtiliCorp would honour its overriding commitment to maintain an efficient capital structure.

Some concern was expressed during the hearing regarding a possible move by UtiliCorp to impose thermal generating plants on the West Kootenay environment. In his opening testimony Mr. Green suggested that one of WKPL's future generating options might be gas turbines (Transcript p. 55). In reaction, Mr. Killough, a resident of Castlegar speaking on his own behalf, observed in his submission that although in periods of peak demand WKPL has to purchase additional power from B.C. Hydro, it was ridiculous to consider coal or gas-fired plants, with their inevitable atmospheric pollution, when surrounded by great surpluses of hydro-electric power (Transcript p. 772). Mr. Scarlett agreed with that position (Transcript p. 794) but was also concerned by other possibilities, including power trading with other utilities or the construction of more dams and the flooding of more valleys. At the same time, however, he questioned UtiliCorp's willingness to guarantee abundant power for the Kootenay area (Transcript p. 791).

In addition to the projects included in its five-year capital plan, WKPL is actually engaged in economic studies on generation and other resource alternatives for future sources of power supply. In cross-examination by Mr. Miles, representing the Sierra Club of Western Canada, Mr. Drennan acknowledged that there is a large list of options for meeting WKPL's future power requirements, including gas turbine, additional generation at Brilliant/Waneta, improved efficiency of existing machinery, load management and peak shaving (Transcript p. 1262).

In response to Commission Information Request No. 2(a) UtiliCorp noted that WKPL's near-term plans involve purchasing as much power as possible from Cominco and B.C. Hydro. They added that, depending on the outcome of the WKPL resource study, if such options as gas turbines for peaking power or purchase of capacity and energy from other utilities such as TransAlta or BPA proved to be feasible, UtiliCorp's experience in both gas turbines and contract negotiation could be useful. Mr. Drennan's testimony supports that opinion.

Under cross-examination by Mr. Scarlett, UtiliCorp acknowledged it had no hydro-electric generation expertise but was strong in coal and gas-fired technology. To Mr. Scarlett's concern that UtiliCorp might bring in an inappropriate source of power simply because they were familiar with it, Mr. Franklin gave assurances that UtiliCorp would not be involved in the day-to-day operation of WKPL. He confirmed that WKPL management would be given total consideration over what alternative future resources to develop and that UtiliCorp would lend its expertise if required but would not bias the generation study report (Transcript p. 2186).

When questioned by Mr. Gathercole Mr. Franklin indicated that UtiliCorp had already made preliminary and purely exploratory contact with BPA and TransAlta to see if energy was available (Transcript p. 2457). Mr. Franklin later indicated that, while additional interconnection with BPA is not being considered in the WKPL study, once UtiliCorp gets involved it can be considered (Transcript p. 2768). When asked by Commission Counsel why UtiliCorp became actively involved in this aspect of the management of WKPL and no other, Mr. Franklin's reason for the active role was the ongoing dispute between WKPL and B.C. Hydro (Transcript p. 2985). He further testified that to date they had not attempted to influence WKPL's views with respect to interpretation of the Commission's Dispute Decision or other local matters (Transcript p. 2991). Mr. Baker agreed that WKPL's operation did not need any additional management function from UtiliCorp (Transcript p. 2982). However, in response to a question Mr. Franklin acknowledged that in order to protect their investment, there could be a point where UtiliCorp would have to have the final say in major decisions (Transcript p. 2979).

During cross-examination of the Cominco Panel, Mr. Anderson filed Exhibit 107 which, among other things, lists the benefits sought in recent years by BPA during ongoing Columbia River Treaty negotiations. These include access for BPA to additional firm storage in B.C. Hydro's reservoirs, and are

evidence of BPA's continuing efforts to obtain increased storage, improved system coordination, or the right to retain the downstream benefits otherwise due to revert to B.C., in return for providing access for B.C. electricity to California markets. Mr. Deane was not prepared to agree that if WKPL sought a tie-line with BPA these objectives would necessarily or inevitably be brought to bear by BPA in their own interest. He did, however, agree that negotiations between BPA and WKPL or Cominco should only be conducted by individuals with a fairly good working knowledge and understanding of the competitive Pacific Northwest marketplace and the concerns and desires of BPA (Transcript pp. 3745-3747).

The Commission does not regard UtiliCorp's preliminary discussions with BPA and TransAlta as an indication that the needs and desires of UtiliCorp will override the knowledge of WKPL management, and views those discussions, although undertaken in the absence of WKPL, as fact-finding and exploratory in nature and not unreasonable in the circumstances.

Commission Conclusions

After extensive review, cross-examination and argument the Commission is unable to conclude at this time that the financial and capital plans of WKPL, as filed and addressed during these proceedings, will be adversely affected in any way by the proposed sale of the utility to UtiliCorp. Under any change of ownership it would be unusual and surprising if such plans were not affected in some way but such changes cannot be assumed to be necessarily or inevitably detrimental. Moreover, these plans, together with the generation resource studies currently underway by WKPL, will be reviewed at future public hearings and will remain subject to ongoing Commission approval under the Act.

While the Commission accepts the Applicant's assurances in good faith, the Commission concludes that its authority over WKPL's plant or system extensions under Section 51(3) and the requirement under Section 57 for

approval of the issuance of securities, is sufficient to protect the public interest.

Accordingly, and in light of the Applicant's absolute commitments to maintain the utility's head office and management function in Trail and to maintain an efficient capital structure, together with its declared objective of autonomy for WKPL management (ref. Appendix B), the Commission concludes that the proposed change in ownership of WKPL will not in itself adversely affect the financial or capital plans of the utility or its pending studies and decisions with respect to future generation resources. The Commission therefore concludes that there are unlikely to be any detrimental effects on the utility or its customers attributable to the influence of foreign ownership on the utility's financial and capital plans, and that existing provisions of the Act afford the Commission an effective and permanent mechanism to review and control the utility's financial and capital plans in the future.

10. WKPL Quality of Service

In the filed evidence supporting this Application, Utilicorp states "The service now provided to customers in the service territory of the Company will be maintained or improved. In addition, UtiliCorp is committed to ensuring the reliability and quality of service offered by the Company and is willing and able to make further investment in the Company to achieve this end." (Exhibit 2, Tab F, p. 7). This broad statement responds to one of the criteria used by the Commission in the T.M.A. Decision that "The conduct of the utility's business including the level of service, either now or in the future, will be maintained or enhanced." The ability of UtiliCorp to finance the expenditures which may be necessary to ensure reliability, and its commitments to give WKPL a significant degree of independence have been explored in other sections of this Decision.

In his cross-examination Mr. Gathercole concentrated on UtiliCorp's policies with respect to quality of service and attempted to determine the company's past record in that regard. In response, Mr. Green stated his belief that WKPL had a very good service record and that UtiliCorp had nothing specific in mind by way of immediate improvements, but indicated that UtiliCorp would support the continuation and possible enhancement of that record over time (Transcript p. 416). Mr. Green's comments, however, were based on interviews with WKPL personnel, and no formal assessment was done by UtiliCorp (Transcript p. 2145). Mr. Franklin testified that the West Kootenay and Missouri service areas were very similar in nature, but was reluctant to go into details about differences such as line losses without more study (Transcript p. 2151).

To Mr. Gathercole's question about UtiliCorp's philosophy with respect to the trade-off between the level of quality of service and the level of rates, Mr. Green responded that it was a matter of evaluation of risk and trying to schedule capital programs over time to keep the system in shape, in order to moderate the impact on rates (Transcript p. 420).

In the evidence filed in support of its Application, UtiliCorp states that it has had a long successful history of providing quality service at reasonable prices (Exhibit 3, Tab 7). Under cross-examination by Mr. Gathercole, Mr. Baker reported that, although in the eighties UtiliCorp experienced no interventions other than by the Consumer Advocate, in the seventies there were interventions by individuals who, while objecting to increases in rates, also praised the quality of service (Transcript p. 422).

In cross-examination of the Cominco panel by Mr. Gathercole, Mr. Stone explained that the criteria listed in the Burns Fry letter (Exhibit 87) and distributed to prospective purchasers, on which all bids received initial evaluation were in part intended to ensure that the prospective buyer's intentions were consistent with the regulatory environment in B.C. (Transcript p. 3392).

In her cross-examination of the Cominco panel, Ms. Helen Overnes posed a significant question by asking "From Cominco's point of view, what benefits would there be to Canadians by the sale of WKPL to a foreign company?" (Transcript p. 3540). In response, and after acknowledging the importance of that question, Mr. Stone said in summary, "we became satisfied that UtiliCorp was an experienced and knowledgeable operator of utilities, that they were responsive to the needs of their customers, and the communities in which they operated. They're technically competent, they're financially sound, and rather met all the criteria that we, and we judge the Commission, would look to for comfort in the ownership of West Kootenay." In response to subsequent questions by Mr. Anderson, Mr. Stone explained that this assessment by Cominco was made on the basis of discussions with the Applicant, their financial advisors, and a review of UtiliCorp's annual reports and other investment media reports on the Applicant (Transcript p. 3692).

In his final argument Mr. Anderson took the position that, while Cominco made a comparative analysis of bids for their own purposes, the company had failed to demonstrate that it had the public interest in mind when it made its comparisons and selected UtiliCorp (Transcript p. 5069). In his view, no one could argue that WKPL's service to the customers would not be adversely affected, because proper analysis might have found a bidder capable of providing equal quality of service without arousing the considerable public opposition by the WKPL ratepayers. He concluded that the service of the utility would be negatively affected by a significant loss of goodwill.

Mr. Anderson, however, did not argue that it was necessary for the Commission to undertake a comparative analysis of all bids. Rather, he felt that there should be guidelines or criteria similar to those in the T.M.A. Decision that any Applicant should follow, prior to the Application.

The Commission notes, however, that the T.M.A. Decision guidelines were precisely the ones used by UtiliCorp in their Application (Exhibit 2, Tab F). The Commission is satisfied that, as long as the potential purchaser

meets those criteria, and any others which may be appropriate in a particular case, the public interest can be protected without imposing onerous conditions on the seller. Mr. Anderson agreed that Section 61(8) of the Act does not require that to qualify for approval there be no detrimental effects whatsoever attributable to a proposed transaction, but that the Commission is required to look at the entire transaction, and if in the Commission's judgement the perceived detriments are offset or exceeded by the potential benefits, then the test for approval has been met (Transcript pp. 5120 - 5121).

Mr. R.W. French appeared on behalf of the Kootenay Okanagan Electric Consumers Association to give evidence on the history of relationships between UtiliCorp and its predecessor company, Missouri Public Service, and the Missouri Public Service Commission, its staff, and the Office of Public Counsel. That evidence (Exhibit 106), focussing on the period between 1979 and 1983, essentially consisted of a series of Orders issued by the Missouri Commission with respect to the Applicant's Missouri Public Service division in that period, and the results of a management audit by the Missouri Commission's staff.

Although Mr. French had not been asked prior to the hearing to comment in his filed evidence with respect to the merits of WKPL as a candidate for acquisition by UtiliCorp, it appeared during cross-examination that Mr. French would have had difficulty with such a task. When asked by Mr. Shannon to rate UtiliCorp he replied "I don't think I'm qualified to make such a determination based on the evidence I have in front of me." (Transcript p. 4200).

Although he highlighted certain issues raised in the Applicant's regulatory history, Mr. French was unwilling to draw conclusions from them. In response to questions by Mr. Macintosh at Transcript page 4324, he testified that, although he had reported that the Commission had disallowed dues paid by the Applicant to two technical research organizations, he did not intend that any

adverse inference should be drawn against the company. He also noted that Appendix 8 of Exhibit 106 raised some concern about quality of service but declined to respond when Mr. Gathercole asked him to compare the Applicant's quality of service with that of other Missouri utilities (Transcript p. 4172). When Mr. Gathercole quoted the company's comments regarding its "long and successful history of providing quality customer service at reasonable prices", Mr. French stated that he had no knowledge of the quality of customer service provided by the company prior to 1981, but was aware of some problems they had experienced in 1982 and 1983. He was not aware of any data or evidence since that time (Transcript p. 4182).

Mr. French noted a number of rate applications where the Commission awarded substantially less than the utility had applied for. Mr. Anderson concluded in argument that such large differences indicated that rate-making in Missouri is a much more adversarial process, which could increase the length and cost of regulation in B.C. at the expense of the ratepayers (Transcript p. 5088). Mr. French, however, had testified earlier that it was neither unusual, nor a common practice in Missouri and that he could not draw any conclusions from it (Transcript p. 4168).

The evidence presented at this hearing was at times somewhat conflicting. During cross-examination by Mr. Bauman, Mr. French stated that the Office of Public Counsel did review UtiliCorp's Application to the Missouri Commission regarding WKPL, but did not express any concerns with respect to the proposed acquisition (Transcript p. 4195). When questioned, however, he agreed that based on UtiliCorp's conduct and reputation before the Missouri regulatory authorities, if the company were to seek to acquire another utility in Missouri, the initial reaction of the Office of Public Counsel would be negative (Transcript p. 4223). Mr. French also testified that the company had experienced more problems with Commission orders than one of the other electric utilities but that each of the utilities had different problems (Transcript p. 4196).

During cross-examination by Commission Counsel, Mr. French commented with respect to the company's reputation in the regulatory context, that once UtiliCorp decided to take a case to hearing, they "take it all the way" (Transcript p. 4366). Several intervenors concluded that this attitude, if maintained by UtiliCorp in B.C., would add unnecessary costs to regulation. Mr. French indicated, however, that the company was not alone in that respect in Missouri and, as noted by the Commission, the conclusions drawn by Mr. Anderson in his argument assume that a utility moving into another regulatory climate is unable to adapt to that different climate (Transcript p. 5090).

The Commission recognizes the importance and high priority that must be given to the maintenance of a quality of service that will both meet the requirements of WKPL's existing customers and encourage economic growth in the Kootenay region.

As indicated by the Commission panel at the hearing during consideration of the quality of service issue, the Commission has some difficulty with any attempt to use evidence on the history of UtiliCorp's experience and performance in the regulatory regime to which the company responds in Missouri, as a necessarily valid indicator of its probable conduct under regulation in British Columbia. To do so is to assume that the Applicant will prove to be incapable of adapting and conforming to a new regulatory climate.

The Commission notes that there was insufficient evidence to support such an assumption and that the Applicant has, in the space of less than five years, managed to adapt to the regulatory regimes in seven different states in the U.S., without apparent evidence of any undue difficulty. The Commission recognizes that the basis for some of the expressed concerns was the evidence of the relatively aggressive history of the Applicant in its response to regulation by the Missouri Public Service Commission. However, the Commission believes that the Applicant's regulatory history in Missouri may be attributable to the relatively adversarial roles accepted as normal by participants in that jurisdiction.

Mr. French, a key witness on the issue of the quality of service in WKPL to be expected under UtiliCorp ownership, appeared to be well informed and knowledgeable of the Applicant's regulatory history in the Missouri jurisdiction, at least for the period since 1981 when he joined the Office of Public Counsel. The Commission feels, however, that Mr. French's own evidence on the role of the Office of the Public Counsel as representing the interests of the ratepayers, has inevitably rendered him adversarial with respect to the Applicant. Moreover, in the Commission's view, his unwillingness to "rate" UtiliCorp as compared to other Missouri utility companies, and his apparent reluctance to express any personal opinions on UtiliCorp's performance, significantly weakens his evidence. His statement that "I don't think I'm qualified to make such a determination based on the evidence I have in front of me" (Transcript p. 4200) leaves the Commission faced with that very task, and as noted by the Commission, without the necessary background knowledge of all the factors which led to the judgements of the Missouri Commission offered by Mr. French as his evidence.

Commission Conclusions

The Commission heard no convincing evidence that will support an assumption that, under UtiliCorp ownership, the quality of service provided by WKPL would decline. In light of the Applicant's declared objective No. 3, to "Keep the quality of service as good or better than it is now and than it would have been if Cominco had retained ownership" (ref. Appendix B to this Decision) and in view of the Commission's responsibilities and mandate under the Act to ensure that this objective is met, the Commission concludes that there are no detrimental effects to either the utility or its customers and the public at large, attributable to the quality of service issue.

11. Economic Development

A number of intervenors took the position that the proposed sale of WKPL to UtiliCorp would have detrimental effects on the economic development of the Okanagan/Kootenay region of the province. In his filed submission at the hearing Mr. Scarlett described UtiliCorp's proposed acquisition of WKPL as a takeover rather than investment in British Columbia. He defined investment as "an infusion of money with a certain degree of risk, into a locality to set up a new business or increase the productivity of an existing one", and concluded that "UtiliCorp proposes to do neither". (Transcript p. 793)

In his evidence, the Vice-President of Finance for Cominco, Mr. Stone, testified that as a result of expenditures of about \$700 million on the zinc plant at Trail and other capital expenditures, commitments and losses, Cominco "found itself with more debt than was appropriate if it was to continue as a viable operation . . . and decided to concentrate on the businesses that it knows best." He explained that "Cominco requires the proceeds from the sale of the shares of West Kootenay Power and from the sale of other assets, to upgrade and develop the operations which are at the core of its business". (Transcript p. 3323)

In his final argument, Mr. Macintosh alluded to Mr. Stone's evidence and argued that the \$80 million influx to the area "is now needed by Cominco for expenditure in its plant, with a resulting probable direct employment benefit for the West Kootenay region." He went on to argue that "This influx of U.S. capital will apparently result in increased employment in this province, or at least in the preservation in this province of Cominco jobs" (that might otherwise have been lost) (Transcript p. 4715).

With respect to UtiliCorp's ability to effectively promote and support the ongoing economic development of the region and the province, in his evidence Mr. Green testified UtiliCorp has given "high priority" to economic

development efforts in the service areas supplied by UtiliCorp's U.S. divisions, "because we see that as a big plus to the communities involved, the customers, and is obviously a benefit to the utility itself." He went on to explain how UtiliCorp proposed to assist WKPL in active economic development endeavours, by supplying economic professionals who, after developing a knowledge of the Kootenay region and its needs by personal contact with existing economic development groups and potential customers, would "hopefully" with such active participation, attract some new businesses or encourage existing ones to expand. (Transcript p. 57)

In his final argument, Mr. Scarlett was clearly skeptical of Mr. Green's testimony, citing UtiliCorp's "almost total ignorance of this area", and expanded this opinion by stating that "UtiliCorp, at least at this time, doesn't have any idea of what the needs of this area are, nor has it expressed any kind of coherent plan as to just what it may do for us." (Transcript p. 5003).

Commission Conclusions

The Commission recognizes the importance of the prevailing interest, policies and programs of both the provincial and federal governments in promoting economic development and job creation. It further recognizes the vital role that the availability of low-cost hydro-electric power must continue to play in the economic development of British Columbia. As is developed in other sections of this Decision, the evidence in these proceedings does not suggest that ownership by UtiliCorp would jeopardize the continued availability of low-cost hydro-electric power from WKPL.

While the Commission shares Mr. Scarlett's skepticism with respect to any immediate or early results from participation by UtiliCorp personnel in economic development activity, the Commission concludes that the proposed UtiliCorp activity would not prove to be a detriment to WKPL or its customers.

The Commission further concludes that, although the acquisition itself may not qualify as economic development or create new jobs, the infusion of \$80 million into the region by UtiliCorp and the preservation of Cominco jobs that could otherwise be lost, does not in any way suggest a detriment to the utility or its customers and is clearly in the public interest. The Commission notes that UtiliCorp's commitment to maintain WKPL's head office and management function in Trail would preserve an important number of jobs making a significant contribution to the economy of Trail and the surrounding area.

12. Public Opposition

The Commission is acutely conscious of the degree of sincere public concern and at times vehement opposition to the proposed acquisition by UtiliCorp, that was so clearly apparent during the public hearings on this matter. Attendance at the proceedings in Trail, Penticton and Kelowna exceeded by a wide margin anything ever before experienced by the Commission. The Commission should note, however, that the conduct of these proceedings was such that a number of Intervenors commented for the record that the hearings have provided a fair and thorough opportunity for all concerns and opinions to be heard. Not surprisingly, the audience was particularly sensitive to anything seen as a potential threat to either the quality or cost of such essential services as electricity.

The Utilities Commission Act, which determines the basis on which the Commission carries out its regulatory responsibilities, clearly specifies the Commission's overriding duty to protect the public interest and is silent on the matter of public opinion. It is apparent that the two cannot be the same unless public opinion has been based on public understanding of the same information required for a reasoned determination of what is in the public's best interests overall. In the present case, it is on the record that Cominco made little effort to adequately inform and reassure the affected public on the implications of its plans to sell WKPL. As a result, and before the hearings

even commenced, well-meaning leaders of consumer groups inadvertently created a high level of public opinion in opposition.

The public's fears and concerns, attributable in part to the absence of either guidelines or legislation controlling foreign investment in what are widely regarded as essential industries, in the Commission's view were entirely understandable and justifiable in the circumstances. They were not significantly relieved by the specific absolute commitments offered by the Applicant for that purpose, and of which intervenors were with few exceptions audibly skeptical.

As indicated heretofore in this Decision, the Commission acknowledges and appreciates the interest and assistance provided to the Commission in this unusually difficult and controversial matter by public participation on the scale demonstrated at the hearings, without which some issues of concern to the public might have been overlooked or inadequately considered by the Commission. The extensive exposure of those attending the hearings, to the facts with respect to the many issues involved in the proposed sale of the utility, in the Commission's view did somewhat soften but did not eliminate, public opposition. This was indicated as the hearings progressed, in the recognition by some of the principal intervenors of the Commission's powers and flexibility under the Act, and by their "fall-back" position that, in the event of a Commission decision to approve the sale, such approval should be subject to appropriate conditions of sufficient strength and duration to protect the public interest in the long-term.

Commission Conclusion

While recognizing the level of public opposition displayed at the hearings, the Commission concludes that only evidence which was supported by either facts or a reasonable degree of probability, should influence its decision. Accordingly, the Decision on the UtiliCorp and WKPL Applications in this matter has been based upon the Commission's mandate under Section 61(8) of the Act with respect to detrimental effects, together with those criteria developed in the T.M.A. Decision where appropriate.

VII THE DECISION

The jurisdiction of the Commission in the Applications before it is set out in Section 61 of the Utilities Commission Act. The Commission does not have the jurisdiction to control foreign investment in a public utility solely on the basis of nationality. As noted in Section III of this Decision, however, the Commission has considered whether the foreign origin of the proposed purchaser would have any detrimental effects on WKPL and its customers under Section 61(8) of the Act.

In the Commission's judgement the conclusions reached with respect to each of the issues addressed in this Decision collectively indicate that there will be no net overall detriment to WKPL, its customers, or to the public interest attributable to the proposed purchase of the utility by UtiliCorp, provided that certain conditions are imposed to ensure that WKPL continues to be operated in a manner consistent with the public interest. The Commission further concludes that the proposed acquisition by UtiliCorp satisfies the formally developed criteria applied to protect the public interest in the T.M.A. Decision.

Accordingly, and pursuant to Section 61 of the Utilities Commission Act, the Commission approves the Applications as filed by UtiliCorp and WKPL, subject to the conditions set out below. Those conditions are to be binding, in each case, upon UtiliCorp United Inc., UtiliCorp British Columbia Ltd. and West Kootenay Power and Light Company, Limited and their successors and assigns. These conditions are an integral part of this Decision and approval of the Applications is based in part on the protection of the public interest which they provide.

1. UtiliCorp United, UtiliCorp B.C., and WKPL will not take any step or adopt any measure which has the direct or indirect purpose or effect of recovering from the customers of WKPL any premium paid over book value by UtiliCorp United or UtiliCorp B.C. for the shares of WKPL.

2. UtiliCorp United and UtiliCorp B.C. will not cause and WKPL will not divert power or energy required in any way whatsoever by WKPL's actual or potential customers to any other use and, in particular, may not use or cause to be used such power or energy for an export or non-utility purpose.
3. UtiliCorp United Inc. and UtiliCorp B.C. Ltd. will not themselves and will not cause WKPL to alter the basis or procedures for determining the appropriate water levels in the Kootenay Lake systems or in the river systems which are dammed as part of WKPL's water storage assets.
4. UtiliCorp United and UtiliCorp B.C. will provide WKPL with whatever form of financial support is necessary to allow WKPL to obtain the full benefit of UtiliCorp B.C. and UtiliCorp United's financing ability, including without limitation, guaranteeing the indebtedness of WKPL and providing the full faith and credit of UtiliCorp United and UtiliCorp B.C.
5. UtiliCorp United and UtiliCorp B.C. will not cause WKPL and WKPL will not lend direct financial support to either UtiliCorp United or UtiliCorp B.C. and in particular will not guarantee any indebtedness of theirs or their affiliates.
6. WKPL will reduce its dividend payouts to 44% of its earnings for the next five years.
7. UtiliCorp United and UtiliCorp B.C. will cause WKPL to elect and maintain a board of directors comprising five independent directors resident within the WKPL service area, two nominees of WKPL management resident in the service area and two nominees of UtiliCorp United.
8. UtiliCorp United and UtiliCorp B.C. will cause WKPL to maintain an efficient capital structure satisfactory to the Commission and UtiliCorp United or UtiliCorp B.C. will contribute equity within three months of any request by the Commission to achieve or maintain the required capital structure. If UtiliCorp United or UtiliCorp B.C. are unable or unwilling to contribute the required equity themselves, they will, without delay, cause WKPL, and WKPL will use its best efforts, to make an offering of and to issue, equity securities to Canadian investors.
9. WKPL will retain its head office and management function in Trail for at least ten years from the date of this Decision and will maintain the head office and management function in the WKPL service area for so long as UtiliCorp United and/or UtiliCorp B.C. own a controlling interest in WKPL.
10. UtiliCorp United will not sell all or part of its shares in UtiliCorp B.C. and UtiliCorp B.C. will not issue securities in such a way as to directly or indirectly convey a reviewable interest as defined in Section 61 of the Act in UtiliCorp B.C. to any other person without the prior approval of this Commission.

11. UtiliCorp B.C. will retain in Canada all dividends paid by WKPL to it in the five years from the date of this Decision.

Any of the foregoing Conditions not stipulating a specific time limit, shall remain in force so long as UtiliCorp United Inc. and UtiliCorp British Columbia Ltd. own WKPL.

The Commission, while regarding the Applicant's corporate "objectives" listed in Appendix B to this Decision as desirable, recognizes that they cannot be fairly imposed as conditions for approval. The Commission will, however, expect UtiliCorp to make every effort to attain them, circumstances permitting.

DATED at the City of Vancouver, in the Province of British Columbia, this 30th day of June, 1987.

M. TAYLOR, Chairman

D.B. KILPATRICK, Commissioner

B.M. SULLIVAN, Commissioner

IN THE MATTER OF
the Utilities Commission Act
S.B.C. 1980, c. 60, as amended

and

IN THE MATTER OF
Applications by
UtiliCorp United Inc.; and
UtiliCorp British Columbia Ltd.; and West Kootenay Power and Light
Company, Limited

DECISION

June 30, 1987

Before:

M. Taylor, Chairman
D.B. Kilpatrick, Commissioner
B. Sullivan, Commissioner

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- Appendix H - Letter dated January 14, 1987 from Counsel for B.C. Hydro to BCUC Re: Proposed Acquisition of WKPL by UtiliCorp
- Appendix I - Sale of Surplus Power Service and Exemption Order

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B.J. WALLACE
J.W. SCHRAMM
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J.W.M. WILSON

R.J. GATHERCOLE

K.C. MACKENZIE

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C.B. JOHNSON
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MAYOR C. LAKES
T. MUNAERUT
P. DURYEA

Commission Counsel

UtiliCorp United Inc. and
UtiliCorp British Columbia Ltd.
West Kootenay Power and Light
Company, Limited
B.C. Old Age Pensioners
Organization;
Consumers Association of Canada,
B.C. Branch; Federated Anti-
Poverty
Groups; Council of Senior Citizens
Organization of B.C.
British Columbia Hydro and Power
Authority
Celgar Pulp Company
Cities of Nelson, Kelowna,
Penticton,
Grand Forks; District of
Summerland;
Slocan Forest Products Ltd.
Cominco Ltd.

Electric Consumers Association
City of Castlegar
Regional District of Central
Kootenay
Kootenay Environmental Group
Self
City of Rossland
Kaslo Chamber of Commerce
Electric Consumers Association,
Kaslo Chapter
City of Trail
Self
East Shore Community
Development Forum

(i)

APPEARANCES

(cont'd)

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W.A. CAMPBELL	Self
J. McDONALD	Self
P. DEWDNEY	Self
W. WELLOCK	Self
C. EVANS	Self
J.R. BATEMAN	Self
G.H. BELEY	Self
W. BYRNELL	Self
W.D. CHARLES	Self
J. ORR	Council of Canadians
MRS. B. SLACK	Slack Electric Limited
B. EVANS	Inland Natural Gas Co. Ltd.
MS. S. IRVINE	Self
F.E. PAUL	Regional District of Kootenay Boundary
H. McDOWELL	Self
R. MILES	Sierra Club of Western Canada
F. SHANNON	B.C. Wildlife Federation,
J.A. CARTER	Okanagan Region
E.A. CROWE-SWORDS	Self
R. TOEVS	Summerland Chamber of Commerce
W.A. GILMOUR	Self
F. LAUER	Self
C. D'ARCY, MLA	Self
S. STAIRS	Electric Consumers Association, Kettle Valley Branch
MS. H. OVERNES	Self
MS. A. BRUCE	Self
T.P. HARVEY	Self
E. REILLY	Self
D.A. CURRIE	Self
MS. M. FRANCK	Self
D. CURSONS	Green Party of British Columbia, Boundary Similkameen Riding Association

(ii)

APPEARANCES

(cont'd)

J.BOWEN
District

West Bench Irrigation

G. CLARK, MLA	Self
I. WADDELL, MP	Self
H.L. DIRKS, MLA	Self
J. SHECTER	Self
H.F. KILLOUGH	Self
MS. M. MURTON	Self
L. MOYLS	Self
C.J. BULL	Self
D. CAMERON	Self
B.C. WILSON	Self
R. SIMPSON	Self
S. DUNSDON	Self
V.C. JOHNSON	Self
MRS. D. MALINS	Self
H. MILLER	Self
MS. M.A. MILLER	Self
R. MOORE	Self
H.G. MORGAN	Self
T. MUNKERUD	Self
G. RICHARDS	Self
W.M. KARPINSKY	Self
R.H. BRISCO, M.P.	Self
MRS. S.B. LICHTENSTEIN	Self
F. SNOWSELL	Self
MRS. E. WARMAN	Self
F. KING, M.P.	Self
MRS. DONATI	Self

R.J. Fletcher
B. McKinlay
J. Hague
J. Greiner
F.L. Stromotich

COMMISSION STAFF

W.R. Harper

HEARING OFFICER

Allwest Reporting Ltd.

COURT REPORTERS

LIST OF WITNESS PANELS

UTILICORP UNITED INC. and
UTILICORP BRITISH COLUMBIA LTD.

R.C. GREEN Officer	President and Chief Executive
J.R. BAKER	Senior Vice President - Corporate Development
D.J. WOLF Treasurer	Vice President - Finance and
J.E. FRANKLIN	Vice President - Engineering
J.E. SAMAYOA	Director of Regulation and Taxes

WEST KOOTENAY POWER AND LIGHT COMPANY, LIMITED

J.A. DRENNAN Officer	President and Chief Executive
-------------------------	-------------------------------

COMINCO LTD.

R. STONE	Vice President, Finance
R. DEANE	Energy Manager, Trail Metals

ELECTRIC CONSUMERS ASSOCIATION

R. FRENCH	Office of Public Counsel, Missouri
-----------	------------------------------------

B.C. UTILITIES COMMISSION

DR. W.R. WATERS	Professor, Faculty of Management Studies, University of Toronto
-----------------	---

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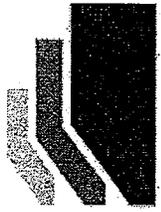
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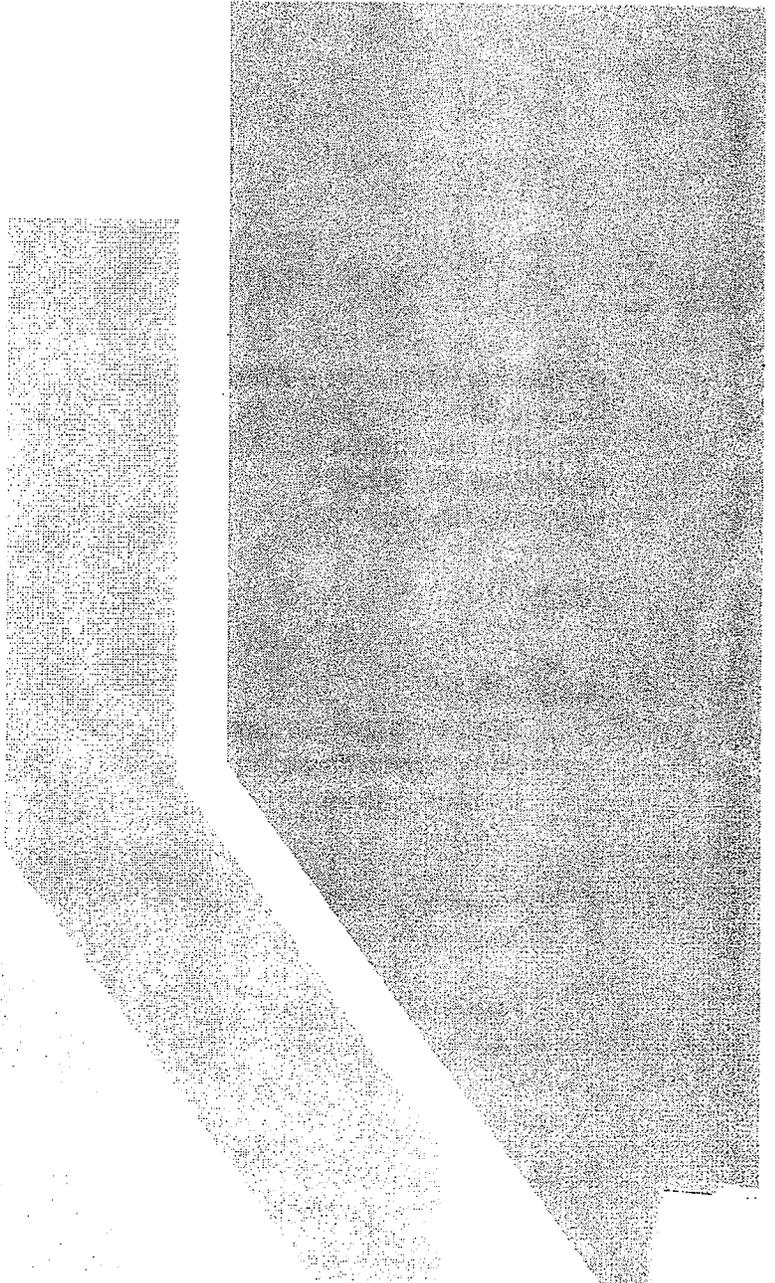
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Alberta Utilities Commission

FortisAlberta Inc.

2010-2011 Distribution Tariff – Phase I

July 6, 2010



ALBERTA UTILITIES COMMISSION

Decision 2010-309: FortisAlberta Inc.
2010-2011 Distribution Tariff – Phase I
Application No. 1605170
Proceeding ID. 212

July 6, 2010

Published by

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ALBERTA UTILITIES COMMISSION

Calgary Alberta

**FORTISALBERTA INC.
2010-2011 DISTRIBUTION TARIFF – PHASE I**

**Decision 2010-309
Application No. 1605170
Proceeding ID. 212**

1 OVERVIEW OF THE APPLICATION

1. FortisAlberta Inc's (FAI) 2008/2009 Phase I revenue requirement negotiated settlement agreement (NSA) was approved in Decision 2008-011¹ which established a forecast revenue requirement of \$256.2 million for 2008 and \$280.8 million for 2009. In the NSA, the Alberta Energy and Utilities Board (Board) noted that capital spending to connect customers and construct the distribution system had been the largest driver of rate increases in 2008 and 2009. The Board directed that, for its next test year(s) at a minimum, the 2010 application be fully litigated.
2. The Alberta Utilities Commission (AUC or Commission) received Application No. 1605170 (the Application), dated June 16, 2009 from FAI, which was entered as Proceeding ID. 212. The Application requested Commission approval of FAI's 2010-2011 Transmission and Distribution General Tariff Application (GTA) and an order or orders to establish a Transmission Facility Owner (TFO) Tariff and a Distribution Tariff. The following is the Commission's decision (Decision) with respect to the Application.
3. FAI, as a distribution wires owner, charges rates that recover both its total allowed costs of distribution (or distribution revenue requirement) and related transmission charges from the Alberta Electric System Operator (AESO).
4. The requested 2010-2011 distribution revenue requirements were updated as part of an undertaking (Updated Revenue Requirement Undertaking)² as follows:

¹ Decision 2008-011: FortisAlberta Inc. 2008/2009 Phase I Distribution Tariff and Negotiated Settlement Agreement (Application No. 1514140, Proceeding ID 1) (Released February 12, 2008).

² Exhibit 193.03 FAI Undertaking.

Table 1. Summary of FAI Distribution Revenue Requirement

	2009 Current Estimate ³ (CE)	2010 Forecast	2011 Forecast
	(\$ Million)		
Total return	94.5	112.0	125.9
Refund of carrying costs	(0.2)	-	-
Depreciation & amortization	98.7	112.0	154.3
Current income tax expense	-	0.0	-
Operating expense	128.7	139.7	140.6
Miscellaneous revenue	(32.4)	(34.5)	(35.6)
Distribution revenue requirement before deferrals	289.3	329.2	385.3
No cost capital settlement		7.0	
Deferral amounts	1.8		
Distribution revenue requirement after deferrals	291.0	336.2	385.3

5. FAI indicated in its Argument that corrections and updates resulted in a 2010 distribution revenue requirement forecast of \$327.2 million and a 2011 distribution revenue requirement forecast of \$380.1 million. The Commission's Generic Cost of Capital (GCOC) Decision 2009-216,⁴ which was released after the Application was filed, further updated FAI's forecast distribution revenue requirement to \$336.2 million for 2010 and to \$385.3 million for 2011.

6. In addition, FAI identified two additional matters that affected the updated distribution revenue requirements, stating that:

- Both the Application and Updated Revenue Requirement Undertaking are premised on acceptance by the Commission of FAI's proposal to defer from collection in 2010, to future years, an amount of \$29.2 million of incremental depreciation expense associated with new depreciation rates and the effects of IFRS.
- The final revenue requirements for 2010 and 2011 will differ from the information provided in the Updated Revenue Requirement Undertaking due to (i) the use of final closing balances for 2009 for all accounts at the time of the post-decision compliance filing in this proceeding, and (ii) reflection in that post-decision re-filing of any determinations and directions of the Commission in this decision.⁵

7. FAI, as part of an update to attachment AUC-FAI-026.01,⁶ proposed the following 19 separate deferral accounts or placeholders, please refer to Appendix 5 for definitions:

³ The 2009 current estimates (CE) were based on the latest estimate of the 2009 results at the time provided.

⁴ Decision 2009-216: 2009 Generic Cost of Capital (Application No. 1578571, Proceeding ID 85) (Released November 12, 2009).

⁵ FAI Argument, page 1, paragraph 5.

⁶ Exhibit 188.02.

Table 2. Summary of FAI Deferral Accounts

		Forecast Year End Balance (\$ millions)		
		2009	2010	2011
1	USA/MFR Implementation Costs	3.3	-	-
2	Meter Reading Costs	1.3	-	-
3	AMI Deferral Account	-	-	-
4	AESO Contribution Deferral	(2.3)	-	-
5	Commission Decisions, Statutory or Legislative Provisions or Changes (future)	-	-	-
6	Changes in Accounting Policy or Practice (future)	-	-	-
7	Changes due to CRA Re-assessment (future)	-	-	-
8	Hearing Cost Reserve	1.1	0.9	-
9	Self Insurance Reserve	1.3	-	-
10	AESO Load Settlement Cost Reserve	-	-	-
11	Return on Equity and Capital Structure	4.1	-	-
12	Pension Cash Costs	-	-	-
13	UUWA Contract Negotiation	-	-	-
14	Insurance Proceeds Related to PP&E	-	-	-
15	Gains or Losses on Disposal	-	-	-
16	Capitalized Overhead	-	11.5	23.8
17	IFRS Transitional Exemptions	-	-	-
18	Depreciation Expense	-	28.6	27.3
19	SIR Related to PP&E	-	-	-
20	Total	8.8	41	51.1

8. Parties who registered as interveners for this proceeding are listed in Appendix 1 to this Decision. Parties who participated in the oral hearing are listed in Appendix 2 to this Decision. A summary of the rulings and procedural requests that preceded the hearing is provided in Appendix 3 to this Decision.

9. Notice of the Application was published in the four major Alberta newspapers (the Edmonton Journal, the Edmonton Sun, the Calgary Herald, and the Calgary Sun) on Monday, July 3, 2009 and was distributed by e-mail on July 3, 2009 to the parties on the Commission's interested party distribution list. In addition, the notice was posted on the Commission's website on July 3, 2009. In the Notice of Application, the Commission set out a process to deal with the Application, which with subsequent amendments followed the schedule below:

Summary of Process and Schedule	
Process Step	Deadline
Statements of Intent to Participate	July 28, 2009
Information Requests to Applicant Round 1	August 28, 2009
Information Responses from Applicant Round 1	September 18, 2009
Information Requests to Applicant Round 2	September 18, 2009
Information Responses from Applicant Round 2	October 9, 2009
Intervener Evidence Round 1	October 9, 2009
Information Requests to Interveners	October 23, 2009
Information Responses from Interveners	November 6, 2009
Intervener Evidence Round 2	October 30, 2009
Information Requests to Interveners	November 13, 2009
Information Responses from Interveners	November 20, 2009
Rebuttal Evidence	November 20, 2009
Hearing – AUC Calgary Office	November 30, 2009

10. A public hearing was convened in Calgary, on November 30, 2009, before Commission members Ms. C. Dahl Rees (Vice-Chair), Mr. M. Kolesar (Commissioner), and Mr. M. A. Yahya (Commissioner). The oral evidentiary part of the process was completed on December 4, 2009. The Commission set dates of January 8, 2010 and January 22, 2010 respectively for Argument and Reply Argument. Supplementary information requests (IRs) were issued by the Commission on March 4, 2010 with information responses due from the FAI on March 19, 2010. As well, the Commission established a supplementary process to allow for Amended Argument and Amended Reply Argument based on the responses to the supplementary IRs. Amended Argument was due on April 1, 2010 and Amended Reply Argument was due on April 9, 2010. Accordingly, for the purposes of this Decision, the Commission considers the record to have closed on April 9, 2010.

11. In reaching the determinations set out within this Decision, the Commission has considered all relevant materials comprising the record of this proceeding, including the evidence and Argument provided by each party. Accordingly, references in this Decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

12. In the Application, FAI requested that, in respect of the rates to be effective January 1, 2011, these rates may be discontinued upon FAI filing an application for a performance or formula based tariff and the AUC approving such an application.⁷

13. The Commission issued a letter to stakeholders, including FAI, on February 26, 2010 regarding its initiative to reform utility rate regulation in Alberta (Rate Regulation Initiative). Subsequently, the Commission held a roundtable discussion on March 25, 2010 to assist the Commission in determining scheduling and the scope of issues for the initial stages of this initiative. Subsequently, on April 9, 2010 the Commission issued a further letter that stated in

⁷ Exhibit 12, Application, page 1-12.

part that the Commission's target date for the implementation of performance based rates will be July 1, 2012 based on 2011 going-in rates.⁸

14. The Commission expects that FAI will pursue its performance based rates agenda within the scope of the Rate Regulated Initiative and the Commission will not make any further determination with respect to this request in this proceeding.

2 CHANGES TO REFLECT 2009 ACTUAL ENDING BALANCES

15. FAI submitted in its Rebuttal Evidence that significant changes occurred in its 2009 capital expenditures and proposed to use its 2009 year-end actual balances. During the oral hearing, FAI testified that it will update both 2009 year-end actual plant balances and accounts which rely on the 2009 year-end forecast data.⁹

16. The Consumers' Coalition of Alberta (CCA) argued that, in the interest of achieving clarity on the nature and extent of the compliance filing, FAI should include actual year-end 2009 data in place of all 2009 forecast year-end data used to compute the 2010 revenue requirement, rather than a selective update affecting, for example, only capital additions and related income tax balances.¹⁰

17. FAI responded in its Argument that its compliance filing will reflect the 2009 year-end closing balances in all accounts that have a bearing on 2010 opening balances.¹¹

2.1 Commission Findings

18. FAI's proposal to reflect the 2009 year-end closing balances in all accounts that have a bearing on 2010 opening balances as part of its compliance filing is consistent with the Commission's usual practice. The Commission finds that the CCA's recommendation is consistent with the approach that FAI has proposed and directs FAI in its compliance filing to update its 2010 opening balances to reflect all 2009 actual closing balances.

3 MAXIMUM INVESTMENT LEVELS

19. Maximum Investment Level (MIL) forms part of the utility's investment policy and, from the utility's perspective, is the maximum amount that the company is willing to invest towards the cost of extending service to new customers, and is applied at the individual end-use customer's Point of Service.¹² MILs may be different for each customer class.

20. As part of its Application, FAI provided a MIL study.¹³ FAI led a consultation with other utilities and stakeholders to develop a common approach to MILs and, as a result of this consultation, the following guiding principles were developed:

⁸ Further information can be found In Proceeding ID. 566.

⁹ Transcript Volume 3, page 508, 509 lines 22 to 3.

¹⁰ CCA Argument, page 8, paragraph 10.

¹¹ FAI Argument, page 1, paragraph 5.

¹² Exhibit 1, Section 9, Appendix O, page 12.

¹³ Exhibit 1, Section 9, Appendix O.

response to the UCA information request (UCA-FAI-69),²⁶² FAI explained that with the recent changes in accounting under IFRS and the July 2009 International Accounting Standards Board Exposure Draft, it may no longer require all three FTEs in 2010 and 2011. This is based on the assumption that the exposure draft will be issued in the final form much like it is at present and if some of the potential limitations are overcome then it is reasonable to assume that one of the requested FTE's in both 2010 and 2011 will no longer be required.

392. The CCA submitted that FAI should be directed to remove one of the three FTEs forecast for IFRS work to reflect the changes in IFRS accounting under the July 2009 IASB Exposure Draft.²⁶³

393. FAI argued that the CCA has chosen to ignore the most up-to-date evidence on this topic.²⁶⁴ FAI indicated there was a significant amount of opposition to the July 2009 IASB Exposure Draft and it was not certain that the standard would even survive or if it did, it may undergo significant amendments to address the concerns raised. As such, three FTEs should be properly included as prudent costs in the revenue requirement.²⁶⁵

15.7.1 Commission Findings

394. FAI initially forecasted that three FTEs would not be required; however it argued that, with opposition to the July 29 IASB Exposure Draft, the three FTEs would again be required. The Commission finds that, with the opposition to the July 29 IASB Exposure draft and given that it may undergo further revisions, FAI may require three additional FTEs. The Commission therefore rejects the CCA's proposal to remove one of the three FTEs and directs FAI to include the three FTEs originally forecast for IFRS work in its compliance filing.

16 ACQUISITION OF RURAL ELECTRIFICATION ASSOCIATIONS

395. FAI has acquired four Rural Electrification Associations (REAs) since January 1, 2008. In response to an Information Request from the UCA,²⁶⁶ FAI provided the following purchase price information:

- a. Provost REA – \$2.640 million + GST
- b. Ryley REA – \$2.125 million + GST
- c. South Hayter REA – \$1.365 million + GST
- d. Hayter North East REA – \$0.172 million

The total purchase price for the four REAs was \$6.302 million + GST and was used for the purpose of incorporating the assets into FAI's rate base.

²⁶² Exhibit 76.02, UCA-FAI-69 (b), page 4 of 5.

²⁶³ CCA Argument, page 77.

²⁶⁴ Transcript Volume 3, page 416, line 20.

²⁶⁵ FAI Reply Argument, page 25.

²⁶⁶ Exhibit 76.02, UCA-FAI-015.

396. As part of its response to the UCA, FAI indicated that it applied the replacement cost new minus depreciation (RCN-D) valuation methodology but that it grossed up the value by 20 percent in order to recognize the value of rights-of-way.²⁶⁷

RCN-D

397. The UCA requested that the Commission clearly direct that any future REAs purchased for inclusion in FAI's Rate Base be based on net book value only.²⁶⁸ The UCA submitted that REA customers have already paid for the accumulated depreciation in rates and that to include a value in excess of net book value would result in customers paying costs twice. The UCA further submitted that in previous Board decisions, any premiums paid on the acquisition of utility assets were not included in customers' rates and should not be allowed.²⁶⁹

398. FAI responded in its rebuttal evidence that there is no premium paid on an acquisition of assets from an REA. FAI explained that pricing based on RCN-D is fair pricing for asset purchases, and is used for small purchases and sales between FAI and REAs, and for larger asset purchases that arise when an REA looks to cease operations. FAI submitted that the UCA has relied on an inapt comparator – the transfer of the fully regulated business from one Commission-regulated utility to another and that, since there was such no business combination here, neither business combination accounting nor related regulatory considerations are applicable.²⁷⁰ FAI submitted that contracts between FAI and REAs prescribe the use of RCN-D as the basis for sale and purchase transactions in respect of individual or smaller subsets of assets being transferred. The use of RCN-D as a methodology to price an asset transfer to serve all former members of an REA is consistent with these similar applications. Further, when customers are being transferred under section 29 of the *Hydro and Electric Energy Act* from one utility to another following an annexation and related alteration in a service area, the prescribed valuation for that transfer of the associated facilities is RCN-D.²⁷¹

Valuation of Rights-of-Way

399. The UCA raised concerns over the valuation of rights-of-way, specifically when compared to the existing rights-of-way costs in FAI's service territory. In its Evidence, the UCA submitted that there is no independent verification that the value of the surface rights is in fact \$1,050,416.67. The UCA further submitted that the value of rights-of-way should be reduced to reflect the historic relationship between rights-of-way and distribution assets. The UCA submitted that, based on the historic relationship between rights-of-way and utility assets, FAI should have paid only \$22,583.96 and not \$1,050,416.67, therefore a reduction of \$997,832.71 results.²⁷²

400. FAI submitted that the treatment of land rights is reasonable within the RCN-D approach and is fair to REA members and to FAI customers. The inclusion of 20 percent of RCN-D to value and pay for the land rights that come with the physical assets represents the rights-of-way and original brushing costs associated with each REA asset purchase, and merely separates this amount from the tangible asset valuation. As well, the use of 20 percent is consistent with the

²⁶⁷ Exhibit 76.02, UCA-FAI-015 (c).

²⁶⁸ Exhibit 106.01, UCA Evidence, page 23.

²⁶⁹ UCA Argument, page 45.

²⁷⁰ FAI Reply Argument, paragraph 243.

²⁷¹ FAI Argument, paragraph 160.

²⁷² UCA Argument, pages 47-48.

application of easement rights and costs for all FAI's customers and is consistent with cases where FAI's assets are sold to a municipality.²⁷³

401. FAI noted in Argument in response to the UCA's observation of FAI's ratio of the value of rights-of-way to the value of its total distribution plant of 0.43 percent, that this percentage should not be applied to estimate the value of surface rights for REAs since FAI's power lines are on road allowances (where rights-of-way are not payable) which is unlike the case for REAs.²⁷⁴

Financial Statements

402. The UCA submitted in its evidence that FAI should be required to produce financial statements (audited or otherwise) for each of the acquired REAs. As well, the UCA requested that the Commission direct FAI to produce financial statements to support future REA purchases.

403. FAI responded to the UCA by explaining that it did not provide financial statements because the financial statements of the REAs were provided to FAI on a confidential basis. Further, the financial statements of the REAs could not be used to value the assets since these financial statements omit the value of a material portion of the assets given the member contribution policies in place.²⁷⁵

16.1 Commission Findings

RCN-D

404. The Commission reviewed prior decisions of the Board which used book value for the purchase of assets.²⁷⁶ In these decisions, the purchases were between entities whose distribution tariffs were approved by the Board. However, pursuant to the *Electric Utilities Act*, an REA's distribution tariff is approved by the board of directors of the REA. As there are different approving parties, the Commission does not consider the prior decisions to be of assistance in the circumstances of this proceeding.

405. The Commission finds the *Hydro Electric and Energy Act* to be instructive on this issue. In particular, sections 29 and 32 of the *Hydro Electric and Energy Act* address the compensation to be paid between the parties when the service area of an electric distribution system is altered.

²⁷³ Exhibit 143.01, FAI Rebuttal Evidence, pages 28-30.

²⁷⁴ FAI Argument, paragraph 167.

²⁷⁵ FAI Reply Argument, paragraph 241.

²⁷⁶ Decision 2007-071: ATCO Electric Ltd. 2007-2008 General Tariff Application – Phase I (Application No. 1485740) (Released: September 22, 2007); Decision 2002-038: TransAlta Utilities Corporation, TransAlta Energy Corporation, and AltaLink Management Ltd., Sale of TransAlta Transmission Assets and Business to AltaLink (Application No. 1252519 and 1242725) (Released: March 28, 2002); Decision 2004-035: Aquila Networks Canada Ltd (ANCL) and Aquila Networks Canada (Alberta) Ltd. (ANCA), ANCL's Sale of all of the Outstanding Shares of ANCA to Fortis Alberta Holdings Inc. (Fortis Alberta), and Fortis Alberta and ANCA, Financing the Acquisition of the ANCA Shares (Application No. 1317233 and 1318425) (Released: April 29, 2004); Decision 2003-098: ATCO Electric Ltd., ATCO Gas North and ATCO Gas South, Both Operating Divisions of ATCO Gas and Pipelines Ltd., Transfer of Certain Retail Assets to Direct Energy Marketing Limited and Proposed Arrangements with Direct Energy Regulated Services to Perform Certain Regulated Retail Functions (Application No. 1299855) (Issued December 4, 2003).

406. The provisions state:

Boundaries

29(1) The Commission, on the application of an interested person or on its own motion,

- (a) when in its opinion it is in the public interest to do so, and
- (b) on any notice and proceedings that the Commission considers suitable, may alter the boundaries of the service area of an electric distribution system, or may order that the electric distribution system shall cease to operate in a service area or part of it at a time fixed in the order.

(2) When a local authority owns and operates an electric distribution system within its municipality, the Commission shall not reduce its service area without its consent.

(3) When a local authority that owns and operates an electric distribution system applies for an enlargement of its service area to include additional land in its municipality, the Commission shall

- (a) in respect of land not included in the service area of another electric distribution system, grant the application, or
- (b) in respect of land included in the service area of another electric distribution system, grant the application unless after a public hearing the Commission finds compelling reasons in the public interest not to do so, in which case the Commission with the approval of the Lieutenant Governor in Council may deny the application in whole or in part, and when the Commission grants an application to which clause (b) applies, it shall stipulate any terms and conditions it considers reasonable including a stipulation of the date on which the alteration of the service areas comes into force.

(4) When an order made under subsection (1) or (3) reduces the service area of an electric distribution system, the Commission, if it considers such a provision suitable, may make provision in the order for

- (a) payment of compensation to the owner of the electric distribution system whose service area is reduced,
- (b) the circumstances and conditions under which, and the time at which, that owner is entitled to receive compensation,
- (c) the matters in respect of which any compensation is payable, which matters may include
 - (i) any facilities transferred, based on reproduction cost new, less depreciation,
 - (ii) severance damages based on

- (A) any period of time the Commission considers reasonable, not exceeding the period that would be remaining had the owner been a party to an agreement under section 45 of the *Municipal Government Act*, and
 - (B) the actual load at the time the service area is reduced, and
 - (iii) the economic effect on the overall operation of the owner of the electric distribution system,
 - (d) the persons by whom the compensation is payable and the apportionment of liability among those persons, and
 - (e) compensation for any obligations or commitments arising from financial arrangements to manage financial risk associated with the pool price or from other arrangements made by the electric distribution system, and provide that if agreement on the amount of any compensation provided for cannot be reached between the parties, the amount is to be determined by the Alberta Utilities Commission on the application of either party.
- (5) When the Commission makes an order to which subsection (4) applies, it may defer the addition to the order of the provisions referred to in subsection (4) in a suitable case to give the parties the opportunity of making an agreement as to compensation to be paid.
- (6) The amount of compensation payable by any person under an order under this section is a debt and is recoverable by the person entitled to receive the compensation under the order by action.

32(1) If a rural electrification association

- (a) under an order made under section 29,
 - (i) has the size of its service area reduced, or
 - (ii) ceases to operate in a service area or part of it,or
- (b) on being authorized under section 30 to do so, discontinues the operation of its electric distribution system,

the Commission may, when in the Commission's opinion it is in the public interest to do so and on any notice and proceedings that the Commission considers suitable, by order transfer to another person the service area or part of it served by the rural electrification association.

(2) When the Commission makes an order under subsection (1), it may

- (a) for the purpose of ensuring the continued distribution of electric energy in the service area or part of it that was served by the rural electrification association, provide for

- (i) the transfer of any facilities associated with the electric distribution system from the rural electrification association to another party, and
 - (ii) the operation of the electric distribution system or part of it by any party that the Commission directs,
- and
- (b) provide for any or all of the following:
 - (i) the payment of compensation, if any, and the matters in respect of which compensation is payable;
 - (ii) the persons by whom compensation is payable and the apportionment of liability for the compensation among those persons;
 - (iii) the determination by the Alberta Utilities Commission of the amount of compensation if that amount cannot be agreed on between the parties;
 - (iv) any other matters that may be necessary with respect to the transfer of the service area or part of it or with respect to the transfer of any facility associated with the electric distribution system from the rural electrification association to another person.

(3) In this section, “rural electrification association” means an association as defined in the Rural Utilities Act and that has as its principal object the supplying of electric energy in a rural area to the members of that association.

407. Under section 32 of the *Hydro and Electric Energy Act*, the Commission may provide for the payment of compensation if an amount cannot be agreed on between the parties, should an order be made under section 29 of the *Hydro and Electric Energy Act* with respect to an REA. Section 32 of the *Hydro and Electric Energy Act* does not dictate a particular manner for determining compensation, such as book value or RCN-D. However, the Commission is mindful of the principle of statutory interpretation that an Act must be read as a whole. Specifically, when analyzing the scheme of an Act, the Commission must consider how the provisions or parts of an Act work together to give effect to a plausible and coherent plan.²⁷⁷ In that regard, the Commission notes that section 29 of the *Hydro and Electric Energy Act* contemplates the use of RCN-D. Given the reference to section 29 in section 32 of the *Hydro and Electric Energy Act* and in consideration of the Act as a whole, the Commission finds that, for the purposes of this Application, the use of RCN-D is an acceptable valuation for the purchase of an REA by a Commission-regulated utility.

408. In approving this methodology, the Commission has considered the UCA’s position that allowing the REA assets to be placed in FAI’s rate base at RCN-D would amount to a higher than net book value, thereby requiring customers to pay for these assets twice. However, FAI provided evidence that the proceeds of such a sale would be distributed to the members of the disbanded REAs. As such, the Commission finds that the payment to the REA’s customers will address the UCA’s concern regarding double payment.

²⁷⁷ R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008), page 364.

Valuation of Rights-of-Way

409. The amount added to the purchase price in recognition of the value of the rights-of-way acquired and original brushing costs was negotiated between FAI and the REAs. The Commission accepts this valuation approach as reasonable because it is consistent with the application of easement rights and related costs for all FAI customers.

Financial Statements

410. The UCA's request for a direction from the Commission to require FAI to produce the financial statements of all future REAs when their assets are acquired by FAI is denied. The value of providing these records is not apparent because, as stated by FAI, the full book value of REA assets would not appear in REA financial statements as these financial statements omit contributed assets. Further, the financial statements are provided to FAI on a confidential basis and, as no party addressed the confidentiality requirements in AUC Rule 001: *Rules of Practice*, the Commission is not prepared, in this proceeding, to issue a blanket direction for disclosure without reviewing the documents in the context of a confidential process.

17 CUSTOMER DRIVEN EXPENDITURE

411. In its letter accompanying the Rebuttal Evidence,²⁷⁸ FAI indicated that customer-driven capital expenditures²⁷⁹ have increased from \$27 million in its August forecast to \$40.3 million. FAI explained that it forecasted customer numbers and derived estimates of customer-related capital costs based on a method developed in consultation with interested parties. FAI noted that no intervenor evidence took issue with the methods or the results and explained that the 2009 delta is small with only an anticipated 3,400 additional customers on a forecasted base of more than 476,000.²⁸⁰

412. The CCA submitted, in its Argument, that it had concerns with FAI's forecasting methods. The CCA noted that the forecast unit costs are based on the number of lots serviced whereas the actual unit costs are based on the number of energized customers. This appears to result in variances between forecast and actual unit costs from year to year.²⁸¹ The CCA submitted that FAI should be directed to change its capital expenditure program to include lots that are serviced but not energized in its next GTA. The CCA in addition explained that the variances were not a result of a volatile economy and cost variability but flawed forecasting methods and recommended that FAI provide major reasons for historical variances such as the percentage of lots not energized, the mix of underground versus overhead development and finer refinement of non-residential classes by customer size or other characteristics.

²⁷⁸ Exhibit 143.02.

²⁷⁹ Customer Driven Capital Expenditures: These projects involve the installation of overhead and underground distribution facilities to connect new customers to FAI's distribution system. Projects also include upgrades to the capacity of existing facilities to accommodate customers who increase their electrical load.

²⁸⁰ FAI Argument, page 6, paragraphs 35-38.

²⁸¹ CCA Argument, page 80, paragraph 226.

TAB 21



IN THE MATTER OF

FORTISBC INC.

**2005 REVENUE REQUIREMENTS APPLICATION
2005-2024 SYSTEM DEVELOPMENT PLAN
2005 RESOURCE PLAN**

DECISION

MAY 31, 2005

Before:

**L.F. Kelsey, Commissioner and Panel Chair
P.G. Bradley, Commissioner**

As part of the Capital Plan FortisBC proposed that the following four criteria be used to determine if a project should be subject to a CPCN application:

1. the total project cost is \$20 million or greater; or
2. the project is likely to generate significant public concerns; or
3. FortisBC believes for any reason that a CPCN application should proceed; or
4. after presentation of a Capital Plan to FortisBC stakeholders, a credible majority of those stakeholders express a desire for a CPCN application.

FortisBC argued that these criteria were consistent with Commission Order No. G-96-04 and directives regarding the British Columbia Transmission Corporation ("BCTC") (Exhibit B-1, Tab 9, p. 6).

FortisBC notes that the Big White Supply Project will be the subject of a Certificate of Public Convenience and Necessity ("CPCN") Application in 2005.

The 2005 Capital plan for Transmission, Stations, Distribution and Telecommunications is based primarily on the System Development Plan, while the 2005 Capital Plan for Generation is based on the Upgrade and Life Extension program as well as other capital sustaining requirements (Exhibit B-1, Tab 9, p. 5).

3.3.2 New Projects

Generation

By a December 8, 2004 letter, FortisBC advised the Commission that in keeping with its proposed CPCN criteria it did not intend to file a CPCN for the Lower Bonnington Upgrade and Life Extension Project. However on May 19, 2005 FortisBC submitted a CPCN application for this project. This project was originally delayed pending the outcome of an agreement with BC Hydro to clarify the entitlement benefits for an upgraded turbine. The subsequent agreement improved the actual benefits of the upgrade.

Transmission and Stations

Although there are numerous small sustaining capital projects, the main projects driving new capital are the Big White Supply project at a total cost of \$24.5 million with \$3.0 million in 2005; the Ellison Distribution source at a total cost of \$8.25 million with \$0.25 million in 2005; the Black Mountain distribution source at a total cost of \$7.25 million and \$0.25 million in 2005; and the new East Osoyoos source at \$5.75 million with \$0.25 million in 2005; and the Kettle Valley distribution source at a total cost of \$7.65 million with \$0.15 million in 2005.

TAB 22

Grand Trunk Railway Co. v. County of Halton, 21 SCR 716

Date: 1893-02-20
Parallel citations: 1893 CanLII 3 (SCC)
URL: <http://canlii.ca/t/1tt8c>
Citation: Grand Trunk Railway Co. v. County of Halton, 1893 CanLII 3 (SCC), 21 SCR 716, <<http://canlii.ca/t/1tt8c>> retrieved on 2013-02-15
Print: PDF Format
Noteup: Search for decisions citing this decision

Supreme Court of Canada
Grand Trunk Railway Co. v. County of Halton, 21 S.C.R. 716
Date: 1893-02-20

Grand Trunk Railway Co.

and

County of Halton

1892: November 8, 9; 1893: February 20.

Present: Strong C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

Railway Co.—Bonus—Bond—Condition—Breach.

APPEAL from a decision of the Court of Appeal for Ontario^[1]affirming the judgment of the Divisional Court in favour of the plaintiffs.

The action was brought by the County of Halton to recover a bonus paid to the Hamilton and North-Western Railway Co. in aid of their road, the company having executed a bond in favour of the county one of the conditions of which was that the bonus should be repaid "in the event of the company, during the period of twenty-one years, ceasing to be an independent company." Four years after the company became merged in the Grand Trunk system, and on the trial it was held that it had ceased thereby to be an independent line. Judgment was accordingly given in favour of the county which was affirmed by the Divisional Court and the Court of Appeal.

The Supreme Court affirmed this decision for the reasons given in the Court of Appeal, and held that the county was entitled to recover the whole amount of the bonus as unliquidated damages under the bond.

S.H. Blake Q.C. and W. Cassels Q.C. for the appellants.

Robinson Q.C. and Bain Q.C. for the respondents.

[1] 19 Ont. App. R. 252.

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by **LEXUM**  for the  Federation of Law Societies of Canada

TAB 23



Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission), 1992 CanLII 5959 (BC CA)

Date: 1992-03-26
Docket: CA013604
Parallel citations: 66 BCLR (2d) 1
URL: <http://canlii.ca/t/231nn>
Citation: Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission), 1992 CanLII 5959 (BC CA), <<http://canlii.ca/t/231nn>> retrieved on 2013-02-18
Print: PDF Format
Noteup: Search for decisions citing this decision
Reflex Record: Related decisions, legislation cited and decisions cited

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.

GROUND OF APPEAL

[27] As set out in the appellant's factum the grounds of appeal are:

that the Commission erred in pronouncing Order No. G-11-91, which reaffirmed Commission Order No. G-77-90 when Order No. G-77-90 contained an error in law ... in that the Order:

(a) failed to permit HVES the opportunity to recover a portion of its rate base costs over three years notwithstanding that the Commission had determined that that portion of its rate base costs was necessary for the establishment of rates which were just and reasonable under the *Utilities Commission Act*, S.B.C. 1980, c. 60 (the "Act");

(b) required a refund of monies which the Commission had determined were necessary to permit HVES an opportunity to receive a just and reasonable rate under the Act.

REASONS FOR THE DECISIONS OF THE COMMISSION

1. *Original Decision*

[28] In the original decision of October 17, 1990, under the heading "Determination of Rate Base," the commission, after reviewing the 1983 decision, went on to say:

This division of the commission considers that the 1983 decision was a practical decision to tide the enterprise at Hemlock Valley over a particularly difficult period. Sooner or later, however, longer-term prospects must be faced squarely. The tie-line has been amortized over five years. Evidence (Exs. 14 through 21) clearly indicates that recovery of plant expenditures was anticipated through utility rates. *Therefore the commission believes that a return to more traditional rate-making practice is justified.*

It was proposed to the commission by the intervenors at the hearing that rate base should not be recognized. The cornerstone of rate base is appraised value of utility property, which is usually taken to be original cost of plant. The commission cannot, by a stroke of the pen, eliminate the appraised value of the property; to do so would be confiscation of property ...

And concluded:

The commission has considered alternative calculations for rate base and concludes that no material difference results from any refinements which might be made. Therefore, the commission accepts the company's evidence, and finds the rate base to be \$366,511 for the test period.

[29] The commission then continued:

4.2 Capital Structure

The company currently has no viable capital structure of its own. Its financing has been by way of loans from the parent company. The applicant proposes a deemed 50/50 per cent debt/equity ratio in this application. It is a frequent practice of regulatory tribunals to use a notional capital structure. While 50 per cent equity is much higher than would be usual for utilities in general, the higher proportion of equity in this case can be considered as reasonable, bearing in mind the relative risks in the case of the company.

4.3 Return on Rate Base

The company has proposed a return of 13 per cent on the debt component, and 15 per cent on the equity component of the rate base. Standing alone, these figures certainly fall within a reasonable range in today's market. Nevertheless, the commission considers it essential to consider the particular circumstances of the company in this decision. While it is true that risky investments typically command higher returns, that position considers primarily the potential investors' point of view in placing funds at the utility's disposal. From the existing shareholders' point of view, the realization of an allowable rate of return depends upon the ability of management to run an efficient organization, and for external factors to favourably affect the prosperity of the company. Bearing in mind the interrelationship of the resort and utility elements at Hemlock, and the current circumstances of the utility, the commission cannot accept a return on equity for rate-making purposes of 15 per cent. *For the foregoing reasons, the commission believes that a 13 per cent return on debt and a 13 per cent return on equity are both just and reasonable within the spirit of s. 65(3) and (4) of the Act, which states:*

"(3) It is a question of fact, of which the commission is the sole judge, whether a rate is unjust or unreasonable, or whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate of service, or whether a service is offered or furnished under substantially similar circumstances and conditions.

"(4) In this section a rate is 'unjust' or 'unreasonable' if the rate is

"(a) more than a fair and reasonable charge for service of the nature and quality furnished by the utility,

"(b) insufficient to yield a fair and reasonable compensation for the service rendered by the utility, or a fair and reasonable return on the appraised value of its property, or

"(c) unjust and unreasonable for any other reason."

[30] Under the heading "Cost of Service" the commission, over several pages, reviewed in detail various components of the cost of service which HVES estimated it would incur and for which it sought a rate sufficient to enable it to recover, and considered the objections to and criticisms of those cost components raised by the

intervenor 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 CanLII 44 (SCC), [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

Interpretation.

2.(1) In this Act ...

"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

NEW ACT

Discrimination in rates

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.

(2) A public utility shall not, as to rate or service, subject any person or locality, or a particular description

rendered, or arising in any other manner:

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.

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.

(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. I have already expressed my view regarding the priority as between those things specifically mentioned in clause (b) and the other matters or things referred to in clauses (a) and (b). This leaves the question as to possible conflict as between the two matters specifically mentioned in clause (b).

Clearly, as between these two matters there is no priority directed by the Act, but there is a duty imposed upon the Commission to have due regard to both of them. The rate to be imposed shall be neither excessive for the service nor insufficient to provide a fair return on the rate base. There must be a balancing of interests. In my view, however, if a public utility is providing an adequate and efficient service (as it is required to do by s. 5 of the Act), without incurring unnecessary, unreasonable or excessive costs in so doing, I cannot see how a schedule of rates, which, overall, yields less revenue than would be required to provide that rate of return on its rate base which the Commission has determined to be fair and reasonable, can be considered, overall, as being excessive. It may be that within the schedule certain rates may operate unfairly, relatively, as between different classes of service or different classes of consumers. If so, the Commission has the duty to prevent such discrimination. But this can be accomplished by adjustments of the relative impact of the various rates in the schedule without having to reduce the total revenues which the whole schedule of rates is designed to produce.

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-1 1-91 must fall with it.

[58] With respect to Mr. Foy's able and forceful submissions they are, in my view, flawed, and for these reasons.

[59] Firstly, in directing the three-year phase-in, the commission was not balancing interests or, if it was purporting to do, it acted improperly. The proper balancing of interests which the commission carried out was done and completed when it settled the rate base, fixed the rate of return and determined the costs of operation allowable for rate-making purposes. It must be remembered that the rate base itself was the subject of much contention at the public hearing and that only after the commission had considered alternative calculations for rate base did it decide to accept HVES' evidence in this regard. It must be remembered as well that HVES had proposed a rate of return of 13 per cent on the debt component and 15 per cent on the equity component of the rate base. The commission denied HVES' request and fixed 13 per cent as the just and reasonable rate of return on both components. In addition, as can be seen from sheet 5 of the Appendix to these reasons, the commission made substantial downward adjustments to many of HVES' estimates of its costs of operation.

[60] This is the balancing of interests which the commission carried out in performing its function. HVES has accepted the commission's decision in these respects. None are the subject of this appeal. Once this balancing of interests had been performed, it was the commission's duty to have due regard to the factors referred to in s. 65(4).

[61] Secondly, I cannot accept Mr. Foy's contention that the three-year phase-in was the result of the commission's expressed concern over the quality of service. The analysis I have made of the original decision and of the reconsideration decision in my view refutes this contention. Alternatively, if in fact the commission decreed the three-year phase-in for this suggested reason it was wrong in law in doing so for it gave an unwarranted priority to one or another of the matters set out in s. 65(4) at the sacrifice of s. 65(4)(b).

[62] Thirdly, Mr. Foy submitted that "rate shock" is a recognized phenomenon which has attracted a number of rate moderation plans, including rate base phase-ins, in the utility regulation field, and he referred to the following authorities: Bonbright, Danielsen and Kamerschen, *Principles of Public Utility Rates* (1988), pp. 260-64; D. Scotto, "Post-Operational Phase-in of Utility Plant: Prolonging the Inevitable" (1983), 112 *Public Utilities Fortnightly*, September 1, pp. 28-34; I.M. Massella, "Rate Moderation Plans – Cushioning 'Rate Shock' " (1984), 113 *Public Utilities Fortnightly*, February 16, pp. 52-56; *Re California-Pacific Utilities Co.*, 52 P.U.R. 3d 446 (1964); and *Re Pacific Telephone & Telegraph Co.*, 65 P.U.R. 3d 517 (1966).

[63] The underlying principle of this theory of gradualism in the implementation of new rate schedules is perhaps best explained in the article by Scotto, "Post-Operational Phase-in of Utility Plant: Prolonging the Inevitable." There the author wrote at p. 28:

In 1982 two new terms were added to the electric utility industry's lexicon: "rate shock" and "phase-in." Rate shock refers to a sudden and "substantial" increase in electric rates. The concept can be illusive because the demarcation between "substantial" and "nonsubstantial" rate increases is usually a function of local political and economic sensitivities rather than a definitive, universal percentage increase. However, a 50 per cent jolt in rates would generally be considered substantial – well beyond the tolerance levels of most state commissions and ratepayers. Increases in the 20 per cent to 30 per cent vicinity, though, are more ambiguous. Rate shock is really a manifestation of the dollar disparity between rate base and new generating

plant investment – the construction work in progress (CWIP) account. For a number of utilities the CWIP to net plant ratio can exceed 100 per cent, necessitating a high revenue increase – a rate shock – to reflect the plan in rate base upon commercial operation. As an alternative to the conventional one-shot hike in rates, new rate-making techniques have been proposed which are designed to spread the revenue impact of new plan investment into the postoperative years – hence, the term “phase-in”.

Post-operational phase-in can be accomplished in a variety of ways, most of which rely on accounting adjustments to protect the integrity of reported earnings. *The basic thesis in each case is the same: Capital recovery is spread over the asset's useful life with no economic loss (at least in theory) to the utility, (emphasis added)*

[64] It can be seen that the purpose of “phase-in” is two-fold: to ameliorate the shock of suddenly imposed significant rate increases and, at the same time, to protect the integrity of the utility's earnings. As the title to Mr. Scotto's article itself indicates, it is merely “prolonging the inevitable.”

[65] The two regulatory decisions, *Re California-Pacific Utilities Co.*, decided in 1964, and *Re Pacific Telephone & Telegraph Co.*, decided in 1966, appear to be out of step with the main stream of American regulatory jurisprudence for, like the decision of the commission under consideration here, they did not provide for any catch up so that the utility could, over time, realize its authorized rate of return. I cannot regard them as binding or even persuasive.

[66] The power of the commission to phase in rates was perhaps presaged by Martland J. in the penultimate paragraph in his judgment in the *British Columbia Electric* case, where he said at p. 857:

... the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, *until a rate schedule is devised which meets the requirements of clause (b) of s. 16(1).* (emphasis added)

[67] What the commission did here fails to meet the requirements of the legislation.

DISPOSITION

[68] In Pt. 4 of its factum, under the heading “Nature of Order Sought,” the appellant seeks an order that:

- (a) the decision of the British Columbia Utilities Commission, dated January 30, 1991 be quashed;
- (b) that portion of the decision of the British Columbia Utilities Commission, dated October 17, 1990 requiring rates to be phased in and directing a refund be quashed;
- (c) the British Columbia Utilities Commission be directed to order HVES to file new tariff schedules permitting it to recover 13% on rate base from July 1, 1990;
- (d) monies held by Lawson, Lundell, Lawson & McIntosh pursuant to the order of Mr. Justice Toy of March 7, 1990 be paid to HVES;
- (e) costs; and
- (f) such further relief as to this Honourable Court may seem just.

[69] I think the proper course for this court to adopt is to allow this appeal and to refer the matter back to the commission with the direction that it permit, or require, HVES to file new tariff schedules which will enable it to earn 13 per cent on its determined rate base from July 1, 1990.

[70] If the commission considers it necessary or appropriate to ameliorate rate shock by directing the phasing in of such revised rates, it shall do so in a way which meets the requirements of s. 65(4) as set out in these reasons.

[71] It will be for the commission to make an order for the appropriate disposition of the funds referred to in para. (d) above.

[72] Section 118 of the Act exempts the commission from any liability for the costs of this appeal. I do not think it appropriate to order that the Attorney General, and thereby the general public, bear those costs. However, I note from para. 5.3 of the original decision and from sheet 3 of the Appendix that provision was made for the recovery, through the rates to be charged, of the sum of \$35,000 for HVES' rate application costs before the commission.

[73] Accordingly, I would direct that, failing agreement between the parties, HVES tax its costs for fees and disbursements of and incidental to this appeal and that the amount so determined be included in the rate application costs in the schedule.

Order accordingly.

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

UTILITY RATE BASE SCHEDULE 1		TEST YEAR APPLICATION	BCUC ADJ
ASSETS			
Structures and improvements		\$5,560	
Overhead conductors and devices		44,891	
UG Conductors and devices		479,504	
Line transformers		90,693	
PLANT IN SERVICE, opening		\$620,648	
Additions to plant in service		0	
Disposals		0	
PLANT IN SERVICE, closing		620,648	
Add: Work in progress		0	
Less:		620,648	
Accumulated Depreciation		(178,677)	
NET PLANT IN SERVICE		441,971	
WORKING CAPITAL ALLOWANCE		0	

RATE HEARING COSTS	0	
CONTRIBUTIONS IN AID	(75,460)	
UTILITY RATE BASE	=====	\$366,511
RETURN ON RATE BASE	14.01%	=====

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

UTILITY INCOME & RETURN SCHEDULE 2	TEST YEAR APPLICATION	BCUC ADJUSTM
SALES VOLUME MWh	2,047	
RATES		
Existing Revenue: ¢/kWh	8.65	
Interim Increase %	42.77%	(
Final Increase %	84.62%	
First year phase-in: ¢/KWh		
Second year phase-in: ¢/kWh		
Third year phase-in: ¢/kWh		
Final Rate: ¢/kWh	15.97	
Interim Rate	12.35	
REVENUE		
Existing Rates	\$177,066	
Interim Rates	75,739	
Required Increase	74,101	(72
Discounts	0	
Other Income	0	
TOTAL REVENUE	326,906	(72
Less: PURCHASED POWER	125,500	(15
GROSS MARGIN	201,406	(57
% excluding Other Income	61.61%	-4
Administration, Accounting and Office	68,300	(25

UTILITY INCOME & RETURN SCHEDULE 2		TEST YEAR APPLICATION	BCUC ADJUSTM
Repairs, Maintenance and Vehicle		31,000	(11
Snow Removal		18,000	(18
Depreciation		15,065	
Amortization of Rate Application		10,000	
OPERATING EXPENSES		142,365	(52
Utility income before tax		59,041	(4
INCOME TAX EXPENSE		7,693	(1
EARNED RETURN	-----	\$51,348	(\$3
RETURN ON RATE BASE		14.01%	-1

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

INCOME TAXES SCHEDULE 3		TEST YEAR APPLICATION	BC ADJUS
UTILITY INCOME BEFORE TAX		\$59,041	
Deduct – Interest		(23,823)	
ACCOUNTING INCOME		35,218	
Timing differences Depreciation		15,065	
Amort, of hearing costs		10,000	
Amortization of Line Costs		0	
Capital cost allowance		(15,065)	
Amort, of contributions			
Overhead capitalized			
Plant removal costs			
Rate application costs		(30,000)	
		(20,000)	
TAXABLE INCOME		\$15,218	
Income tax rate – deferred		21.84%	
Income tax rate – current		21.84%	
Income tax expense			

- Deferred		\$4,369
- Current		3,324
INCOME TAX EXPENSE		===== \$7,693

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

RETURN ON CAPITAL SCHEDULE 4		TEST YEAR APPLICATION	BCI ADJUST
Contribution in Aid		\$0	
proportion		.00%	
Capital Loan		\$0	
proportion		.00%	
embedded cost		.00%	
\$ return		\$0	
Current Debt		\$0	
proportion		.00%	
embedded cost		.00%	
\$ return		\$0	
Notional debt		\$183,256	
proportion		50.00%	
embedded cost		13.00%	
\$ return		\$23,823	
Preferred shares		\$0	
proportion		.00%	
embedded costs		.00%	
\$ return		\$0	
Common equity		\$183,256	
proportion		50.00%	
ROE		15.02%	
\$ return		\$27,525	
TOTAL CAPITAL		===== \$366,511	=====

HEMLOCK VALLEY ELECTRICAL SERVICES LTD.

ADJUSTMENTS		
1. \$15,371	Adjust BC Hydro charges for error in Application	
2. \$25,300	Adjust Administration, Accounting and Office expenses to ap	
3. \$11,00	Adjust Repair and Maintenance expenses to approved amou	
4. \$18,000	Eliminate Snow Removal expenses.	
5. 2.02%	Adjust return on equity to 13%	
6. \$5,000	Adjust Rate Hearing costs.	
	Rate Increase Phase-in consists of:	<u>Application</u>
	Purchased Hydro	6.13
	Operating expenses	6.22
	Rate Base costs	3.62

	Total	15.97

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TAB 24



ONTARIO ENERGY BOARD

IN THE MATTER OF A RATE APPLICATION
UNDER THE ONTARIO ENERGY BOARD ACT BY

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

REASONS FOR DECISION

OCTOBER 29, 1971



ONTARIO

ONTARIO ENERGY BOARD

IN THE MATTER OF A RATE APPLICATION

UNDER THE ONTARIO ENERGY BOARD ACT BY

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

REASONS FOR DECISION

OCTOBER 29, 1971

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ONTARIO

ONTARIO ENERGY BOARD

IN THE MATTER OF The Ontario Energy Board Act, R.S.O. 1970, Chapter 312;

AND IN THE MATTER OF an application by Northern and Central Gas Corporation Limited to the Ontario Energy Board for an Order approving or fixing just and reasonable rates and other charges for the sale of gas by the Applicant in the respondent municipalities.

BETWEEN:

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

Applicant

and

The Cities of BELLEVILLE, CORNWALL, NORTH BAY, ORILLIA, SAULT STE. MARIE, SUDBURY and THUNDER BAY,

Towns of BRACEBRIDGE, COBALT, COBOURG, COCHRANE, CONISTON, COPPER CLIFF, DRYDEN, ENGLEHART, GANANOQUE, GERALDTON, GRAVENHURST, HAILEYBURY, HEARST, HUNTSVILLE, KAPUSKASING, KENORA, LIVELY, NAPANEE, NEW LISKEARD, PORT HOPE, PRESCOTT, SMOOTH ROCK FALLS, STURGEON FALLS, TIMMINS, TRENTON,

Townships of ARMSTRONG, ATKOKAN, AUGUSTA, BLACK RIVER-MATHESON, BUCKE, CALVERT, CHAFFEY, COLEMAN, CORNWALL, CRAMAHE, DRAPER, DYMOND, EDWARDSBURG, ERNESTOWN, EVANTUREL, FALCONBRIDGE, FAUQUIER, NORTH FREDERICKSBURG, GLACKMEYER, HALDIMAND, HAMILTON, HOPE, JAFFRAY & MELICK, KENDREY, KINGSTON, LONGLAC, MACAULAY, MONCK, MOUNTJOY, MURRAY, MUSKOKA, NEEBING, NEELON & GARSON, NIPIGON, ORILLIA, OSNABRUCK, PAIPOONGE, PITTSBURG, PLAYFAIR, RATTER & DUNNET, RICHMOND, SHUNIAH, SIDNEY, SPRINGER, TECK, THURLOW, TISDALE, WATERS, WHITNEY, WILLIAMSBURG, WINCHESTER,

Villages of CARDINAL, CHESTERVILLE, IROQUOIS, MORRISBURG, SOUTH RIVER, SUNDRIDGE, WINCHESTER

Improvement Districts of EAR FALLS, RED ROCK, TEMAGAMI, and

Unorganized Townships of ASHMORE, BOSTON, BRODER, BRUCE LAKE, EILBER, ERRINGTON, GUIBORD & MUNRO, HOYLE, HUTCHINSON, KENDALL, LAMARCHE, MATHESON, O'BRIEN, SNIDER, STUDHOLME,

Respondents.

REASONS FOR DECISION

A. Introductory and General

1. The Application

By an application dated May 1, 1970, Northern and Central Gas Corporation Limited applied for an Order pursuant to subsection 1 of section 19 of The Ontario Energy Board Act, 1964, as amended, approving as just and reasonable the Applicant's proposed rates and other charges for the sale of natural gas in the respondent municipalities and unorganized townships named in the application. Some of the rates and charges applied for are those presently in effect. The remainder are revised rates and charges designed to provide the Applicant with increases in revenues estimated by it at \$1,342,365 per year. The application also requested that the Board authorize a purchased gas adjustment clause that would permit the Applicant to pass on to its customers future increases in its own costs of purchased gas.

2. The Applicant

The Applicant is a corporation resulting from the statutory amalgamation effective January 1, 1968, of three inter-related Ontario gas distributors, namely Northern and Central Gas Company Limited, Twin City Gas Company Limited and Lakeland Natural Gas Limited. The relationship prior to amalgamation was that of share ownership by Northern and Central Gas Company Limited of the two other companies. Because the amalgamated company took a name somewhat similar to the name of one of the amalgamating companies, Northern and Central Gas Company Limited, it is important to try to avoid confusing one with the other. In these Reasons the amalgamated company will be usually referred to as the Applicant or "Northern and Central". Northern and Central Gas Company Limited, one of the amalgamating companies, will usually be referred to as NONG (an abbreviation of the name by which it was known in the earlier years of its existence). The other two amalgamating companies will be usually referred to herein as "Twin City" and "Lakeland".

Twin City provided gas service to certain municipalities in northwestern Ontario, the most important of which were the cities of Fort William and Port Arthur, which are now amalgamated and known as the city of Thunder Bay. NONG was the natural gas distributor throughout the remainder of northern Ontario, and as far east and south as Orillia. Shortly before the amalgamation, NONG acquired the gas distribution system at Sault Ste. Marie. Lakeland was the natural gas distributor in an area in eastern Ontario that included the cities of Belleville and Cornwall and a number of towns, villages and townships.

On March 31, 1969, the Applicant acquired the gas distribution system in Augusta Township, near Brockville, previously owned and operated by Augusta Natural Gas Limited. As an Ontario gas distributor the Applicant has associated with it three subsidiary companies which are engaged in fringe activities often carried on by a distributor itself as an integral part of its gas distribution business. These companies are Nortwin Development Company Limited (Nortwin), Northern Ontario Acceptance Company Limited (N.O.A.C.) and Northern and Central Realty Limited (N. & C. Realty). The businesses of these companies were explained by Mr. Zboroluk, a witness for the Applicant, at pages 143 and 144 of the transcript. Nortwin owns various buildings leased to the Applicant for use in its Ontario utility operations. N.O.A.C. owns certain transportation equipment leased to the Applicant for use in its Ontario utility operations. It also finances the purchase of gas fired equipment by customers of the Applicant. N. & C. Realty is engaged in the financing of new housing construction which will use gas fired equipment and thus performs a useful function in the acquisition of additional gas customers.

In addition to carrying on directly a gas distribution business in Ontario and indirectly, through the three subsidiaries mentioned above, certain fringe activities associated with the gas distribution business in Ontario, the Applicant acts in an important

way as a holding company. As such its activities range far beyond Ontario and far beyond gas distribution. The principal subsidiaries are Greater Winnipeg Gas Company (the gas distributor in Winnipeg), Gas Metropolitan Inc. (the gas distributor in the Montreal area), and Canadian Industrial Gas and Oil Limited - an important company with headquarters at Calgary that is engaged not only in western Canada but also in the Northwest Territories, the Arctic Islands and the North Sea, in gas and oil exploration and production. In these Reasons these three principal subsidiaries are usually referred to as Greater Winnipeg, GMI, and CIGOL. Other subsidiaries that will be mentioned in these Reasons are Le Gaz Provincial du Nord de Quebec Ltcs. (Le Gaz) and Champion Pipe Line Corporation Limited (Champion). Le Gaz distributes gas in Quebec in the Noranda-Rouyn area and Champion transmits the gas to Le Gaz from the pipeline of TransCanada Pipelines Limited in Ontario.

3. The Existing Rates of the Applicant

The existing rates and other charges of the Applicant are those approved by the Board on a firm basis for NONG and Twin City by an Order dated March 2, 1964 and for Lakeland by an Order dated June 22, 1967, except in each case as replaced or supplemented by interim Orders of the Board made pursuant to subsection 5 of section 19 of The Ontario Energy Board Act, 1964.

The firm Orders referred to were made by the Board after public hearings. Detailed Reasons for Decision were given and are available in printed form.

The most important existing rates, by far, are those that were established on a firm basis. However, the interim rates, continued on a year to year basis until the holding of a hearing, are not unimportant. They include rates for new areas such as Sault Ste. Marie, and also the penalty charges for late payment of bills in the NONG and Twin City areas. Subsection 5 of

section 19 of the Act, under which they were made, reads as follows:-

- (5) The Board may, at the request of any applicant, without a hearing, make one or more orders under subsection 1, each effective for a period of not more than one year, pending a final disposition of the application,
 - (a) where the rates or other charges proposed in the application are the initial rates or other charges for the sale, transmission, distribution or storage of gas by the transmitter, distributor or storage company in the municipality or area named in the application;
 - (b) where, after notice of the application has been given in accordance with the regulations, no one has filed an answer within the time limited therefor;
 - (c) where the application is for approving or fixing prompt-payment discounts or delayed-payment penalties;
 - (d) where the transmitter, distributor or storage company is selling, transmitting, distributing or storing gas, as the case may be, at a loss; or
 - (e) where the application does not contain a request for an increase in the rates or other charges then being charged for the sale, transmission, distribution or storage of gas by the transmitter, distributor or storage company.

4. The Rate Changes Proposed by the Applicant

The revenue increase of about \$1,300,000 sought by the Applicant represents a little less than 3% of total revenues. However, the Applicant has not sought a blanket percentage increase in its rates but, for reasons explained at the hearing, it has sought varying increases from different classes of customers and in different areas. Basically it has proposed that the rates remain unchanged at Sault Ste. Marie, that residential and commercial rates be increased approximately 3% in the Lakeland area and that residential, commercial and certain industrial rates be increased approximately 7% in the other areas served. In addition, an important part of the application is for the Board to include in its Order a provision for a purchased gas adjustment clause to permit prompt adjustments of rates in the event of gas purchase costs being changed by an Order of a regulatory Board having jurisdiction, the calculation of such adjustments to be subject to approval by the Ontario Energy Board.

5. The Applicable Legislation

The applicable legislation, in its present form, is The Ontario Energy Board Act, Revised Statutes of Ontario, 1970, chapter 312. At the time of the hearing the Revised Statutes had not come into force and the Act was known as The Ontario Energy Board Act, 1964. Because the numbers of many sections and subsections were changed in the revision, the Board has, in order to avoid confusion, referred in these Reasons to the Act in its earlier form. The most important section, in these proceedings, is section 19, which reads in part as follows:

19. (1) Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors and storage companies, and for the transmission, distribution and storage of gas.

(1a) In approving or fixing rates and other charges under subsection 1, the Board shall determine a rate base for the transmitter, distributor or storage company, and shall determine whether the return on the rate base produced or to be produced by such rates and other charges is reasonable.

(1b) The rate base to be determined by the Board under subsection 1a shall be the total of,

- (a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount deemed adequate by the Board for depreciation, amortization and depletion;
- (b) a reasonable allowance for working capital; and
- (c) such other amounts as, in the opinion of the Board, ought to be included.

(1c) In determining the reasonable allowance for the cost of the property under clause a of subsection 1b, the Board shall ascertain the actual cost of the property to the present owner, but

- (a) where the actual cost to the present owner of any of the property cannot be ascertained, the Board shall determine a reasonable allowance to be included in the rate base for the cost of that property; and
- (b) where in the opinion of the Board the actual cost to the present owner of any of the property is more than a reasonable allowance for inclusion in the rate base for the cost of that property, the Board shall determine a reasonable allowance to be included in the rate base for the cost of that property.

(1d) In considering whether the actual cost mentioned in subsection 1c exceeds a reasonable allowance for inclusion in the rate base and in determining the appropriate

deductions to be made in respect of any such excess, the Board may consider all matters it deems relevant, including the public benefit resulting from the acquisition of the property, whether the acquisition at the price paid was prudent in the circumstances existing at the time and, where the property was acquired as an operating system or part thereof, the allowance made for its cost in the rate base of the former owner or, if no such rate base had been determined that included an allowance for the cost thereof, the allowance that would have been made therefor in a rate base for the former owner determined in accordance with this section.

(1e) Findings of fact on which determinations are made by the Board under subsections 1a, 1b, 1c and 1d shall be based on the evidence adduced at the hearing.

6. Hearing of the Application

The application was filed with the Board on May 1, 1970, and it was then served on all the municipalities affected along with copies of the Board's rules of procedure, the proposed rate schedules and a summary of the existing and proposed rates. Objections were filed with the Board and served on the Applicant and the application was set down for hearing commencing July 13, 1970. Notice of Hearing was widely served and published in accordance with the rules of procedure and the directions of the Board.

At the opening of the hearing and throughout the proceedings Mr. F. A. M. Huycke, Q.C., assisted by Mr. B. Bellmore, appeared as counsel for the Applicant. Mr. D. J. Wright, Q.C., assisted by Mr. C. R. Vernon, appeared as counsel for a large number of municipalities. Mr. Robin Scott appeared as counsel for the Board. Mr. W. E. Bryan appeared as counsel for the Lakehead Board of Education, but, because of the limited nature of the issue raised by that Board, he subsequently withdrew. Mr. G. C. Corsten initially appeared as counsel for the City of North Bay, but he subsequently withdrew and Mr. Wright then represented that city.

At the initial sittings in July the Board heard most of the evidence-in-chief of the Applicant and then adjourned the hearing to September 24 in order to enable the Board and Interveners to prepare requests for additional evidence and to prepare for cross-examination. During the month of August the Board, with the assistance of its staff, made requests for a large amount of important additional information and informed counsel for the Interveners of the details of the requests. In addition, the Interveners submitted to the Applicant requests for additional information.

The hearing was resumed, as arranged, on September 24 and was then adjourned until October 5 in order to allow additional time for preparation. From October 5 on, the hearing proceeded more or less continuously to completion on January 22, 1971. The hearing comprised in all about 50 sittings and gave rise to over 5,000 pages of transcript of evidence and argument and 162 formal exhibits. Eleven witnesses testified on behalf of the Applicant.

Although the Interveners took a very active part in the proceedings and their counsel conducted a very intensive and detailed cross-examination of the Applicant's witnesses, he did not call any witness. He was, however, assisted by Mr. R. Pope, C.A., in preparation of his cross-examination and final argument.

The Board and its counsel were assisted throughout the proceedings by Mr. W. P. Armes, C.A., Energy Returns Officer, and Mr. O. J. Cook, C.A., Deputy Energy Returns Officer, of the Board staff. Further, because of the very high degree of informed judgment involved in a finding of the reasonableness of any particular rate of return, the Board retained an expert in this field, Dr. Eric Hanson, who testified in the proceedings.

7. Counsel and Witnesses

For convenient reference, a complete list of counsel and witnesses appearing in the proceedings is set out below:-

For The Applicant

Counsel Mr. F. A. M. Huycke, Q.C., and
Mr. H. Hellmore with him.

Witnesses Mr. Edmund C. Bovey, President and Chief Executive
Officer, Northern and Central Gas Corporation
Limited.

Mr. Timothy G. Sheeres, Vice-President, Finance,
Northern and Central Gas Corporation Limited.

Dr. Eric C. Siewwright, Consulting Economist,
E. C. Siewwright Associates Limited, Toronto.

Mr. Leonard E. Barlow, Vice-President and Director,
McLeod, Young, Weir and Company Limited, Toronto.

Mr. John J. Lercux, Executive Vice-President,
Ontario Operations, Northern and Central Gas
Corporation Limited.

Mr. William Zboroluk, Controller of Gas Utilities
Operations, Ontario, Northern and Central Gas
Corporation Limited.

Mr. Harry W. Johnson, Supervisor, Rates Department,
Northern and Central Gas Corporation Limited.

Mr. Samuel Joseph, Consultant on Rate of Return
Matters, H. Zinder and Associates, Inc., Washington.

Mr. Michael Rascon, also of H. Zinder and
Associates, Inc., of Washington.

Mr. V. A. McElfresh, Director, Senior Vice-
President and Manager of the Dallas office of
H. Zinder and Associates.

Mr. Andrew T. Kerr, Internal Auditor of Northern
and Central Gas Corporation Limited.

For The Interveners

Counsel Mr. W. E. Bryan for the Lakehead Board of Education.

Mr. G. C. Corston for the City of North Bay.

Mr. Donald J. Wright, Q.C., and Mr. C. R. Vernon,
with him, for 39 other municipalities.

For The Board

Counsel Mr. Robin Scott

Witness Dr. Eric J. Hanson, Consulting Professor of
Economics, University of Alberta, Edmonton.

The Annual Return

B.

1. Introductory

The legislation requires the Board in approving or fixing rates, to determine whether the return on the rate base produced or to be produced by the rates is reasonable. The return is the amount of the utility revenues remaining after deducting appropriate operating expenses, provision for depreciation and amortization, and taxes. The audited accounts of an Applicant provide figures of total revenues and expenses and for the provision made for depreciation and amortization and taxes but, in order to derive the annual return from these statements, attention must be given to:

- (a) separation of utility from non-utility operations
- (b) correction of any errors
- (c) appropriate rate-making adjustments to revenues and expenses, including adjustments needed to make past results a more reliable indicator of the reasonableness of the rates.

2. The Test Year

In this case, the hearing commenced on July 13, 1970, and the latest year for which complete information was available from the accounts was 1969. The Applicant presented its evidence on the basis of a 1969 test year and the Board is making its decision on that basis.

3. Consolidation of Financial Results of Applicant and its Associated Subsidiaries.

The Applicant presented its figures for the test year after consolidating the costs and revenues for its Ontario utility operations with those of three Ontario subsidiaries that are wholly, or almost wholly, engaged in certain fringe activities. The subsidiaries are Nortwin, N.O.A.C. and N. & C. Realty and their activities are outlined earlier in these Reasons. Counsel for the Board inquired why results were not given for the Applicant alone and he received the following answer from Mr. Zboroluk, a witness for the Applicant:-

"Nortwin, N.O.A.C. and Northern and Central Realty perform services that could also be performed by the Applicant and because it is an integral part of the utility operations was so included in this application ... were these companies not in existence I believe Northern and Central could perform these services and they are of use to the distribution of gas".

(transcript, pages 1851-1852)

In its Lakeland decision in 1967 the Board dealt with the problem of fringe activities carried on by a gas distributor and said that a future Applicant should not leave out of its presentation a full explanation of the details of fringe activities, including the need for them and the profit or loss from engaging in them. In this case the Board is satisfied as to what the fringe activities are and that they can reasonably be considered as part of the Applicant's gas distribution business. The Applicant has recently taken steps to ensure that services to the public provided by its subsidiaries do not result in substantial losses and it has adjusted its revenues, in its presentation to the Board in this case, to reflect such action.

The Board is satisfied that the fringe activities, whether carried on directly or through the subsidiaries, can be properly considered as part of the Applicant's gas distribution business and that no practical purpose would be served in this case by rejecting the Applicant's consolidation of its financial results with those of the three Ontario subsidiaries.

4. Net Operating Income and Adjustments Thereto

In its initial submission the Applicant produced figures to show net operating income, per books, of \$9,535,907, and proposed downward adjustments of \$540,879, for an adjusted net operating income, or earned return, of \$8,995,028. Later on in the proceedings other adjustments were proposed by the Applicant and different adjustments were proposed by the Intervenors. The Board has given careful consideration to the evidence and to the conflicting claims, its own precedents, and what it considers to be the right principles, and has made its own determinations of appropriate adjustments. These are set forth in Table 1 and the Appendices thereto. The adjusted net operating income amounts to \$9,870,742.

The explanatory notes in Table 1 and the Appendices indicate in a summary way the evidence on which the Board bases its findings. A fuller explanation of some of the more important items is set forth below.

5. Revenue Adjustments

(a) Normalization for weather

The Applicant presented evidence to show that in 1969 the weather was colder than normal, that the revenues for the year were therefore abnormally high, and that in using the year as a test year there should be a downward revenue adjustment of \$96,094. The Intervenor submitted that the evidence as to the coldness of the weather was not reliable and that the Applicant's claim should be rejected. The Board is satisfied with the evidence relied on by the Applicant and considers that the Applicant has followed reasonable principles and methods in estimating an appropriate weather normalization adjustment. Its claim of a downward adjustment of \$96,094 is accordingly allowed.

(b) Normalization for major strikes

Major strikes in 1969 in the areas served by the Applicant caused a very substantial curtailment of the use of gas and consequently a substantial and abnormal impairment of the return for the year. The Board thinks that in such a case there should be a normalizing upward adjustment to revenues and the Board therefore asked the Applicant to submit in evidence the information needed for such an adjustment. The Applicant estimated its loss of operating income in 1969 due to strikes as \$322,769, but submitted that, since there is an average annual loss from strikes of about \$80,000, the difference (\$242,769) represents the abnormality in 1969 and should be used in the revenue adjustments. The Intervenor submitted that what was real was the loss of income of \$322,769 and that the \$80,000 figure was hypothetical and should be rejected by the Board. The Board has concluded that in the rare cases where an adjustment for strikes is necessary, it is not fair to the gas company and simply not realistic to assume that if the year had been normal there would have been no loss of income due to strikes. The Board is satisfied that, for the purpose of normalizing for strikes, the Applicant's estimate of an adjustment in the amount of \$242,769 is reasonable.

(c) Adjustments re Augusta revenues

The Augusta natural gas properties were acquired by the Applicant on March 31, 1969, and therefore were operated by the Applicant for only 9 months in 1969. In the opinion of the Board this acquisition has unusual characteristics and should be given special treatment (see Part C, section 4(b)(ii) of these Reasons). The Board is allowing in the rate base the full amount of the acquisition premium and is allowing in expenses the full cost of its annual amortization. Apart from the cost of gas, the annual return and amortization expense that are associated with the amount of the acquisition premium represent nearly all the annual costs of providing service from the Augusta system, i.e. operating expense and the carrying charges for investment in tangible plant are very small. The Board's treatment of rate base and expenses in the test year makes that year reasonably representative of an on-going annual period and in the special circumstances of the case, it seems appropriate to the Board to adjust the actual revenues for the year to make them also more nearly reflect an on-going annual period.

The Intervenor proposed that the operating income for 1969, which was obtained over a period of only nine months, be put on an annual basis by adding to revenues for 1969 the mark-up on gas sales during the first three months of 1970, the amount of which was \$54,411. The Board agrees.

The Intervenor also submitted that the Augusta income, even after the adjustment described above, would still be abnormal. They pointed out that in 1969 the Applicant's sales to DuPont were not normal because the Applicant was carrying out in that year a gas pay-back obligation entered into by it some years before. The Board is satisfied that the gas pay-back arrangement did create a substantial abnormality in revenues and necessitates an adjustment. The Intervenor presented an estimate of \$119,520 as the loss of income, based on 996,000 Mcf of gas at a normal profit to the Applicant of 12¢ per Mcf. On consideration of the evidence the board finds that the amount of gas was slightly less than 996,000

Mcf, and that the total mark-up (to be shared with GMI) would have been in the order of 10¢ to 12¢, so that the Applicant's share would have been in the order of 5¢ to 6¢. The Board finds that a reasonable adjustment to reflect normal sales to DuPont would be to add \$55,000 to revenues.

The Board has made a further adjustment to revenues in connection with the Augusta acquisition. The allowance of the total Augusta acquisition cost in the rate base will increase the Applicant's annual return and amortization and depreciation expense by approximately \$435,000.

The evidence established that the benefits of the acquisition are shared by the Applicant and GMI and, in the Board's opinion, the costs ought to be borne by the two companies in approximately the same proportion as the benefits.

The Augusta acquisition resulted in the assignment to the Applicant of certain favorable gas supply contracts and the Board accepts the evidence that, during the term of the contracts, an annual benefit of about \$81,000 will accrue to the Applicant alone. The evidence also is that the acquisition brought with it two large volume customers, Brockville Chemicals Limited and DuPont of Canada Ltd. Sales to these customers in future years will result in an annual profit to the Applicant of approximately \$395,000.

In addition, however, GMI benefits to the extent that volumes of gas sold to DuPont on an interruptible basis are made available from the GMI operations in Quebec and are sold to the Applicant at a mark-up, over the commodity cost of gas, of approximately 5¢ per Mcf. The Applicant, in effect, splits the profit on sales to DuPont between itself and GMI.

An examination of the feasibility studies prepared by the Applicant prior to the Augusta acquisition and filed as exhibits leads the Board to conclude that the annual benefits accruing to GMI from the acquisition amount to approximately one-third of the total annual benefits. The Board therefore concludes that an

assignment to GMI of approximately one-third of the total annual carrying charges associated with the acquisition cost (including the premium) would be reasonable. An adjustment to revenues of \$145,000 per year has therefore been made.

The Board assumes that the division of benefits between the Applicant and GMI may change. It may well be that some years from now, GMI will have profitable sales for its surplus gas elsewhere and the Applicant will have available from its Ontario operations all the surplus gas needed for profitable sales to DuPont. Further, even without such a change in the sources of supply, the Applicant can arrange with its subsidiary at any time to have it accept a smaller mark-up on its gas sold to the Applicant for resale to DuPont, thus leaving the Applicant with a larger mark-up, out of which it might then be fairly charged with all the costs of the Augusta acquisition. The Board accordingly expects that on some future rates application no adjustment or some quite different adjustment may be appropriate.

(d) Adjustments re charges to affiliate (Le Gaz)

Although Le Gaz operates outside the jurisdiction of this Board, its general management and supervision are carried on by the Ontario Division of the Applicant. None of the inter-company arrangements is the result of an arm's-length agreement and the Board has found it necessary to investigate the reasonableness of the recorded inter-company charges. The Le Gaz operation has not been notably successful to date and, for whatever corporate reasons have seemed sufficient to the Applicant, it has been relieved in more than one way from the full burden of the costs that might fairly be assigned to it.

Subsequent to its initial presentation of its case, the Applicant proposed an adjustment, (Exhibit 28, Schedule 2, Page 3) which would assign to Le Gaz a charge of \$13,134 per year as its share of the return required on the Applicant's investment in the liquefied natural gas plant near Sudbury. A notional charge for

this purpose must be included in the revenue adjustments and the Board is satisfied that the amount of \$13,184 is reasonable if the charges for the supply of gas by the Applicant to Le Gaz are appropriately adjusted.

There was a great deal of evidence and argument related to the reasonableness of the charges for the supply of gas to Le Gaz. Charges were not made in accordance with the formal gas supply contract entered into by the companies and the Board is satisfied that the amount charged by the Applicant to its subsidiary is too low. The Board accepts the Intervenor's estimate of \$78,430 as an appropriate and reasonable adjusting figure. This estimate is based on the demand and commodity charges set out in the formal contract and on the charge made by TransCanada in 1969 for winter peaking gas. The revenues of the Applicant are, therefore, accordingly adjusted upward by this amount.

A "management fee" of \$18,000 is charged by the Applicant to each of Le Gaz and Champion and these charges purport to be a reasonable assignment of the administrative and general expense for the functions carried out for them by the Ontario Head Office. An analysis of the administrative and general expense for Ontario Operations (Exhibit 11, Section 3, Page 8) indicates that, on a per customer basis, the combined charge of \$36,000 could be considered reasonable in the test year 1969. Although the Board is not making any adjustment, it notes, however, that these charges have not been altered over time to reflect the increased costs, including administrative and general, on which the Applicant bases its need for a rate increase. Item 67(a) of Exhibit 17, a forecast for 1970 based on six months actual and six months estimated experience, shows a 20% increase in administrative and general expense over 1969. The Board expects that these management fees will be revised to reflect increasing administrative and general expense.

In addition to the administrative and general functions

carried out by the Ontario Division for Le Gaz, all customer billing and accounting work for Le Gaz is done by the Applicant and the Intervenor submitted that there should be a further adjustment of \$18,495 to establish a charge for use of the Ontario Division computer. The Applicant, in reply, submitted that the overall management fee of \$18,000 charged to Le Gaz should be deemed to cover the computer expense and that, in any event, the appropriate amount would be \$10,400 rather than \$18,495. The Board does not accept the Applicant's submission that the management fee should be deemed sufficient to cover this expense but accepts the Applicant's figure of \$10,400 as an appropriate notional charge and includes it in the Board's revenue adjustments.

The evidence indicates that Le Gaz does not have any engineering personnel of its own and, in the opinion of the Board, a small notional charge should be made with respect to this function. The Board considers that a charge of \$1,000 which relates, on a per customer basis, to the system operating and engineering expense for the Ontario Division shown on Exhibit 11, Section 3, Page 5, would be reasonable.

(e) Adjustment for increased charges now in effect

During the test year 1969 penalty charges for late payment of bills were introduced in the NONG and Twin City areas. During that year and in 1970 increases were made in certain unregulated other charges. In determining whether changes in gas rates are necessary, one must take into account, on an annual basis, the additional revenues now being obtained from these sources. In its initial presentation the Applicant submitted that the appropriate adjustment for penalty charges (described as "forfeited discounts") would be \$178,763 and that for increases in rental charges \$309,187. The Board accepts these amounts as reasonable.

(f) Adjustments Proposed by the Parties but Rejected by the Board

In proposing certain adjustments, subsequent to its initial submission, the Applicant included a proposed downward adjustment of revenues for the test year of \$172,000 attributable to invocation by INCO, effective in 1971, of a "most favored-nation" clause, in its gas contract with the Applicant. This adjustment was opposed by the Intervenor. The reduction in revenue will come about in 1971 as a result of new sales to other customers, and it is inconceivable to the Board that the Applicant would take action involving loss under the INCO contract unless the action produced offsetting additional profits from other sources. Therefore, the Board rejects the adjustment proposed by the Applicant.

There were a number of adjustments proposed by the Intervenor which the Board also rejects. Two of these may be conveniently considered together, namely increases of \$124,138 to normalize operating income at Sault Ste. Marie and \$125,392 to normalize operating income at Bruce Lake, in order to reflect the differences between income earned in 1969 and the income estimated in the feasibility studies.

As explained elsewhere in these Reasons, the Board has normalized revenues and expenses relative to the Augusta acquisition, because of the very special characteristics of that particular acquisition. However, the same treatment is not warranted for the Sault Ste. Marie acquisition and the Bruce Lake extension. It is normal for a gas distributor, when expanding into new areas, to install a system capable of serving the potential market. The market is not attached at once and therefore during the early years, the market does not contribute its full share to profits. Further, the build-up of market may be somewhat slower or faster than forecast at the time of the expansion. It is the opinion of the Board that with the expansion into Sault Ste. Marie and Bruce Lake having been made prior to the test year, 1969, the ordinary treatment with respect to rate base, depreciation, revenues and expenses, is appropriate. The adjustments proposed by the Intervenor are therefore rejected.

Another adjustment proposed by the Intervenors but rejected by the Board was an increase of \$101,998 in revenues from rental equipment. The Intervenors submitted that rental rates, even after substantial increases made by the Applicant in 1969 and 1970, would fall short by \$101,998 of meeting merely the requirements for depreciation and interest on investment in rental equipment, and that an adjustment to revenues in this amount would be appropriate to prevent subsidization, in gas rates, of the equipment rental business. The object of engaging in the business is to promote gas sales and the effect of increasing gas sales in this way is to increase market saturation and reduce unit costs of gas distribution. A modest loss on equipment rentals is justified if it is necessary in order to achieve the object. The Applicant has, on its own initiative, made very substantial increases in its charges for equipment rentals and has reflected them in its adjustments for the test year. In the opinion of the Board, the Applicant has reduced the revenue deficiency to a justifiable amount. The proposal to make a further adjustment to revenues is therefore rejected.

The Intervenors proposed that the Board make an adjustment to provide for increases in certain service charges that were being considered by the Applicant. An amount of \$50,000 was suggested by counsel for the Intervenors as being reasonable. Counsel for the Applicant put his objections to an adjustment partly on the ground that although increased charges were under consideration no decision had been made, and partly on the ground that, even if a decision had been made, there was no evidence on which the Board could measure the amount of an appropriate adjustment. In considering the matter, the Board notes that the amount of service given by a gas distributor to its customers free or for a charge varies from one company to another. Whatever the practice, it does not involve in any substantial way discrimination between one customer and another and is left to the company as a matter of policy. There is nothing wrong with the Applicant's present policy nor would there be anything wrong with a less liberal policy if it chose

to adopt it. In the opinion of the Board, the ability of the Applicant to achieve a modest increase in revenues from a change in its service policy is one of the avenues open to the Applicant to minimize the need for increases in gas rates in future, as its costs increase. The adjustment proposed by the Intervenors is therefore rejected.

The Applicant eliminated from the utility operating revenues it presented to the Board for consideration in this case the following items:

Interest on deferred payment on sale of aircraft	\$43,514
Gain on sale of real property	78,686
Gain on redemption of preferred shares	41,888
Gain on sinking fund investments	235,931

The Intervenors asked that these items be added back into utility operating income. Counsel for the Intervenors said (transcript, page 5137):-

"While there might be some basis for attributing a portion of some of these amounts to other than the Ontario utility operations, the Applicant left the Board without any evidence on which to make an apportionment with the result in my submission that the Board has no alternative but to include all of the items, that is, the \$400,000, in the income of the Ontario division as was done in the entries in the Applicant's own books".

Counsel for the Applicant submitted (transcript, page 5766) that in eliminating the items the Applicant was following conventional regulatory practice.

The first item, interest on the deferred payment on the sale of an aircraft, was non-utility income. In the opinion of the Board, it is properly eliminated for that reason. The Board also thinks that the gain on the sale of certain real property was properly eliminated for the same reason. The last two items have some bearing on the cost of money, but the effect is not very great and it is sufficient for the Board to take it into account only in a very general way in its calculation of the reasonable return.

(g) Summary of Revenue Adjustments

As appears from Table 1, all the revenue adjustments as determined by the Board, result in a net upward adjustment of \$992,050.

6. Operating Expense Adjustments

(a) Charitable Donations

The Applicant included in the expenses claimed for rate-making purposes an amount of \$9,445 for charitable donations made during the test year. The Board has considered and disallowed such claims in earlier decisions and sees no reason to depart from its own established precedents. A reduction of \$9,445 in the expenses claimed by the Applicant has therefore been made by the Board.

(b) Head Office Expense

In its initial presentation (Exhibit 11, section 3, page 8), the Applicant included in the expenses of the Ontario Division (which includes Le Gaz and Champion) the sum of \$477,702 for the latter's share of Head Office expense. This amount was determined by deducting an amount of \$156,000 for CIGOL from the total Head Office expense of \$1,589,328 and dividing the remaining amount of \$1,433,328 equally among the "Ontario Division", Greater Winnipeg and GMI.

The Intervenor submitted that CIGOL should be assigned one-quarter of the total Head Office expense and that the remainder should not be divided equally among the three gas distributors but rather on the basis of the number of gas customers. In the result the Intervenor claimed that the amount to charge to the Ontario Division would be \$238,400.

The Board is satisfied from the evidence that the Applicant has used reasonable methods in allocating equal amounts to the gas distributors, and that such allocation is not unfair to Ontario gas users. However, the Board is not satisfied that a sufficient amount has been allocated to CIGOL. The amount of \$156,000 has not been

justified by a satisfactory cost study. It represents only about 10 percent of the total Head Office expense and is simply a figure agreed upon some years ago by the heads of affiliated companies. As noted above, the Interveners have submitted that CIGOL should bear an equal share with other Divisions, i.e. 25 percent of the total. Certainly, the importance of CIGOL to the whole is emphasized by the Applicant in its annual reports to shareholders. On the other hand, CIGOL operates much more independently of Head Office than do the other Divisions and, in particular, does its own financing. The Board expects the Applicant to revise its charges to CIGOL from time to time on the basis of continuing objective studies. In the meantime, in the opinion of the Board it would be reasonable in this case to allocate to CIGOL about 15 percent of the total and reduce the amounts allocated to the gas distributing divisions accordingly. The Board accordingly finds that the reasonable amount to include for Head Office expense in this case is \$450,000, being \$27,702 less than the \$477,702 claimed by the Applicant.

(c) Reduction in Office Expense for Ontario Division

During the test year, the Ontario Division offices were located in downtown Toronto, in the Toronto-Dominion Centre, with the Head Office of the Applicant. The Applicant evidently came to the conclusion that the space was unnecessarily expensive and moved the division offices in 1970 to Willowdale, a Toronto suburb. The savings were substantial and, in the opinion of the Board, the 1969 test year results should be adjusted to reflect them. The adjustments proposed by the Applicant in Exhibit 28 are accepted by the Board. The reduction in rental expense was \$23,396. Other adjustments affect rate base and depreciation and will be discussed later in these Reasons.

(d) Increase in gas costs

During the course of the hearing the Applicant made a claim for an adjustment of its 1969 recorded expenses to provide for an expected increase of \$109,193 in gas costs. In July, 1970, TransCanada Pipelines Limited, the Applicant's supplier, announced an increase in the charges made by it under its contracts to reflect increased charges to it by Alberta Gas Trunk Lines Limited in Alberta. The Interveners

submitted that the adjustment should not be made because:

- (i) the Applicant had disputed and had not accepted or paid the increase announced by TransCanada,
- (ii) the increase by Alberta Gas Trunk Lines was under appeal, and
- (iii) some portion of the increase would be recovered by the Applicant from its industrial customers.

It is a matter of public knowledge, of which the Board takes official notice, that after the conclusion of the hearing by the Ontario Energy Board on the rates of the Applicant, the regulatory Board in Alberta refused to allow the entire amount of the increase proposed by Alberta Gas Trunk Lines Limited but allowed one-third of the amount. Recognition of this decision of the Alberta Board is sufficient to dispose of the first two objections of the Intervenor, in so far as they have reference to the one-third of the increase. With respect to the third objection, counsel for the Intervenor said (transcript, pages 5089-90) that "some of the increase in any event will be obtained from industrial customers under corresponding provisions in their contracts providing for increases in the cost of gas to be automatically passed along to them". The Board is satisfied that the Applicant allowed for this in its calculation of the increase (Exhibit 28). Accordingly, in the light of the Alberta decision, the Board allows one-third of the \$109,193 claimed by the Applicant as an adjustment to its test year expenses for gas costs in this case. The amount is \$36,398.

(e) Wage Increases

The Applicant requested the Board to make an upward normalizing adjustment of the 1969 payroll costs charged to Operations and Maintenance to reflect wage increases that it either had granted or expected to have to grant to the end of 1971. The Applicant's calculation of the amount of the proposed adjustment was contained in Exhibit 11 and shows that the payroll costs of \$1,887,268 charged to Operations and Maintenance in 1969 would receive an upward adjustment of \$326,237 or about 17%. The figure

of \$326,237 was broken down into \$81,191 to normalize for increases that took place during 1969 and were therefore not fully reflected in the accounts and \$245,046 for increases that had occurred or were expected up to the end of 1971, and were therefore not reflected at all in the accounts.

In support of its claim, the Applicant submitted that, although it is not bound by wage agreements to grant increases to all employees, it is so bound to grant increases to some employees and that, as a practical matter, it must expect to have to grant increases to all employees at about the same rate as to those to whom it is bound by wage agreements. Accordingly, it determined from the wage agreements the weighted average rates of increase and applied them to total Operations and Maintenance payroll costs for 1969 to obtain its proposed adjustments of \$81,191 and \$245,046.

The Intervenors contended that the wage increase adjustment should be disallowed because it did not represent costs actually incurred in the test year and because the wage increases would be offset by:-

- (i) anticipated increase in number of customers
- (ii) anticipated increase in sales volume, and
- (iii) improved utilization and saturation of existing facilities.

The Applicant claimed, in effect, that the wage increases are known and measurable and should therefore be allowed, while the ability of the Applicant to offset them in the manner suggested by the Intervenors is uncertain and not measurable and should therefore be ignored.

In the opinion of the Board it is appropriate to normalize for wage increases occurring during the test year. However, the farther one goes beyond the test year in adjusting for wage increases, the more it becomes necessary to speculate about a variety of other factors and their possible effect on revenues and expenses and, consequently, on the return. Accordingly, the Board has determined

that it should allow the proposed adjustment of \$81,191 for 1969 wage increases and \$122,523, being one-half of the proposed 1970-1971 adjustment of \$245,046.

(f) Hearing Costs

Hearing costs can be quite large on an application for a substantial rate increase, especially when an Applicant raises important issues of a somewhat contentious nature and is faced with strong and prolonged opposition from Intervenor, as in this case. In the opinion of the Board, which is amply supported by precedent, the incurring of such costs by a regulated public utility is a normal and proper part of the whole process of ensuring that customers are not overcharged, and the hearing costs incurred by or charged to the Applicant are reasonably passed on by the Applicant to its customers. In the opinion of the Board, the evidence does not support the submission of the Intervenor that in this case some of the costs were incurred wastefully and should be disallowed. Accordingly, the costs incurred should be estimated as well as possible and allowed. Because they are large and because major rate hearings are, at least on the basis of past experience, infrequent, the costs should be spread equally over a period of five years. The results for 1969, considered as a test year, should reflect in expenses one-fifth of the estimated total hearing costs.

Some of the hearing costs were incurred well in advance of the hearing and their amortization over a period of five years is reflected in the expenses as derived from the accounts. In its initial presentation (Exhibit 11), made at a time when a very long hearing was not anticipated, the Applicant estimated that additional hearing costs not provided for in the 1969 accounts would be \$150,000 and that, on the basis of amortization over five years, there should be an upward adjustment to expenses for the test year of \$30,000. Toward the close of the hearing, it was apparent that the expenses would greatly exceed the earlier estimate and the Applicant submitted a revised estimate (Exhibit 162) of annual

amortization expense, not provided for in the accounts for 1969. The revised estimate, \$47,900, appears to the Board to be reasonable and acceptable except that it makes no change in the earlier estimate of Board costs. These will be charged to the Applicant and the earlier estimate is low by about \$25,000. Accordingly the estimate of \$47,900 should be adjusted upwards to \$53,000.

(g) Understatement of 1969 Gas Costs

As stated elsewhere in these Reasons (Part C, section 4(c)), the Board has allowed in the rate base the amount of \$4,650,589 for the Liquefied Natural Gas Plant of the Applicant at Hagar, near Sudbury. The opening ceremonies for this plant were held in September, 1968, but because of technical problems it was not fully operational in 1969. Nevertheless, by the end of the year there was liquefied natural gas in storage and the plant was capable of being used for an emergency source of gas supply, as was demonstrated by such use being made of it in early 1970. In the Applicant's accounts, the plant is shown as being placed in service on December 31, 1969. Interest during construction and operating expenses to that date were capitalized and, in accordance with the Applicant's practice, depreciation was provided for as from January 1, 1970.

The Applicant, in its accounts for 1969, made a downward adjustment of \$144,733 in its gas costs to reflect an expected recovery of that amount from the contractor alleged to be responsible for delays in bringing the plant into full operation. Mr. Johnson, a witness for the Applicant, explained that the amount "should be called normalizing adjustment for winter peaking costs, 1969, because what we are attempting to do here is to normalize the year as if the Liquefied Natural Gas Plant were in operation as it will be in future years".

The Board must decide whether the adjustment referred to above should or should not be eliminated for the purposes of this

case and whether any other adjustments to expenses respecting the plant should or should not be made.

In its initial submission the Applicant proposed that the plant be treated in the same way as any other plant addition brought into service in 1969, except for allowance of the adjustment, referred to above, that had already been made in the accounts. Later in the proceedings it proposed (Exhibit 28) that expenses be adjusted to include \$198,155 for annual cost of operation of the plant and \$53,920 for annual depreciation expense. The Intervenor, who contended that the plant should be excluded from the rate base, made it part of their contention that these new claims should be rejected, but they conceded that the adjustment of \$144,733 made in the accounts would then be inappropriate.

The Board agrees that the treatment of expenses relative to the plant should be that proposed by the Intervenor. The plant was not used for its primary purpose of peak shaving in 1969 and was not deemed by the Applicant to be operational until the last day of the year. Any effect it had on revenues and expenses was minimal and that lack of effect is reflected in the accounts, if one eliminates the adjustment of \$144,733 that was made in the accounts. If the Board did make an adjustment to the booked figures to provide for operating expenses and depreciation, it would also have to try to quantify the benefits of full annual operation and the Board does not think that the Applicant's normalizing adjustment of \$144,733 adequately measures such benefits.

In conclusion, the Board is satisfied that the right treatment of the plant is the normal treatment of a plant addition brought into operation at the close of the year. Therefore, the only adjustment to the booked expenses is elimination of the downward adjustment of \$144,733 that had been made in the books.

(h) Expense Adjustments Considered but Rejected

The Applicant asked for a normalizing adjustment for increased property taxes and proposed an amount of \$82,375. The Board is

satisfied that where a hearing is held in the year following the test year and increased taxes on the same property are made known to the Board, a normalizing adjustment would be appropriate. However, the Board cannot find on the evidence in this case that the Applicant's property taxes were in fact increased in 1970 over 1969, and must reject the Applicant's proposal for an adjustment.

An expense adjustment proposed by the Intervenors was to eliminate an item of \$47,932 for deferred gas costs from the expenses for the test year. In the year 1967 extra costs for gas, in the amount of about \$480,000, were incurred by the Applicant because of delays in completion of the "Great Lakes project" of American Natural Gas Company and TransCanada Pipelines Limited and the temporary inability of the Applicant to obtain normal supplies from the latter company. In its accounts, the Applicant is amortizing the extra cost over a ten-year period and the recorded expenses for 1969 accordingly include \$47,932 for the annual charge. The Intervenors contended that this was a cost relating to 1967 revenues and operations, did not concern the test year, and should be disallowed. It is the opinion of the Board that this is an extraordinary expense of large amount for which amortization is appropriate and that a ten-year period of amortization is not unreasonable. Accordingly, the proposed elimination from 1969 expenses of the annual amortization charge of \$47,932 is rejected.

(i) Summary of Operating Expense Adjustments

As appears from Table 1, all the operating expense adjustments as determined by the Board result in a net upward adjustment of \$377,302.

7. Amortization and Depreciation Adjustments Pertaining to Acquisition Premiums.

As discussed more fully under the heading of rate base, the board has had to consider the proper rate-making treatment of four acquisitions. These were (a) the acquisition, by purchase, of the utility property of Augusta Natural Gas Limited, in Augusta Township near Kingston, (b) the acquisition, by purchase, of the

utility property of Great Northern Gas Company Limited at Sault Ste. Marie, (c) the acquisition, by share acquisition followed by corporate amalgamation, of the property of Twin City, and (d) the acquisition, by share acquisition followed by corporate amalgamation, of the property of Lakeland.

The Applicant proposed that the full amount of all the acquisition premiums be included in the rate base, the amounts being accounted for as franchise costs in the case of the property acquisitions and as "acquisition adjustments" in the case of the share acquisitions. The Applicant did not, in its accounts for 1969, provide for any amortization expense with respect to any of the acquisition premiums. However, it proposed that the Board should do so in its rate-making decision and, in separate accounting proceedings, it has indicated that if amortization is allowed as an expense for rate-making, amortization will be provided for in the accounts.

The Applicant proposed that the annual amounts to allow for amortization should be:

Amortization of Franchise Costs		
Sault Ste. Marie	\$93,031	
Augusta	<u>158,073</u>	
		\$251,104
Amortization of Acquisition Adjustment		
Twin City and Lakeland		<u>296,012</u>
		<u>\$547,116</u>

The Intervenor submitted that none of the acquisition premiums should be allowed in the rate base and that none of the annual expense of amortizing them should be allowed in rate-making. As appears in these Reasons under the heading of Rate Base, the Board has decided that the acquisition premiums with respect to the Sault Ste. Marie and Augusta acquisitions and part of the premium with respect to the Lakeland acquisition should be allowed in the rate base. The amounts allowed in the rate base are to be accounted for as intangible plant, but not necessarily as franchise costs, and they should be amortized by appropriate

depreciation charges at rates determined by the probable duration of the benefits that justify inclusion of the premiums, or parts of them in the rate base. The Board has allowed in the rate base the total amount paid for the Augusta acquisition. In distributing the total amount to the accounts the Applicant has placed a value of \$250,000 on tangible plant, which is greatly in excess of the cost as recorded by the former owner. The Applicant did not submit to the Board very satisfactory evidence to justify such valuation but since the entire acquisition cost (\$3,253,389) is to be included in the rate base, it is not a matter of great importance whether the Applicant's figure of \$250,000 for tangible plant or a somewhat lower figure is used and the Board accepts the Applicant's figure. The amount for intangible plant is then \$3,003,389. In determining an appropriate depreciation rate, the Board notes that some of the benefits of the acquisition are of limited duration and that, although the major benefits are of indefinite duration, they are largely dependent on what one company, DuPont, may decide to do in future. A fairly high rate of depreciation is therefore appropriate and the Board has decided that the rate should be 5%. This will produce depreciation charges of \$150,169 per year.

The Board has allowed in the rate base the total amount paid for the Sault Ste. Marie acquisition. The Applicant's distribution of the total amount to the plant accounts is reasonable, except for an excessive valuation placed on old mains and services. The record in this proceeding does not provide the information necessary to determine precisely what the appropriate amount for old mains and services should have been and the Board has had to consider whether to reopen the hearing to have the appropriate evidence placed on the record. From the information now available to it, it appears to the Board that if this were done the overall effect on rate base and annual expense would be slight and that, therefore, it is better to deal with the problem in a separate accounting proceeding and accept in the present proceeding the figures for plant and depreciation as presented by the Applicant.

Its figures show an amount of \$1,860,620 for intangible plant. In the opinion of the Board the benefits that justify inclusion of this amount in the rate base are long term benefits and, accordingly, a fairly low rate of depreciation should be used. The Board has decided that a rate of 2% is appropriate and, accordingly, the annual expense for depreciation allowed for in this proceeding is \$37,212.

With respect to the Twin City acquisition the Board has decided that the acquisition premium should not be included in the rate base. The Board has therefore also decided that whatever provision is made under the Uniform System of Accounts for amortization of the acquisition premium, the amount is not includible in expenses for rate-making. It will be determined in separate proceedings under the Uniform System of Accounts.

With respect to the Lakeland acquisition, the Board has included \$4,000,000 of the acquisition premium in the rate base (subject to a reduction for two years' depreciation). This is being regarded as intangible plant subject to depreciation. In the opinion of the Board the benefits that justify inclusion of this amount in the rate base are long term benefits and the Board has therefore determined that the depreciation rate should be 2%. This results in an annual depreciation expense of \$80,000. The provision, if any, to make for amortization of the part of the acquisition premium that is not included in the rate base can be determined in separate proceedings under the Uniform System of Accounts. Whatever the annual amount may be, it is not an expense for the Board to take into consideration in rate-making.

The total amount of the annual depreciation charges on intangible plant to be allowed as expenses for rate-making is \$267,381, as shown in Table 1, Appendix C.

8. Other Depreciation Adjustments.

In its initial submission, the Applicant showed that its provision for depreciation, per books, in 1969, was \$2,412,262 and it proposed that the Board make an adjustment of \$8,446 to

this amount "to reflect net under provision of Accumulated Reserve for Depreciation during the year ended December 31, 1969, and recorded in other periods". The manner in which the Board has determined the appropriate depreciation provision for 1969, as explained below, makes it unnecessary to make the separate \$8,446 adjustment.

Subsequent to its initial presentation, the Applicant proposed that the recorded figures be adjusted to reflect revised rates of depreciation approved by the Board in 1970 and, in the opinion of the Board, such an adjustment is proper. The Applicant showed in Exhibit 28 that, at Board approved depreciation rates, and with the transfer of Ontario Division offices from the Toronto-Dominion Centre to Willowdale allowed for, the appropriate provision for depreciation in 1969 would be \$2,424,794.

The Applicant proposed a downward adjustment of \$74,175 in the annual provision for depreciation to reflect "non-utilization of certain assets". The assets to which the Applicant proposed to apply the adjustment were the Bruce Lake extension and all the depreciable property acquired at Sault Ste. Marie. The Board has on several occasions in the past been similarly asked to approve provisions for depreciation in amounts less than those resulting from the application of straight-line rates of depreciation, the rationale being that under-utilization of the property justifies a reduction in the provision for depreciation. In its 1964 Decision on Twin City and NONG the Board permitted this to be done "for a short period after the construction period". In its 1967 Decision on Lakeland the Board discussed the matter in more detail. It said:

"The 'utilization factor' may be described as a device used to justify provision for depreciation at less than straight-line rates in the early years of load build-up of an entirely new system. At first glance it appears to do violence to the concept of depreciation as a cost of service. Moreover, it is evident that if in fact it results in under-depreciation it produces an inflated rate base just as effectively as a direct appraisal write-up. Nevertheless, there is some sanction in accounting literature for the limited use of 'utilization factor' and the Board thinks it reasonable to apply such an adjustment in this case, to mains only, along with adequate depreciation rates. Although the application of the factor involves some rather arbitrary assumptions as to what con-

stitutes under-utilization, the Board has accepted the assumptions used by the Applicant."

In the opinion of the Board, there is no place for the utilization factor in this case in determining the appropriate annual provision for depreciation. Accordingly, the Board finds that the appropriate allowance for depreciation expense for the test year is \$2,424,794. The amount booked in 1969 was \$2,412,262 which therefore requires an upward adjustment of \$12,532.

9. Income Tax

In the past NONG and Twin City, at their request, had their rates regulated by this Board on the basis of "normalizing" income tax, i.e. treating as an operating expense for rate-making purposes not only the tax actually paid or payable but also the deferred income tax for the year resulting from the claiming of capital cost allowances for income tax purposes in excess of the depreciation recorded in the books of account.

In accordance with the Applicant's request in these proceedings, to which no objection was taken by anyone, the Board is disposing of the present application on the basis of including in operating expenses only taxes actually paid or payable (the "flow-through" method). The result is beneficial to present customers.

A change from normalization to flow-through treatment of income tax requires consideration of the regulatory treatment to give to the accumulated tax deferrals. This is the first time the Board has had to deal with such a change.

As outlined in the Board's decisions on the rates of NONG and Twin City, of Union Gas Company of Canada, Limited, and of United Gas Limited, the accumulated tax deferrals have been treated, for rate-making, as an interest-free loan to the utility, the benefits of which are to be shared by shareholders and customers. In these cases, the method used by the Board to bring about a sharing of the benefits has been to make a notional credit to income calculated by applying to the amount of the accumulated tax deferrals an interest rate derived from the average cost of the utility's

debt capital. With such treatment there is of course no deduction of the accumulated tax deferrals from the rate base, and the utility's share of the benefit of having an "interest-free loan" comes from earning a return thereon in excess of the "notional credit" to income.

The continuing need for attention to be given to accumulated tax deferrals was brought to the attention of the Board and all parties by Board counsel in his argument (transcript, pages 5526 to 5531). He submitted that there should be a notional credit to income or recognition in some other way of the special character of the income tax deferrals.

Counsel for the Intervenor (transcript, pages 5556 to 5557) expressed the view that upon a change to flow-through rate-making it would be proper not to make the credit to income. However, he expressed some reservations and concern and concluded by leaving the matter in the Board's hands.

The Applicant virtually ignored the problem until counsel for the Board made his submission about it. At that time the comments of counsel for the Applicant indicated a view that, in principle, upon a change to flow-through rate-making the accumulated tax deferrals should be ignored.

The Board does not think that accumulated tax deferrals should be ignored upon a change to flow-through rate-making. However, for reasons set out later (Part B, section 3), the Board is not treating them in this case in the same way as in the past. They are being taken into account in determining the reasonableness of the rate of return. Because of this different treatment, the Board's calculation of income for the test year does not provide for the notional credit of interest on accumulated tax deferrals.

10. Conclusion

As appears from Table 1 and for the reasons that have been set forth above, the Board has determined that the adjusted net operating income, i.e. the return to apply to the rate base for the test year, is \$9,870,742.

The Board accepts the Applicant's estimate of \$1,342,365 as the increase in revenue that would result from its proposed rate increases and, since such an increase in revenue would not put the Applicant in an income tax paying position and thus increase expenses, this is also the amount of the increased return. Thus, in testing the reasonableness of the proposed rates rather than present rates, the return figure to use would be \$11,213,107 i.e. \$9,870,742 plus \$1,342,365.

C. The Rate Base

1. The Legislation

The Board is required by section 19 of The Ontario Energy Board Act to determine, in fixing or approving rates, whether the rates produce or will produce a reasonable return on the rate base. That section states that the rate base is to include:

- (a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount deemed adequate by the Board for depreciation, amortization and depletion;
- (b) a reasonable allowance for working capital, and
- (c) such other amounts as, in the opinion of the Board, ought to be included.

The Act directs that, in determining a reasonable allowance for the cost of the property, the Board shall determine its actual cost to the present owner. It then lays down certain guidelines for determining whether the actual cost exceeds a reasonable allowance and for determining the amount of any excess.

2. The Year-end Rate Base

The concept of a return on a rate base, which in practice is expressed as a rate of return, implies a co-relation of time. Therefore, it might well be argued that when operating results for a given year are used to determine the return, the rate base

ought to be determined as of the middle of that year or as an average of a beginning-of-year and an end-of-year rate base.

The Ontario Energy Board, like many other regulatory boards, has followed the practice of applying the return for a given year to a rate base determined as at the end of the year. In the opinion of the Board, in the circumstances of increasing costs that exist today, it should continue its practice of using a year-end rate base. It has done so in this case.

3. Procedure for Determining the Applicant's Rate Base.

In its initial presentation, in Exhibit 11, the Applicant made its own submission of what the year-end rate base ought to be. The amount, \$126,303,821 is set forth in the first column of Table 2 of these Reasons. As the hearing progressed, certain adjustments were proposed by the Applicant (primarily set out in Exhibit 28) and certain adjustments and eliminations were proposed by the Intervenor. All these proposals were carefully considered by the Board in making its own determination of the rate base. The Board's adjustments and its finding of a rate base of \$116,586,250 are shown in Table 2 and the Board's reasons for its findings are hereinafter set forth.

4. Gas Plant in Service

The major element of the rate base is Gas Plant in Service. In its initial submission (Exhibit 11) the Applicant proposed that an amount of \$116,990,993 should be included. Subsequently, the Applicant proposed an adjustment with respect to office space and the Intervenor proposed the elimination of \$4,864,009 claimed by the Applicant for Franchises and Consents, \$4,650,589 for the Liquefied Natural Gas plant near Sudbury, and \$305,257 for the Liquefied Petroleum Gas plant at Sault Ste. Marie.

(a) Reduction re Office Space

During the course of the proceedings the Applicant proposed certain adjustments incidental to the proposal that the move to less expensive office space, carried out in 1970, be deemed to have been made in the test year 1969. The Board is satisfied that the adjustments ought to be made, in the amounts proposed. As set out in the notes to Table 2, the net adjustment is a reduction of \$672,585.

(b) Franchises and Consents

The Applicant's total amount of \$116,990,993 for gas plant in service includes an amount of \$3,003,389 for "Franchise Cost - Augusta Natural Gas" and \$1,860,620 for "Franchise Cost - Sault Ste. Marie", the two amounts coming to the \$4,864,009 which the Intervenor asked the Board to eliminate. Each amount results from the acquisition by the Applicant of an operating gas system at a price greatly in excess of the amount recorded in the accounts of the former owner for tangible plant or of the amount the Applicant thought reasonable to record in its own accounts for tangible plant. The amounts represent part of the actual cost of the systems to the present owner (the Applicant). For the Board to exclude them or any part of them from the rate base, it must determine that the total actual cost was more than a reasonable allowance for inclusion in the rate base. In doing so, the Board must be guided by subsection (ld) of section 19 of the Act, which provides that in considering whether the actual cost exceeds a reasonable allowance for inclusion in the rate base and in determining the appropriate deductions to make in respect of any such excess:

"the Board may consider all matters it deems relevant including the public benefit resulting from the acquisition of the property, whether the acquisition at the price paid was prudent in the circumstances existing at the time and, where the property was acquired as an operating system or part thereof, the allowance made for its cost in the rate base of the former owner or, if no such rate base had been determined that included an allowance for the cost thereof, the allowance that would have been made therefor in a rate base for the former owner determined in accordance with this section".

It is the opinion of the Board that, in considering whether the actual cost incurred by the Applicant for the Sault Ste. Marie or Augusta acquisition exceeds a reasonable allowance for inclusion in the rate base, particular attention ought to be given to the question whether the overall benefits are sufficient to offset the cost.

(i) Sault Ste. Marie Acquisition

The Board has carefully reviewed the evidence with respect to the Sault Ste. Marie acquisition. It had earlier become familiar with most of the relevant facts as a result of approving the municipal franchise and granting a certificate of public convenience and necessity under The Municipal Franchises Act at the time of the acquisition in 1967. The Board does not consider that in granting a certificate of public convenience and necessity it precluded itself from determining now, pursuant to section 19 of the Act and on the evidence now before it, that the actual cost of the gas system was more than a reasonable allowance for inclusion in the rate base. Accordingly, that question is being dealt with on the merits.

Until 1967, the Sault Ste. Marie system was one based on propane, not natural gas, and the owner had a gas distribution franchise that would not expire until 1977. For the public to have the advantages of an adequate supply of natural gas (which is less expensive than propane), it was necessary for someone to obtain a long-term supply of gas from TransCanada Pipelines Limited or some other supplier, install a natural gas distribution system (which might be in part a conversion of the old system) and aggressively promote sales, including profitable industrial sales. The former owner was not itself in the natural gas distribution business

in Ontario nor was it affiliated with companies that were, and it was relatively secure in its franchise rights. It cannot be assumed that, if it had not sold its system, it would have done as promptly or economically as the Applicant what had to be done to bring the advantages of natural gas to Sault Ste. Marie. Accordingly, it cannot be assumed that, in the absence of the acquisition, gas users at Sault Ste. Marie would now be receiving adequate and safe natural gas service from a modernized or new system at total costs to the distributor as low as the Applicant's (even including in the Applicant's costs the costs associated with the acquisition premium).

As a practical matter the Applicant could only become the gas distributor at Sault Ste. Marie by buying out the former owner at the best price it could negotiate. The Board had not at any time determined a rate base for the former owner and has not made in these proceedings a determination of what it would have allowed in such a rate base but, on the basis of either the booked cost of property to the former owner or a reproduction cost appraisal, there was an acquisition premium of almost half the total acquisition cost. It is necessary for the Board to consider whether some part or all of it should be excluded from the rate base on the ground that the total cost is more than a reasonable allowance.

The Applicant described the benefits of the Sault Ste. Marie acquisition but submitted that they could not be quantified in the same way as for the other acquisitions because some are not capable of quantification and others have not yet been fully achieved and cannot yet be satisfactorily assessed. The Board must therefore do its best to come to a conclusion on the basis of facts known to it that are of a more general character. The basic facts are that the Applicant acquired a propane-air distribution system, much of it very old, operated it as such for a year while preparing for the availability of natural gas from new facilities constructed by TransCanada Pipelines Limited and its affiliate, Great Lakes Gas Transmission Company, replaced a great deal of old plant that

was at or approaching the end of its useful life, converted the remainder to natural gas, installed several millions of dollars of new plant and took active steps to build up residential, commercial and industrial loads. In the result, the community has been provided with a good natural gas system, integrated with that of the Applicant elsewhere in Ontario, providing safe and adequate service at the same rates as in the Northern rate division of the Applicant.

Counsel for the Intervenor did not represent the City of Sault Ste. Marie and neither the customers at Sault Ste. Marie, nor the City on their behalf, intervened in the present case to say that anything less than the actual cost of the acquisition ought to be allowed in the rate base or that, for any reason, present or proposed rates at Sault Ste. Marie are too high. On the basis of the present rates, the feasibility study prepared by the Applicant in 1967 shows that, after providing fully for the total acquisition cost, the Sault Ste. Marie system would grow rapidly to a profitable position so as not to be a burden to the rest of the Applicant's system. The Board is satisfied that the ability of the system to do so is substantially aided by integration of its management and operations with those of the Applicant elsewhere in northern Ontario.

In the circumstances, the Board is of the opinion that there have been very substantial benefits flowing from the acquisition of the Sault Ste. Marie system and that they will increase in future. Although they are not quantifiable, the Board is of the opinion that they will offset the costs and therefore the Board finds that the actual cost is the reasonable allowance to include in the rate base.

(ii) Augusta Acquisition

In the case of the acquisition by the Applicant of the operating gas system in Augusta Township, there are some very unusual circumstances. Of the total cost only about \$250,000 was

entered in the Applicant's books for tangible plant and the remainder, \$3,003,389, was entered for intangible plant under the heading of franchise costs. These amounts are almost identical with the amounts specified for each class of plant in the contract of purchase.

The Board in 1961 determined a rate base for Augusta Natural Gas Limited as at December 31st, 1960 and in doing so found an amount of \$151,607 for net utility plant, in accordance with the booked costs of the company. There were no substantial plant additions and the Board is satisfied that the amount recorded in the books of the former owner at the time of the acquisition would be substantially less than the \$250,000 odd recorded in the Applicant's books.

The system had been owned and operated by Augusta Natural Gas Limited for the supply of gas to its parent company, DuPont of Canada Limited, and one other large industrial customer, Brockville Chemical Industries Ltd. The tangible plant consisted of little more than a fairly short pipeline. The things that made the acquisition very attractive were the favourable gas supply contracts held by Augusta Natural Gas Limited, the gas sales contract for sales of large volumes of gas to Brockville Chemical and, above all, the willingness of Augusta's other customer, DuPont, after making whatever changes were necessary in its gas burning equipment and its methods of operation, to purchase large supplies of gas from the new owner of the system in a way that fitted well with the gas supply and demand characteristics of the new owner and companies affiliated with it and at rates attractive to the new owner.

In the case of the Augusta acquisition the Applicant produced figures to quantify the benefits of the acquisition. These figures show that for the Ontario operations alone for some years to come the benefits are estimated to amount to \$476,000 per year. Other evidence shows that benefits amounting to about \$250,000 per year would also be received by the Applicant's subsidiary, GMI.

Operating costs are very small and a fair return on the total acquisition cost plus provision for annual depreciation charges would amount to very much less than the total estimated benefits.

The Board is satisfied, on the evidence before it, that it cannot reasonably question the business judgment of the Applicant in acquiring the Augusta system at the price it paid.

The Board has made adjustments in expenses to ensure that GMI will share the costs of the acquisition in approximately the same proportion as it shares the benefits. The Board is satisfied that with such adjustments and with the whole amount of the acquisition cost included in the rate base of the Applicant the annual costs resulting from the acquisition that are chargeable to Ontario gas customers will be more than offset by the benefits. The Board is therefore satisfied, in the very special circumstances of the case and notwithstanding the strikingly high amount of the acquisition premium, that the actual cost of the Augusta property is a reasonable allowance for inclusion in the rate base.

(c) Liquefied Natural Gas Plant, Sudbury

In proposing that the cost of the L.N.G. plant, amounting to \$4,650,589, be eliminated from the rate base, the Intervenor submitted that the plant was not available for use in the test year and had not been finally accepted from the contractor. This plant, a peak shaving plant at Hagar, near Sudbury, is an important part of the Applicant's system. Its treatment for rate-making has been considered earlier in these Reasons under the heading of the Annual Return and the important facts are there outlined. The Board is satisfied that it was useful during the test year and that in fact it was used, since the Applicant was storing gas in it in 1969. The Board is of the opinion that non-acceptance from the contractor does not justify its exclusion from the rate base and the inclusion of its cost in the rate base is approved by the Board.

(d) Liquified Petroleum Gas Plant, Sault Ste. Marie

The L.P.G. plant, a peak shaving facility, was acquired as part of the Sault Ste. Marie assets and its cost, less depreciation, was shown on the Applicant's rate base submission as \$305,257.

The Intervenor submitted that, since the plant had not been in use during the test year, its cost should be eliminated from the rate base.

The Applicant agreed that the plant had not been used for peak shaving during 1969 but stated that, since it was fully operational and had a supply of propane in storage, it was capable of such use. It was further submitted that TransCanada PipeLines Limited could not guarantee the availability of winter peak shaving gas in future years and thus the L.P.G. plant was a very necessary and valuable part of the system serving the heat sensitive (low load factor) Sault Ste. Marie market.

The Board is satisfied from the evidence that the L.P.G. plant was a useful standby facility during the test year. It is the Board's opinion that peak shaving of some nature is essential for the Sault Ste. Marie market and that this plant meets such a need.

The elimination proposed by the Intervenor will therefore not be made and the cost of L.P.G. plant is included as a part of the rate base.

5. Construction Work in Progress in Service

Although it is not obvious, from the title given to it by the Applicant, that this item of \$2,932,683 shown in Table 2 is one that is properly includible in the rate base, the Board is satisfied from the evidence given at the hearing that the amount is so classified because of an accounting lag and does in fact represent plant in service in the test year.

6. Retirement Work in Progress

As appears from Table 2, the Applicant has asked the Board to include in the rate base an amount of \$1,180,723 for "Retirement Work in Progress". It is a normal practice of a gas distributor in retiring property to first transfer its cost from plant in service to retirement work in progress and then, later, remove it from retirement work in progress by charging it to the depreciation reserve. The result for rate base purposes is the same whether the amount remains in the plant accounts with the depreciation reserve untouched or the amount is removed from plant and a like amount charged to the depreciation reserve. The Board is satisfied that the amount recorded for retirement work in progress at December 31, 1969 is sufficiently explained in the evidence as being the result of an accounting lag.

7. Abnormal Retirements

The Intervenor asked the Board to exclude from the rate base an amount of \$1,891,249 for retirements which had been charged to the depreciation reserve and which, in their submission, should be treated as abnormal retirements and be charged to retained earnings. The request was put forward when counsel for the Intervenor was dealing with Retirement Work in Progress but it was not directly related to that item. It was a separate claim based on consideration of all retirements in 1968 and 1969 of mains, services, meters, metering and regulating equipment and meter and regulator installations. He drew attention to the large amount recorded by the Applicant for retirements and submitted that the Applicant had not met the onus of adequately explaining the amount and that therefore it would be fair and reasonable for the Board to act in accordance with his proposal.

The Board asked the Applicant for explanations and the Applicant put in as Exhibit 155 a statement showing that retirements from Gas Plant in Service were:

1966	\$ 589,179
1967	594,270
1968	777,482
1969	1,707,311

A large part of the amount shown for 1969 retirements was explained in Exhibit 155 as follows:

"Retirements from GPIS at cost for rental equipment in the year 1969 includes an amount of \$325,712 which in fact wasn't a retirement at all but merely a transfer of equipment from NOAC to the Ontario Company. This item is shown as an addition and a retirement in the same year."

The retirements at Sault Ste. Marie were shown to be as follows:

	Mains	Services
1967	\$ 123,767	\$ 4,493
1968	10,377	-
1969	312,147	179,715

The Board is satisfied, after consideration of the explanations respecting the transfer of rental equipment, that except for the Sault Ste. Marie retirements the 1969 retirements of the Applicant are not abnormally large.

Upon careful examination the Board is satisfied that the amounts shown for retirements at Sault Ste. Marie are abnormally large for two reasons - an excessive valuation placed at the time of acquisition on tangible plant that was subsequently retired and an error in pricing at the time of retirement.

With respect to the excessive valuation placed on tangible plant at the time of acquisition the Board has found, as appears elsewhere in these Reasons, that the whole amount of the Sault Ste. Marie acquisition cost is a reasonable allowance for inclusion in the rate base. Therefore, an over-pricing of tangible plant simply implies an under-pricing of intangible plant which is also included in the rate base. Correction of the accounts would have little effect on the 1969 rate base and is not necessary for the

purpose of this proceeding. It will be made in a separate accounting proceeding.

Correction of the other error - an over-pricing of certain items on their retirement - involves restoring the same amount to Gas Plant in Service as to accumulated depreciation as at the date of the error and also would have little effect on the 1969 rate base and return. It will also be made in a separate accounting proceeding.

For the above reasons the Board rejects the submission of the Intervenor's that there should be a reduction from the rate base for abnormal retirements.

8. Lakeland Organization Expense

As appears from Table 2, the Applicant has asked that an item of \$444,048 be included in the rate base for "Lakeland Organization Expense - Net". In its 1967 decision on the rates of Lakeland the Board found an amount of \$494,761 under this heading and decided that the unamortized balance of \$463,838 was includible in the Lakeland rate base for 1965. The balance as at the end of 1969 (after amortization in accordance with the Board's 1967 decision) is \$444,048. The Intervenor's initially asked that this be eliminated from the Applicant's rate base on the ground that it should have been charged to retained earnings on the amalgamation of Lakeland with its former parent company, NONG. Later in the proceedings, (transcript, page 6002) the Intervenor's substantially withdrew this request and left the matter to the discretion of the Board.

The Board finds no good reason to question its earlier decision that the unamortized balance was properly includible in the Lakeland rate base and does not think that the amalgamation of the companies warrants any change in present rate base treatment. The Board therefore finds that the unamortized balance of \$444,048 is properly includible in the rate base of the Applicant.

9. Acquisition Adjustment, less amortization for 1969

As appears from Table 2, the Applicant has asked that there be included in the rate base for 1969 an amount of \$12,752,535 for "Acquisition Adjustment", less an amount of \$296,012 for "Amortization of Acquisition Adjustment" for 1969.

The amount of \$12,752,535 is the unamortized balance at December 31st, 1968, of the share acquisition premiums for Lakeland and Twin City, the two amounts making up the total being \$11,022,005 for Lakeland and \$1,730,530 for Twin City. No amortization was provided for in the accounts for 1969. However, the Applicant proposed that the Board provide for amortization at the Applicant's composite depreciation rate, which would produce an annual expense of \$296,012, and that this amount be included in the expenses for 1969, for rate-making purposes, and deducted from the amount of \$12,752,535 in determining the 1969 rate base.

The Intervenor's submitted that the acquisition premium should be excluded from the rate base and that therefore the amortization expense, if any, would not be an allowable expense for rate-making.

The Board's treatment of the Lakeland acquisition premium requires a fairly detailed discussion, because allowance or disallowance of the full amount or a substantial part of it would have a significant effect on the success of the application.

In February of 1965 NONG acquired 47% of the outstanding common shares of Lakeland for cash. In May of that year NONG purchased additional common shares and as a result of these two acquisitions and some limited cash purchases in the open market, it held substantially all of Lakeland's common shares before the end of 1965. The excess of the price paid for the common shares over their underlying book value, i.e. the acquisition premium, after amortization of about \$730,000 to retained earnings in 1966 to 1968, inclusive, was \$11,022,005.

The Board is required by the statute to determine the "actual cost to the present owner" of its property that is used or useful in serving the public.

Under The Corporations Act (Ontario), which was applicable at the time of amalgamation, the amalgamating companies "are continued as one company". This concept of continued existence of a company after its amalgamation with another leads to a problem under the legislation which requires the Board to determine "actual cost to the present owner", in that it supports an argument that Lakeland (as a continued company) is the present owner and that, accordingly, for the Board's determinations, actual cost to the present owner is the actual cost to Lakeland. This argument would not permit the inclusion of any part of the acquisition premium as cost to the present owner.

On the other hand, the cost of the shares of Lakeland to NONG (one of the amalgamating companies which was "continued" after the amalgamation) clearly included the acquisition premium, and it is certainly arguable that the shares have, on the amalgamation, been replaced by the Lakeland property.

Finally, however, it is clear that the present owner is the present Applicant and it does appear to the Board that, for the purposes of this decision, it should treat the "actual cost" of the Lakeland property to the Applicant as including the acquisition premium.

The next step is to decide whether such actual cost of the Lakeland property is more than a reasonable allowance for inclusion in the rate base for the cost of that property.

One of the matters that the Board may consider in determining whether part of the cost of property should be excluded from the rate base is "whether the acquisition at the price paid was prudent in the circumstances existing at the time". The Board finds it difficult in dealing with the Lakeland acquisition

to draw useful conclusions from consideration of this aspect, because prudence might be affected by the correctness of the Applicant's assessment of regulatory treatment of the acquisition premium. However some observations can be made as to the circumstances existing at the time. Lakeland was a viable independent gas distributor with approximately 10,000 customers. It was apparently well financed, had a large undeveloped sales potential and was earning a reasonable rate of return. Its common shares were rated by the stock market and could be freely sold by their owners to other investors at a large premium over their book value. The market price was in fact about three times book value.

NONG was as free as any other potential investor to acquire the shares. Although NONG paid somewhat more than market price in order to obtain control, it was not necessarily imprudent in doing so because its control enabled it to integrate the operations with its own and make possible substantial savings that could not be effected with Lakeland operated independently.

The Act provides that, among other things, the Board may consider the allowance in the rate base of the former owner. In its 1967 decision on the rates of Lakeland, the Board made a determination of rate base as of December 31, 1965, and, in doing so, it was neither asked to nor did it in fact make any allowance for the acquisition premium, which was then slightly more than the amount of \$11,022,005 now recorded in the accounts of the Applicant. The Board has taken note of its earlier decision but considers that what is most helpful, in deciding whether all or any part of the acquisition premium should be excluded from the rate base in this proceeding is an examination of the savings resulting from the acquisition.

The evidence indicates that the integration of operations commenced under share control and completed under amalgamation, produced significant savings in the expenses that would have been

incurred if Lakeland were operated independently. These were the result of a lower cost of purchased gas, substantially lower operation and maintenance expense, somewhat lower head office administrative and general expense and, possibly, of marginally lower costs of financing. The savings in expense come mainly from a reduction in the number of employees required to manage and operate the system. Although the evidence clearly supports the finding that substantial savings have been achieved, the Applicant had some difficulty in demonstrating the amount. The supporting evidence has to be largely opinion evidence because a comparison has to be made between an actual situation and a somewhat hypothetical one. The integration of operations, which was commenced after share control was obtained by NONG and was aided by the statutory amalgamation on January 1st, 1968; was substantially completed by the end of 1969 and, in the opinion of the Board, the savings to consider should be the specific quantifiable savings achieved by that time. The Applicant submitted a figure of \$502,000 (Exhibit 51) as its estimate of the annual savings achieved as of 1969.

The Board agrees substantially with the claim for savings estimated to result from a reduction in the number of employees and management salaries and expenses. However, the Board does not think that the large amount claimed by the Applicant for savings in gas costs has been established by the evidence. The Applicant contended that major savings would result from the ability of the combined operation to transfer gas to the Lakeland area and maintained that with the companies operated separately, neither such transfers nor alternative "dump" sales of excess gas would be possible. While the Board is satisfied that some reduction in gas costs would result, it is not convinced that the assumptions used by the Applicant in quantifying gas transfer savings are reasonable. With respect to savings in the form of lower interest rates, the

Board is of the opinion that the amount claimed by the Applicant is excessive.

On careful consideration of the supporting evidence the Board finds that a reasonable estimate of the specific quantifiable savings achieved as of 1969 is \$400,000 per year.

The annual costs of service attributable to inclusion in the rate base of all or a portion of the acquisition premium would include not only the fair return thereon but also the amortization expense. If the Applicant were in an income tax paying position, increased income tax would also have to be considered. However, the Applicant is not in such a position and the evidence is that it will not be until some distant and indefinite time in the future. Consideration of income tax in the calculations in this case would only introduce unnecessary complications of a highly speculative nature.

It is apparent that with the full amount of the acquisition premium included in the rate base, any reasonable return and provision for amortization would result in costs of service greatly exceeding \$400,000 per year. The Board is therefore of the opinion that the actual cost of the Lakeland property (which includes the full amount of the acquisition premium) exceeds a reasonable allowance for inclusion in the rate base. However, in view of the savings involved, the Board considers it appropriate that some part of the acquisition premium be included in the rate base.

In the circumstances of the Lakeland acquisition, the Board is of the opinion that the Applicant's customers have the right to expect that the rates paid by them for the same service should not be higher merely because there has been a change in the corporate ownership or structure of the gas distributor. On the other hand, they should expect that, if the new owner has incurred new capital costs in order to acquire the system and integrate it into other gas distribution operations and has produced substantial

savings as a result, the new owner ought to be allowed to keep at least part of these savings as compensation for the additional capital costs it has incurred.

Accordingly, the Board considers that it would be acting fairly to both the gas customers and the shareholders if it included such part of the acquisition premium in the rate base as would balance estimated savings with the annual costs, comprising a return and amortization expense, associated with the amount of the premium included in the rate base. It is not possible to achieve a perfect relationship between the savings and the rate base. Such relationship changes from year to year. The aim of the Board is to produce a reasonable relationship over the fairly clearly foreseeable future.

The Board is of the opinion that inclusion in the rate base, as of January 1, 1968, of a part of the acquisition premium amounting to \$4,000,000 would achieve the appropriate relationship between savings and rate base over the foreseeable future. The amortization expense (as provided for in these Reasons for Decision in Part C, section 7) would be \$80,000 per year and the unamortized balance in the rate base at the end of 1969, i.e. after two years of amortization, would be \$3,840,000.

The Twin City acquisition and the resulting premium, while similar in some respects to the Lakeland acquisition and premium, have many points of difference.

The circumstances surrounding the Twin City acquisition are known to the Board in somewhat more detail than as presented at the hearing, as a result of evidence presented to the Board by NONG and Twin City at Certificate of Public Convenience and Necessity proceedings and at the earlier NONG-Twin City rate hearing and as a result of explanations given in early Annual Reports of NONG.

As early as 1954 several companies, among them NONG and Twin City, were studying the feasibility of providing gas service to .

communities in northern Ontario located close to the proposed TransCanada Pipelines Limited transmission line.

NONG, formed in May, 1954 had, by mid-June 1956, acquired gas franchises for a chain of municipalities throughout western and northern Ontario and was in the process of obtaining Certificates of Public Convenience and Necessity from the Ontario Fuel Board which would allow it to construct gas transmission and distribution systems.

Twin City had by that time acquired gas franchises for the Cities of Port Arthur and Fort William (now Thunder Bay) as well as the Towns of Geraldton, Nipigon and Dryden and had applied to the Fuel Board for Certificates of Public Convenience and Necessity preparatory to distributing gas in these communities.

Port Arthur and Fort William were very important potential markets and franchise rights in these communities were significant to the overall feasibility of gas distribution in northern Ontario.

Apparently NONG and Twin City officials considered that a combination of effort would be mutually beneficial and it was disclosed to the Fuel Board at the Twin City certificate hearing referred to above that, on June 14, 1956, (over a year before construction commenced and over a year and a half before a supply of gas was available from TransCanada in the Twin City area), NONG had acquired approximately a 50% interest in Twin City. The evidence adduced at that hearing left no doubt that NONG then had effective control of Twin City.

In late 1957, in order to honour what Lakehead residents considered a commitment by Twin City, that company sold shares to local residents which had the effect of reducing the NONG holdings in Twin City to about 31 percent. In mid 1958 NONG acquired most of these shares through a share exchange offer giving it, at that time, about 78% of the outstanding shares. Most of the remaining shares were obtained by NONG from the President of Twin City through a further share exchange in 1960.

The Board notes, as set out in its Reasons for Decision in the earlier NONG-Twin City rate hearing that 253,595 Twin City shares were acquired for \$99,400 in cash and that the remaining 520,737 shares were acquired as a result of exchange arrangements under which NONG issued its shares in exchange for Twin City shares. It is apparent that most of the acquisition premium arose as a result of the share exchange agreements which occurred subsequent to NONG acquiring effective control of Twin City.

In the consolidated balance sheet of NONG, and subsequently in the balance sheet of the Applicant after the statutory amalgamation, the excess of the recorded cost to NONG of the Twin City shares over the underlying book values of those shares was recorded as Intangible Assets Arising from Acquisition. It is commonly referred to as the acquisition premium. No provision was made for its amortization until 1966 and, although provision was made in 1966, 1967 and 1968 the practice was then discontinued, with the result that most of the original amount recorded remains on the books.

In its 1964 Decision on the rates of NONG and Twin City the Board did not allow the inclusion, in the rate base, of the acquisition premium which was then \$1,809,058. The chief reason given by the Board for disallowing the premium was its stated preference for an original cost rate base.

Under present legislation the Board must, of course, start with actual cost to the present owner and then decide whether this cost is a reasonable allowance for inclusion in the rate base. For the reasons outlined earlier, in its examination of the Lakeland acquisition premium, the Board will treat the "actual cost to the present owner" of the Twin City property as including the acquisition premium. In determining whether all or part of that portion of the actual cost that represents the acquisition premium should be excluded in arriving at a rate base, the Board is involved in a balancing of investor and customer interests and should be guided by the Act as presently worded. The decision should not depend on

what method of accounting was used. Nor should it depend on how the matter was treated in an earlier rate base finding, although that is one of the matters to consider.

In the Board's opinion the circumstances do not warrant treating the Twin City acquisition in the same way as the Lakeland acquisition, i.e. by balancing the costs and benefits of the acquisition. As the board has stated, at the time of acquisition Lakeland was a well financed independent gas distributor with a large sales potential and had demonstrated its economic viability. The board was able to estimate and compare its total cost of service with the cost of service resulting from the integration of its operations with those of NONG. Twin City, on the other hand, never did exist as an independent operating gas utility. Construction of its system could not commence before the Fuel Board issued Certificates of Public Convenience and Necessity and, as mentioned, NONG acquired control of Twin City before that time. Both companies were then in the initial pre-construction stage and it appears to the Board that their investors combined their interests in expectation of greater future profits resulting from the inclusion of the Twin City communities as a part of integrated gas distribution operations throughout northern and western Ontario. The combination did not result in any significant cash burden being thrown on NONG in the form of interest charges or preferred share dividends and there is no reason to conclude that NONG's subsequent earnings per common share were any less as a result of the share exchange than if it had not taken place.

The Board has concluded that it would be inappropriate for it to speculate as to how Twin City might have developed as an independent company under different circumstances and as to its hypothetical cost of service and the savings, if any, attributable to NONG control.

Upon consideration of the circumstances the Board has con-

cluded that the actual cost to the Applicant of the Twin City property, which includes the acquisition premium, exceeds a reasonable allowance for inclusion in the rate base by the amount of the premium. It is therefore unnecessary to determine whether the provision made in the accounts for writing off or amortizing the acquisition premium has been adequate and whether the amount presently recorded in the accounts for the acquisition premium is appropriate.

To sum up the Board's conclusions as to the Lakeland and Twin City acquisition premiums, the Board has determined that the reasonable allowance in the 1969 rate base for that part of the actual cost of the Lakeland property that pertains to the acquisition premium is \$3,840,000, and that no allowance should be made in such rate base for that part of the actual cost of the Twin City property that pertains to the acquisition premium. The Applicant's proposed amounts, and the Board's adjustments, are set out in Table 2.

10. Contributions in Aid of Construction

In earlier decisions of the Board, it has concluded that the part of the cost of plant that is paid for by a customer by a contribution in aid of construction should be deducted from the "utility plant" element of the rate base. As indicated in Table 2, the Applicant has presented its figures to the Board in this way and the Board has accepted them. The amount is \$885,107.

11. Summary - Utility Plant

As appears from the foregoing discussions and from Table 2, the amount allowed in the 1969 year-end rate base for Utility Plant is \$123,830,755.

12. Accumulated Depreciation - Gas Plant

Earlier in these Reasons, (section 8 of Part B) the Board has discussed the treatment of depreciation as an expense for 1969. The Board concluded that for the purposes of this case, it should use the annual provision that would have been made at Board-approved rates had they been in effect - an amount which, in the result, is very little different from the amount recorded. As appears from Table 1, the adjustment amounted to \$12,522.

The Board considers that it should in this proceeding give consistent treatment to depreciation expense and the depreciation reserve and, accordingly, an upward adjustment of \$12,532 is also made in the reserve.

In addition to the adjustment to the reserve, explained above, to reflect use of Board-approved depreciation rates in 1969, an adjustment to the reserve is necessary to reflect the treatment being given in this Decision to the move of the Ontario Division to less expensive office space. The move was made in 1970 but is being deemed to have been made in the test year, 1969. With removal from plant of the property at the old location, the accumulated depreciation amounting in all to \$40,745 must also be removed from the reserve.

The two adjustments explained above amount together to a net reduction of \$28,213 and this is shown on Table 2, together with the Board's resulting figure for "Accumulated Depreciation - Gas Plant" of \$11,119,912.

It appears to the Board that the amount of the depreciation reserve as submitted by the Applicant is too low because of initial over-valuation and also because of a pricing error on retirement of certain old plant at Sault Ste. Marie but, as explained elsewhere in these Reasons for Decision (Parts B7 and C7) it is not necessary to make an adjustment for the purpose of this Decision.

13. Accumulated Depreciation - Applicant's Adjustment of \$8,446

Table 2 shows as a separate item in the Applicant's figures, under "Accumulated Depreciation", an amount of \$8,446 headed "Adjustment". The amount is very small and represents correction of a certain under provision for depreciation in the 1969 accounts. With the Board's treatment of the principal item of "Accumulated Depreciation - Gas Plant", which substitutes Board-approved 1969 figures for those recorded in the accounts, the under provision in that year is corrected.

14. Amortization of Franchises

The Applicant proposed that the intangible plant portions of the Sault Ste. Marie and Augusta acquisitions, stated by it to be \$1,860,620 for the former and \$3,003,389 for the latter, be treated in this proceeding as if they were being amortized by annual charges to the depreciation reserve of \$93,031 for the former and \$158,073 for the latter, commencing in 1969. The Applicant provided for these amounts in its claimed expenses for 1969, and for their addition to Accumulated Depreciation as at December 31, 1969. The two amounts come to \$251,104, the figure shown in Table 2 for the Applicant's proposal for "amortization of franchises".

As explained earlier in these Reasons (Parts B7 and C4b) the Board has accepted the amounts proposed by the Applicant for intangible plant but has made its own determination of appropriate annual depreciation charges, being \$37,212 per year, commencing in 1968, for Sault Ste. Marie and \$150,169 per year for Augusta, commencing in 1969.

The Board's figures for Sault Ste. Marie (\$74,424) and Augusta (\$150,169) amount together to \$224,593 as shown on Table 2.

15. Net Utility Plant

The Board's findings with respect to the provision for accumulated depreciation, namely \$11,119,912 under the heading of "Gas Plant", and \$224,593 under the heading of "Amortization of Franchises", give a total of \$11,344,505. Upon deducting this amount from the Board's figure of \$123,830,755 for Utility Plant, the amount for net utility plant, as shown on Table 2, is \$112,486,250. This is the main component of the rate base.

16. Working Capital

The Act requires the Board to include in the rate base a "reasonable allowance for working capital". In earlier decisions, the Board has discussed proper components of a working capital allowance in the rate base of a gas distributor and how the amounts should be estimated.

If a gas distributor does not engage in fringe activities, two principal components are "Materials and Supplies" and "Cash Requirements". One additional component may be necessary to provide for funds tied up in gas purchases, because "Cash Requirements" does not normally take such funds into account. "Cash Requirements" is an estimate of the amount required to take care of the time lag between the incurring of operating expenses, other than gas purchase costs, and the receipt of revenues. An assumed time lag of 45 days has been somewhat hallowed by precedent. The cost of gas purchased is a very large item and cash requirements for it need to be dealt with separately from cash requirements for other operating expenses because the time lag might be quite different. On industrial sales, there may be no time lag at all between the time the distributor pays the supplier and the time it collects from the customer. On other sales, the time lag is not necessarily 45 days. Some of the Board's earlier decisions indicate how a specific allowance for cash requirements for purchased gas can be estimated and the Applicant might well have prepared its working capital submissions in accordance with the methods therein indicated. It did not make a specific claim for working capital allowance for gas costs, but did make a claim, of a kind criticized by the Board in the past, for an allowance for overdue accounts, and the Board must do its best to arrive at a reasonable allowance for working capital on the evidence before it.

Where a gas distributor, like the Applicant, engages in fringe activities, such activities give rise to items that are properly included in the allowance for working capital. Some, like "Mortgages Receivable", may be very large.

The Applicant's initial claim for an allowance for working capital (Ex. 11) was broken down into ten items, coming in all

to \$4,399,181, as shown below.

1. Allowance for Overdue Accounts	\$1,187,844
2. Materials and Supplies	553,786
3. Natural Gas Storage	36,627
4. Prepayments	43,153
5. Accounts Receivable	801,376
6. Mortgages Receivable	1,770,022
7. Contributions for Customer Conversion	144,206
8. Allowance for Doubtful Accounts	(407,801)
9. Security Deposits and Refundable Contributions	(348,512)
10. Cash Requirements	<u>618,480</u>
11. Total Working Capital	<u>\$4,399,181</u>

Later (Ex. 28) the Applicant revised the above claim. It submitted, and the Board accepts, that the working capital allowance should include a provision, overlooked in the preparation of Exhibit 11, for Average Appliance Inventory. The Applicant asked that an amount of \$189,654 be included. The Applicant also pointed out that its claim for cash requirements was subject to revision if adjustments were made by the Board to the Applicant's claimed operating expenses, because "Cash Requirements" is calculated as one-eighth of operating expenses (excluding gas purchases). As a result of disallowance by the Board of part of the amount claimed by the Applicant for operating expenses, the Applicant's claim for "Cash Requirements" would be slightly less than the amount of \$618,480 shown above. Thus, with provision for this and inclusion of an amount for Average Appliance Inventory, the Applicant's total claim would be somewhat less than \$4,600,000.

There was no serious criticism of the amounts claimed by the Applicant under its items 3, 4, or 6 or the amounts proposed by it under items 8 and 9 for reductions.

The Intervenor submitted that the amounts claimed for "Customer Conversions" and "Cash Requirements" should be totally disallowed. In addition they contended that the amount claimed

for "Allowance for Overdue Accounts" was excessive by an amount of \$391,513. With the proposed eliminations and reduction, the Intervenor submitted an amount of \$3,456,481 as a reasonable allowance for working capital.

The Board has considered the proposal of the Intervenor for elimination of \$144,206, representing cash advances by the Applicant with respect to certain "Customer Conversions" and is satisfied that, since associated revenues are included in the earned return for the test year, the amount of \$144,206 should be included in the working capital allowance.

The Intervenor also claimed that the item of "Cash Requirements" should be eliminated because there was in fact in 1969 "a substantial negative cash position for several months". In the opinion of the Board, this consideration is not relevant and does not provide a proper ground for questioning the amount claimed by the Applicant for inclusion in the rate base for "Cash Requirements".

With respect to the "Allowance for Overdue Accounts", the Applicant, in calculating its proposed allowance, started with the amounts outstanding at the end of each month of 1969, and then made adjustments to the amounts for the first eight months to show the Applicant's estimates of what the amounts would have been had forfeiture of discount for late payment of bills been in effect then, as it was in the last four months. Upon the cross-examination of Mr. Kerr, it appeared that there were serious weaknesses in the assumptions or methods used to calculate the amounts of the adjustments. In particular, there is reason to think that the adjusted figure for January, 1969, was excessive by \$346,107. The lack of an adequate explanation of the adjusted figure for January, 1969, throws doubt on the figures for other months and, accordingly, on the twelve months average.

The Board has had available to it from the record the amounts outstanding for overdue accounts for each of the first six months

of 1970. By making use of these figures instead of the questionable adjusted figures for 1969 in arriving at an average over a one-year period, the Board finds the Applicant's claim of \$1,187,844 for "Allowance for Overdue Accounts" is excessive by somewhere between \$75,000 and \$100,000. The Board is satisfied that the use of an average of the last four months of 1969, as proposed by the Intervenor, gives an inadequate figure, because it is clear from the record that those are the months when overdue accounts are at their lowest level.

Although the Board is of the opinion that the Applicant's claim for an "Allowance for Overdue Accounts" is not excessive by more than about \$100,000 for the reasons discussed above, it considers the claim to be objectionable on other grounds. The Board has on previous occasions criticized the calculations by gas distributors of amounts for "Allowance for Overdue Accounts" to include in the rate base. The attempt to include an item under this heading brings about unnecessary confusion by mixing up the regulatory concept of working capital requirements with the accounting concept of "Working Capital", and the Board is dealing with the Applicant's claim under this heading only as an unsatisfactory substitute for a legitimate claim for "Cash Requirements - Gas Purchases". In doing so, the Board finds that the claim is exaggerated not only because of the weaknesses pointed out by the Intervenor, but also because it contains an element of "mark-up" that has no place in an estimate for rate base purposes of the Applicant's cash requirements.

The Board's objection to the inclusion of an amount for mark-up applies not only to the Applicant's claim for "Allowance for Overdue Accounts" (\$1,187,844) but also to the claim for "Accounts Receivable" (\$801,376). After making a deduction, as proposed by the Applicant, of an amount for "Allowance for Doubtful Accounts" (see item 8 of the Applicant's claim), the Board finds that the net amount of that part of the Applicant's

claim for working capital from which mark-up should be eliminated is about \$1,600,000. The Board is satisfied that mark-up forms a very substantial part of this amount.

The Board does not think that it is required to, or should, attempt to support a finding of an overall working capital allowance by precise detailed findings of amounts for the components. The presentation by the Applicant of a detailed analysis of its estimated requirements is indeed helpful to the Board in determining an overall allowance, but it must not be assumed that acceptance without argument of the figure for any component implies that that is the precise amount that the Board thinks is needed. For example, a detailed study of the time lag actually experienced by the Applicant might well show that the amount for "Cash Requirements", calculated to the nearest dollar as one-eighth of allowable operating expense, excluding gas costs, is only a very rough approximation of working capital needs under this heading.

In conclusion, upon careful consideration of the weaknesses in the evidence supporting the Applicant's overall claim, the Board finds that a reasonable allowance in the rate base of the Applicant for working capital is \$4,100,000.

17. Unamortized Deferred Rate Hearing Expense

The Board is satisfied that rate hearing expenses borne by the Applicant are includible in the cost of service charged to customers and should be amortized. However, counsel for the Applicant was unable to provide the Board with any precedent, in Ontario or elsewhere, for including the unamortized amount in the rate base. The expenses are not incurred all at once and, moreover, they should be amortized over a fairly short period. In the opinion of the Board the unamortized amount should not be included in the rate base. As appears from Table 2, the amount to eliminate from the rate base figures, as initially submitted by the Applicant, is \$192,452.

18. Purchasing Power Adjustment

The Applicant presented evidence to show an amount that might be allowed in the rate base to compensate the Applicant for the effect of inflation. This evidence was in the form of a table headed "Purchasing Power Adjustment as at December 31, 1969" (Exhibit 23), which purported to show that if an inflation factor were applied to the net plant investment for each of the years 1959 to 1969 inclusive, there would be a "purchasing power adjustment" of \$18,461,524 to add to total net plant investment, at the end of 1969, of \$118,039,841. The table also purported to show that if the purchasing power adjustment were applied only to net plant investment represented by the common stock equity (30.96 percent of the whole, as per Mr. Joseph) an appropriate amount would be \$5,715,688.

When presenting this evidence, the Applicant did not make it clear whether its purpose was merely to show how reasonable the other claims of the Applicant were or whether it was asking that this be received as a separate claim, additional to the others. However, the matter was clarified by counsel for the Applicant in his argument. He referred to the manner in which this Board had considered the effect of inflation in former decisions and said that, although the Board had indicated that it preferred to deal with the matter in the allowable rate of return, it had left the door open to future consideration of an inflation factor in the rate base and had indicated how it might be so treated. He said that the evidence presented was for the purpose of enabling the Board to make an adjustment in the rate base for past inflation if it thought fit to do so. He conceded that the amount could not properly be brought in under a "reasonable allowance for the cost of the property" (section 19(lb)(a) of the Act) but would have to be brought in under "such other amounts as, in the opinion of the Board, ought to be included" (section 19(lb) (c)). He agreed that the amount of the adjustment, if made, should be determined by reference to the equity portion of the investment.

The Intervenor strongly opposed the inclusion of the proposed purchasing power adjustment in the rate base. In addition to criticizing assumptions used in calculating the amount of \$5,715,688, counsel for the Intervenor put their objections on the ground that inflation would be adequately allowed for in other ways. The Board notes that its use of a year-end rate base, rather than a mid-year or average rate base, benefits the Applicant by at least as much as the amount of the claimed "purchasing power adjustment". Further, inflation is a phenomenon affecting the whole economy and the Board, in determining a reasonable return on the equity for the Applicant, has had regard to the actual returns on the equity of other companies.

For the foregoing reasons the Board is of the opinion that in this case it should make no specific allowance for inflation.

19. Conclusion

The Board finds that the rate base, for use in these proceedings, is the sum of \$112,486,250 for net utility plant and \$4,100,000 for working capital allowance. The total is \$116,586,250.

D. The Return on the Rate Base

The annual return for the test year on the basis of present rates has been found by the Board to be \$9,870,742 and the rate base has been found to be \$116,586,250. This return on this rate base can be expressed as a rate of return of 8.47%.

On the basis of the increased rates proposed by the Applicant the return would be greater by \$1,342,365 and the rate of return would amount to 9.62%.

E. The Reasonableness of the Return

1. Introductory

It has become a common practice to test the reasonableness of a public utility's over-all return on the rate base, expressed as a percentage, by reference to what might be called the public utility's composite cost of capital, which is derived from the annual cost of each capital component. With respect to debt and preference share capital, the embedded cost as of the test year for interest and fixed dividends can be determined and, with relatively minor adjustments for other costs that have been incurred and for current costs of new capital required in the immediate future, an annual cost can be determined with some precision. With respect to the common share equity, the "cost" figure used is the percentage return that is found to be reasonable for the public utility, after consideration of its particular characteristics and of the returns earned by investors in other securities. The cost is different for each kind of capital and therefore the various capital components must be weighted when determining a composite cost of capital.

In the present case there are unusual difficulties in determining a composite cost of capital that would be useful in testing the reasonableness of the rate of return on the rate base. If the Applicant were wholly an Ontario gas distributor, its own financial statements could normally be expected to provide nearly all the information needed for determining the capital components and the percentage rates to use for the cost of debt capital and preference share capital. However, the Applicant is not such a company and it cannot even be correctly described as a public utility holding and operating company. One of its most important subsidiaries, CIGOL, is not a public utility at all. Moreover, although GMI is a public utility, it has an abnormally high proportion of debt in the capital employed by it.

The special difficulties in this case affect both the weighting to be given to each capital component and the determination of

the annual cost for each component. One of the main reasons for this is that the Applicant has in recent years, when the cost of money has been very high, raised large sums of money for use by its subsidiaries outside Ontario.

In the result, the Board was asked to consider widely differing proposals, all subject to some weakness, as to the weighting to be given to each capital component and the cost (or reasonable return) on each component.

2. Capital Structure

The principal submission of the Applicant - and the one on which it relies - was a study prepared by and introduced in evidence by Mr. Joseph and explained on cross-examination by Mr. McElfresh. Among other things this study (Exhibit 16) purports to show the year-end capital structure (including short-term debt) as at December 31, 1969, adjusted to July 2, 1970. It shows that, after the adjustments, the amount of each capital component, as a percentage of the whole, would be

Long-term debt	51.74%
Short-term debt	2.41%
Preference shares	14.89%
Common share equity	30.96%

Dr. Hanson, who had been retained by the Board for the purpose, presented his own rate of return study. It had been prepared along much the same lines as the Joseph study but differed from it in some important respects. Whereas the Joseph study was based on the corporate capital structure, the Hanson study was based on a fully consolidated capitalization for the Applicant and its subsidiaries. Dr. Hanson's study (Exhibit 145) showed that, for the year 1969, the amount of each capital component, as a percentage of the whole, was

Long-term debt	61.8%
Preference shares	14.4%
Common share equity	23.8%

Dr. Hanson said that the 1969 proportions would change somewhat with subsequent financing and he submitted that the following

capital structure would be a realistic guide in fixing the rate of return for 1970 and 1971

Long-term debt	62%
Preference shares	13%
Common share equity	25%

Dr. Hanson submitted that the consolidated capitalization is preferable to the corporate capitalization because it is the one investors look at. Counsel for the Applicant dealt with this point by saying (transcript page 4681) that

"It does not seem to me that what the investors look at really bears any particular relationship to what is the appropriate capitalization for the purpose of ascertaining what the rate of return should be.

Now, in looking at it from that point of view, while the corporate capital structure is obviously not perfect in that ... in the equity and in the debt it includes money raised for purposes other than the Ontario division, the consolidated capitalization is even worse in that respect because it includes money raised by CIGOL or GMI which, under no stretch of the imagination, could have any relationship to the Ontario division.

It was money raised for their own particular businesses even before Northern and Central acquired any interest in their company.

We would submit that the corporate capitalization is the best one for use in this hearing."

Upon examination of the Joseph study the Board finds some serious weaknesses. The corporate capitalization includes the common equity arising out of the exchange of parent company common shares for those of its subsidiaries. It does not, however, include any of the debt or preference share capital issued directly to the public by these subsidiaries prior to the acquisition. Consequently the result is to show an excessively high common equity ratio in Mr. Joseph's calculation of the capital structure. Moreover, the Joseph study contains an important adjustment to the actual corporate capitalization as at December 31, 1969; it shows the capitalization as it would have been at that date if the bond and share financing that was in fact done in 1970 had been done on December 31, 1969. Without the adjustment the capital components at December 31, 1969, were

Long-term debt	37.7%
Short-term debt	21.3%
Preference shares	14.8%
Common share equity	26.2%

The amount of short-term debt outstanding at any particular time varies very widely and it seems clear that at December 31, 1969, the amount outstanding was very large. A normalizing adjustment is not inappropriate. However, the method used by the Applicant tends to over-correct in two ways. In the first place, just as the amount of short-term debt is likely to be abnormally large just before long-term financing, so is it likely to be abnormally small immediately after. Secondly, in a normalizing adjustment it would appear to be reasonable to take account of the amount of short-term debt accumulated from the end of 1969 until the dates of the 1970 financings.

With regard to the Hanson study, it appears to the Board that his approach might well be the most appropriate one if the Applicant were a public utility operating and holding company, with its operating division and its subsidiaries very similar to each other. This is not the case. CIGOL is not a public utility and its capital structure differs from that of a normal public utility. GMI is a public utility, but has an abnormally high proportion of debt and its inclusion in a consolidated capitalization gives weightings for capital components that are not appropriate to apply in a cost of capital study for Ontario operations.

Because of the above-mentioned weaknesses in both the Joseph and Hanson studies, the Board thinks it appropriate to make a study of capital assignable to Ontario operations. However, the Board does draw certain general conclusions from its consideration of the Joseph and Hanson studies, namely, that the appropriate weighting for the common equity capital component would be somewhere between Mr. Joseph's 30.9% percent and Dr. Hanson's 25 percent and that the appropriate weighting for debt would also lie somewhere between Mr. Joseph's 54.15 percent (long-term and short-term combined) and Dr. Hanson's 62 percent.

In making a study of capital assignable to Ontario operations

the Board has been greatly assisted by a study carried out by the Applicant's witness, Mr. Sheeres, in response to a request from counsel for the Intervenor. This was put in as Exhibit 123. Mr. Sheeres drew attention to the large measure of judgment involved in making his study and counsel for the Applicant did not rely on it. Counsel for the Applicant said (transcript, page 4681):

"Now it is the company's submission that the appropriate capitalization for the Board to use in this hearing is the capitalization submitted in their material, and that is the capitalization of the corporation."

Referring to the capitalization in Mr. Sheeres' study (Exhibit 123) as the hypothetical capitalization, he added:

"They submit that the capitalization, the hypothetical calculation, is so hypothetical as not to represent any real capitalization at all, and it just does not represent any accurate picture of what the capitalization should be, although in fact the one submitted is not really substantially different from the corporation capitalization."

The Intervenor did not accept the results shown in Exhibit 123, but made use of the information obtained from it and from cross-examination of Mr. Sheeres to develop their own submission. After criticizing Mr. Sheeres' assumptions, counsel for the Intervenor made a number of assumptions and adjustments of his own and concluded (transcript, page 5247) that of the total common share equity of the Applicant, very little has anything to do with Ontario operations and that "there is, in fact, very little common equity employed in Ontario". He asked the Board to use the following weightings for the various capital components:

Long-term debt	76.8%
Short-term debt	5.8%
Preference shares	13.6%
Common share equity	3.8%

The Board is of the opinion that important assumptions and adjustments made by counsel for the Intervenor were not appropriate or not reasonable and that, accordingly, the conclusions are not useful for the purposes of this proceeding. Nevertheless, the information obtained by counsel for the Intervenor in Exhibit 123 and in his cross-examination of Mr. Sheeres is valuable.

Exhibit 123 is set out in full in Table 3 of these Reasons. It provides the following figures to use for the various capital components:

Long-term debt	56.2%
Short-term debt	nil
Preference shares	11.7%
Common share equity	32.1%

As indicated earlier, the Board reached a general conclusion, from examination of the Joseph and Hanson submissions, that an appropriate weighting for common share equity would be somewhat less than the 30.9% percent proposed by Mr. Joseph. Consequently, the manner in which Mr. Sheeres arrived at the larger figure of 32.1 percent has been examined very closely by the Board.

In his testimony regarding Exhibit 123 (transcript, commencing at page 3214) Mr. Sheeres explained that he started with the figures in the Joseph study, i.e. corporate capitalization adjusted for 1970 financing, and then eliminated certain items to obtain a total capitalization that "more closely resembles the total rate base for Ontario operations". Mr. Sheeres' total amount for Ontario Capitalization is \$134,962,000. The Applicant's initial rate base claim (Exhibit 11, section 4, page 1) was \$126,303,821 and its revised claim (Exhibit 2A) was \$125,907,895.

In the opinion of the Board, the main weakness in Mr. Sheeres' assumptions lies in his treatment of the 1970 financing. He assumed that the amount of that financing, \$62,071,000, was used to replace most of the short-term debt that was outstanding at December 31, 1969, and that most of that short-term debt was attributable to operations outside Ontario. However, in making his eliminations of capital employed outside Ontario, he eliminated most of the new debt but none of the new equity capital. The effect was to exaggerate the weighting to be given to common share equity in the "Ontario Capitalization". Mr. Sheeres' explanation for attributing all the 1970 common share financing to Ontario operations is set forth at pages 3220 to 3221 of the transcript as follows:

"The reason for that is that there has been eliminated from the common share capital of \$56,177,000 at December 31st, 1969, the issue of common shares which is included in that figure that related to the share acquisitions of Greater Winnipeg Gas and Canadian Industrial Gas and Oil and I think it is patently obvious that had Northern and Central not issued its common shares in those acquisitions it would have been necessary for Northern and Central, prior to March 1970 ... to make a common share issue for cash in order to keep its capitalization of the Ontario company without its subsidiary within the realms of reasonability."

In the opinion of the Board, the need for the Applicant to do new common share financing is affected by the amount of debt financing it has done in the recent past, as banker for its subsidiaries, and if most of the debt financing it has done has been done for the subsidiaries outside Ontario it is unreasonable to attribute no part of the new common share financing to operations outside Ontario.

The Board appreciates Mr. Sheeres' difficulties in trying to trace dollars and cannot itself do so. To determine with precision either the total amount of capital assignable to Ontario or the amounts of each kind of capital so assignable, it would be necessary to completely divorce the Ontario capitalization from the Applicant's total capitalization on both a corporate and a consolidated basis. Such a procedure, for the Applicant in this proceeding, is probably impossible and even if possible, could well produce an unreasonable result. If useful conclusions are drawn by the Board from the Sheeres' study they must be tempered by the conclusions drawn from other evidence. The Joseph and Hanson studies, as well as the Sheeres study, are therefore used by the Board in arriving at its own determination of a reasonable weighting of the elements of capital attributable to the Ontario operations.

Upon consideration of all the evidence the Board finds that for the purposes of this case, the weighting to be given to common share capital ought to be 29 percent. It remains to consider how the remaining 71 percent ought to be divided among the other forms of capital.

Mr. Sheeres' weighting of preference share capital was 11.7%, much lower than Mr. Joseph's figure of 14.89% or Dr. Hanson's 1969 figure of 14.4%, and even lower than Dr. Hanson's proposed adjusted figure for 1970 and 1971 of 13%. It is a matter of some importance whether a high or a low figure is determined because, as appears later in these Reasons, the Applicant's cost of preference share capital is substantially less than its cost of debt. The reason Mr. Sheeres' weighting figure of 11.7% is lower than the others is that most of the preference shares of the Applicant were issued to obtain the funds for purchase of the GMI common shares and he eliminated them from the Ontario Capitalization. In the case of these preference shares, as in some other cases, it is possible to trace dollars with some confidence and, in the opinion of the Board, the circumstances justify assigning a weight of 12% for preference share capital.

Because short-term debt is temporary financing and fluctuates widely, the Board is of the opinion that it does not warrant inclusion as a separate capital component. There is ample precedent in regulatory practice elsewhere for this. The Board notes that in the case of the Applicant in particular the trust deed for the bonds requires that current indebtedness be eliminated periodically.

For the foregoing reasons the Board finds on consideration of all the evidence that the appropriate weighting of the components of the Applicant's capital structure to use in these proceedings is as follows:

Long-term debt	59%
Preference shares	12%
Common share equity	29%

3. Accumulated Tax Deferrals

Although the reasonableness of the rates of NONG and Twin City was determined in the past on the basis of normalized treatment of income tax, the reasonableness of the Applicant's rates is being determined in this case on the basis of flow-through treatment.

The Board's 1964 Decision on the rates of NONG and Twin City indicated that part of the benefits of the accumulated tax deferrals were to be passed on to customers, in the form of a notional credit to income. A fundamental question for the Board to determine is whether benefits to customers from the regulatory treatment of past tax deferrals should be discontinued merely because, in regulating rates for the future on a flow-through basis, the Board would not take account of further accumulations. The Board can see no reason why such benefits should be discontinued on that ground.

In the case of the Applicant another question arises, namely whether its customers should lose the benefits from the regulatory treatment of accumulated tax deferrals on the ground that the Applicant did not set aside the amount of such deferrals in its accounts. Since January 1, 1967, when the Uniform System of Accounts for Gas Utilities became applicable to NONG and Twin City, those companies were required, subject to certain exceptions, to set aside income tax deferrals in a separate account, but they were not required to do so prior to that date and they did not do so. In its 1964 Decision the Board expressed its concern as to the propriety of allowing normalized income taxes in the case of NONG and Twin City because they did not set up the accumulated deferred income taxes in their accounts as a liability but rather only referred to the liability in footnotes to their balance sheets. Under those circumstances, the Board was concerned with the possibility that the accumulated deferred income taxes might be dissipated in the form of dividends or other distributions and would not then be available in the years in which the deferred

taxes might become payable. However, the Board decided that the accounting procedures of NONG and Twin City should not determine the issue and that, for rate-making purposes, the normalizing treatment of income taxes was appropriate for them. The Board sees no reason why, in the present proceeding, it should give the Applicant preferred treatment on the ground that it did not record the accumulated tax deferrals in a separate account. They should be treated in the same way as if they had been so recorded.

In the present case, the Board sees merit in using a different method than it has used in the past for distributing the benefits of accumulated income tax deferrals between shareholders and customers.

A method that is better known to the general body of investors has been used by the U.S. Federal Power Commission and other regulatory tribunals and the Board considers it appropriate for use in this case. That method provides that, in determining a reasonable overall rate of return, the accumulated tax deferrals, as a separate capital component, are allowed to earn at a rate considerably lower than the rates for other capital components. The rate used is largely a matter of judgment and determines the division of benefits between shareholders and customers.

In determining the amount of the accumulated income tax deferrals it is necessary to decide when they ceased to accumulate. This is not a matter that was put in issue by the Intervenor and the Board therefore does not consider it unfair to them to rely on its background of knowledge in deciding it.

In its 1966 annual report to shareholders, issued early in 1967, NONG, on behalf of itself and subsidiaries including Twin City, stated that "with the introduction of Ontario Regulation 245/66 by The Ontario Energy Board, effective January 1, 1967, the company and its subsidiary, Twin City Gas Company Limited, intend to apply to the Board to have their expenses reviewed on a basis that allows, as a cost of service, only those taxes payable in respect of the year under examination".

By a formal request to the Board, by letter dated September 15, 1967, NONG and Twin City requested "that the Board reconsider its previous decision with respect to the treatment of deferred taxes and permit both companies to adopt the flow-through method".

Since that time the Board has granted extensions of time, from year to year, for compliance by the Applicant with the requirement in the Uniform System of Accounts that tax deferrals be recorded in a separate account.

Although the formal application for a rate review was made in 1970 and is being decided in 1971, the Board is of the opinion that, in dealing with the specific problem of regulatory treatment of the Applicant's income tax deferrals, it is reasonable to dispose of that problem as if the application had been made and decided in the year in which the Applicant stated that it would not thereafter claim deferred taxes as expenses for rate-making. On this basis the Board has deemed that, for rate-making purposes, income tax deferrals ceased to accumulate at the end of 1966. This conclusion is based on all the circumstances of this case and is not regarded by the Board as a precedent applicable in other circumstances.

The rates of Lakeland were never regulated on the basis of "normalizing" income taxes and there are no income tax deferrals from the operations of that company that are required to be taken into account by the Board in this proceeding. The accumulated tax deferrals for NONG and Twin City, as at the end of 1966, as shown by Exhibit 88 and Exhibit 17, item 42, total \$6,500,200.

The evidence indicates that the accumulated tax deferrals must be regarded in this case as being included in the common share equity capital and, because they will be treated differently by the Board from other common share equity capital, it is necessary for the Board to segregate them in its cost of money analysis and to determine an appropriate weighting.

As stated earlier in these Reasons, the Board cannot make a precise determination of the amount of capital of the Applicant assignable to Ontario operations. Mr. Sheeres' study (Table 3 of these Reasons) shows an amount of \$134,962,000 but this was not intended by him as anything more than an approximation of the capital assignable to Ontario operations, closely resembling the total rate base for such operations. The Board is satisfied that a reasonable figure for Ontario Capitalization would probably be somewhat more than the Applicant's claimed rate base (Exhibit 28) of \$125,908,895. By reference to an amount for Ontario Capitalization of \$130,000,000, which the Board considers to be a reasonable approximation, the Board finds that the appropriate weighting to be given in a cost of money study to accumulated tax deferrals of \$6,500,200 is 5%.

The Board therefore finds that the 29% weighting for common share equity of the Applicant is the sum of 5% for accumulated tax deferrals and 24% for the remainder.

4. Cost of Money

(a) Cost of Debt Capital

In considering the cost of (or a reasonable allowance for) debt, preference share capital, and common share equity capital the Board has before it a great mass of evidence contained in the Joseph study (Exhibit 16), the Hanson study (Exhibit 145) and the testimony of several witnesses, including in particular Mr. Barlow, Mr. Joseph, Mr. McElfresh, Mr. Siewright, Mr. Sheeres and Dr. Hanson.

With respect to the cost of debt and preference share capital there was general agreement that the initial consideration is the embedded cost to the Applicant. Nevertheless, because the objective was approached in different ways, widely different results were produced.

In the Joseph approach, using the corporate balance sheet of the Applicant, all the long-term debt issues of the Applicant

up to the end of 1970 were considered. In the cases where common share purchase warrants had been issued with debentures or notes, the actual annual cost (i.e. interest plus amortization of discount and expenses) was not used but, rather, an estimate of the higher cost that would have been incurred if warrants had not been issued with the debt. The difference was referred to in the evidence as the "cost of sweeteners". In the result the Applicant asked the Board to find that its embedded cost of debt was 8.09%. Toward the conclusion of the hearing the Applicant also asked the Board to give consideration to its January, 1971, debt financing, the cost of which was clearly not less than the coupon rate of 9 5/8%.

The Board does not think that the Joseph approach produces a figure that is appropriate for use as the embedded cost of debt for Ontario operations of the Applicant because it averages the early low-cost debt that was incurred solely for Ontario operations with not only the later high-cost debt incurred for such operations but also the very substantial later high-cost debt incurred for GMI and Greater Winnipeg.

In the Hanson approach, using the consolidation of the Applicant and its subsidiaries, all the long-term debt of all the companies was considered. Dr. Hanson testified that the cost of about 8.1%, using the unconsolidated approach, would become about 7.4% using the consolidated approach.

Both Mr. Joseph's and Dr. Hanson's calculations of the cost of debt capital include provision for the cost of sweeteners. The Board is satisfied from the evidence that sweeteners made the notes and debentures to which they were attached much more attractive to investors and that without them the securities would have sold at a discount or at a higher interest rate. However, the Board thinks it appropriate, in determining the embedded cost of debt, to use the actual cost rather than an estimated higher amount.

Counsel for the Intervenor submitted that the embedded cost of debt to use in these proceedings should be the cost of the

debt capital employed in Ontario operations. This cannot be determined with precision because it is impossible to trace the proceeds of all the recent debt issues. Nevertheless it seems reasonable to the Board to assign to Ontario operations all the debt issued by the Applicant before it acquired GMI and Greater Winnipeg and to estimate Ontario's share of recent debt issues. In this way a reasonable approximation can be made of the cost of debt capital assignable to Ontario operations.

If the same eliminations of debt were made from corporate capitalization as were made by Mr. Sheeres in Exhibit 123 (Table 3 of these Reasons), the cost of the remaining debt would be 7.19% (Exhibit 141). The removal of the cost of sweeteners included in this remaining debt cost would reduce the amount of 7.19% to approximately 7.1%. The Board fully appreciates that the Applicant does not rely on these exhibits as a basis for calculating either the debt capital assignable to Ontario operations or the cost thereof and that Mr. Sheeres drew attention to the large measure of judgment that was necessary in assigning the proceeds of particular securities to particular operations. The Board has therefore examined the assumptions very carefully. In some cases they can be firmly supported but in some other cases they appear to rest solely on Mr. Sheeres' judgment, and other assumptions, equally valid, would produce a figure slightly in excess of 7.19%, even after removing the cost of the sweeteners. In particular, Mr. Sheeres eliminated all of the 9½% debentures issued in 1970, although the evidence indicates that the use of some of the proceeds was related to Ontario operations. The inclusion of a reasonable part of that issue, and removal of the cost of the sweeteners, justifies a finding of 7.2% as a reasonable figure to use as the embedded cost of long-term debt capital, as of 1970, assignable to Ontario operations.

If it had not been possible to determine a reasonable estimate of the cost of debt capital assignable to Ontario operations, the Hanson approach would have provided an alternative,

i.e. the embedded cost of all debt of the Applicant and its subsidiaries. With removal of the cost of sweeteners, the Hanson figure of 7.40% would become approximately 7.25%. In the opinion of the Board the reasonableness of using its own figure of 7.2% for capital assignable to Ontario operations is supported by the adjusted results of the Hanson study.

As stated in the 1967 Lakeland Decision of the Board some allowance should be made for current costs of anticipated new financing. In that Decision the Board said:

"The evidence shows that, whether new debt financing is done by the Applicant or by its parent company, the annual cost of the net proceeds will be approximately 7%. The capital expansion program will require each year a substantial amount of funds beyond what will be generated internally. Precise estimates cannot be made of the amounts or the cost of money and the Board is of the opinion that an increase from 6.35% to 6.45%, as the average cost of debt, makes reasonable allowance for the current costs of new borrowed funds required for the foreseeable future."

At the close of the proceedings in the present case the Applicant filed as Exhibit 158 the prospectus for the issue of \$50,000,000 of 9 5/8% debentures made in January, 1971 and, from this, the Board estimates that the Applicant's annual cost of this issue for interest and for amortization of discount and expenses is about 10%. This is almost the same as the cost to the Applicant, 9.97%, of its \$20,000,000 of 9 1/2% debentures issued in July, 1970. The evidence in these proceedings, with which the Board agrees, is that interest rates for long-term debt will not drop substantially in the foreseeable future. Thus it can be reasonably concluded that the Applicant's cost of long-term debt after 1970 has been and will be much higher than its 7.2% embedded cost of debt as of that year. There remains the problem of what weight to give to new debt in these proceedings when adjusting 1970 embedded costs to reflect anticipated new financing at substantially higher costs.

As appears from Exhibit 17, item 67(b), capital expenditures of the order of \$8,000,000 to \$10,000,000 per year are planned for Ontario operations in 1971, 1972 and 1973.

It seems obvious to the Board that internally generated funds, such as retained earnings and the provision for depreciation and amortization, will not provide nearly enough money for capital expenditures at the level planned. The Board thinks it reasonable to use a rate of 7.5% in these proceedings as the Applicant's cost of long-term debt, rather than the rate of 7.2% that has been found to be the embedded cost of long-term debt as of 1970.

Some high-cost new debt of the Applicant will be issued to replace some lower-cost old debt retired in accordance with sinking fund obligations and in some cases this does not appear to impose a substantial real burden, at least for the immediate future. The reason for this is that the Applicant can, in carrying out its sinking fund obligations, purchase the old securities on the market and, so long as high interest rates continue, the market price of the old securities will remain low. The Board is unable, on the evidence, to quantify the "benefit" the Applicant will receive from this source in future. Even if it could, only a part could fairly be allocated to Ontario operations. However, the matter is not unimportant; the accounts show that in 1969 the Applicant included in its income for the year an amount of \$235,931 for "gain on sinking fund investments".

Similarly, the Applicant's accounts for 1969 recorded a "gain on redemption of preference shares" of \$41,888. It is reasonable to assume that further such gains will be made in future and that the redemption of shares that makes the gains possible will be one of the causes of a need for high-cost new financing.

The Board has recognized in a general way the probability of further gains of both kinds by giving somewhat less weight in these proceedings to the cost of anticipated new debt financing than it would otherwise have done.

(b) Cost of Preference Share Capital

The Applicant's preference share capital, as at December 31, 1969, consisted of:

First Preference Shares

First Series	\$ 7,352,000
Second Series	2,015,000

Convertible Second Preference Shares

Series A	6,840,000
Series B	<u>32,939,000</u>
	<u>\$49,146,000</u>

The small issue, i.e. First Preference Shares, Second Series, originated in an issue by Lakeland in 1963, prior to the amalgamation of NONG, Twin City and Lakeland in 1968. The First Preference Shares, First Series, and the Second Preference Shares, Series A, originated in issues by NONG in 1965 and it is clear from the prospectuses that the proceeds of these issues were to be used primarily in connection with the Lakeland common share acquisition.

The Second Preference Shares, Series B, which account for two-thirds of the preference shares of the Applicant, were issued for the specific purpose of retiring bank loans aggregating \$33,000,000 obtained in 1967 to finance the acquisition by NONG of 2,300,189 common shares of GMI.

In the case of the preference share issues of the Applicant, the tracing of the initial use of the funds can be done better than in the case of debt issues. Reference to the prospectuses shows that only a small part of the proceeds of the first three issues was initially used for subsidiaries outside Ontario and that all of the proceeds of the later issue were so used. However, the Board is of the opinion that initial use of the funds should be only a guide to a fair allocation of cost to Ontario operations and, therefore, that confirmation of the reasonableness of the results is desirable. This was obtained in the case of debt,

because the average cost of debt allocated to Ontario operations was almost the same as the average cost of all the debt of the Applicant and its subsidiaries. In the case of the preference shares, however, the results are not so nearly the same.

The two issues of second preference shares had sweeteners, in the form of rights to convert the preference shares into common shares, and Mr. Joseph, in his calculation of the annual cost to the Applicant, showed what the cost would be if non-convertible, instead of convertible, shares had been issued. The Board is satisfied from the evidence that the convertibility feature was attractive to investors and that, without it, the shares would have sold at a substantially lower price or would have carried a substantially higher dividend rate. However, the Board is concerned with the embedded cost of the shares that were actually issued, and it does not think that the calculation made by Mr. Joseph is appropriate.

Mr. Joseph's evidence, based on all the preference shares of the Applicant and including his provision for the "cost" of sweeteners, was that the embedded cost to the Applicant for preference share capital is 7.17%. The Board finds that, with the provision for sweeteners removed, his rate would be 5.9%.

Dr. Hanson testified that, on the consolidated basis (i.e. using the average cost of preference share capital for the Applicant and its subsidiaries), the embedded cost of preference share capital would be about 6.7%, rather than 7.17%. Using his approach the Board finds that, with the provision for sweeteners removed from the cost of the Applicant's preference share issues, his rate would be 5.8%.

The Intervenors submitted that the issue of Second Preference Shares, Series B, should not be included, since the proceeds were used for the purchase of common shares of GMI, and that there should be no provision for the "cost" of sweeteners in calculating the cost of the Second Preference Shares, Series A. With removal of the Second Preference Shares, Series B, and no provision for the

cost of sweeteners with respect to the Second Preference Shares, Series A, the result would be a rate of 5.1% for the cost of preference share capital assigned to Ontario operations.

In the opinion of the Board, with such wide differences between the said figure of 5.1% and the figures of 5.8% and 5.9% (obtained, after appropriate adjustments, from using the Joseph and Hanson approaches, respectively) judgment must be exercised by the Board in determining a fair figure to use in these proceedings for the cost of preference share capital. On the one hand, it seems unfair to Ontario gas users that the costs chargeable to them should be suddenly and substantially increased by reason of a major acquisition program outside Ontario at a time of high cost money. On the other hand, it must be recognized that, in the long run, funds cannot be traced. Even though the initial disposition of the funds from a particular issue is known, the particular financing vehicle chosen is affected by all the past financing and affects both the kind and the cost of future financing. Thus a large equity issue, whether preference or common, may well lay the groundwork for future debt issues at lower cost than would otherwise be the case.

The Board accordingly finds that a fair rate to use in these proceedings for the cost of preference share capital is 5.5%. The Board is not aware of any present plans for additional preference share financing and does not think any upward adjustment of the rate of 5.5% is warranted to take account of the substantially higher cost of preference share capital that would be incurred on a new issue at the present time.

(c) Reasonable Return on Accumulated Tax Deferrals

The rate to apply as a return allowance on the accumulated tax deferrals is largely a matter of judgment, aided by precedent. The object is to make a fair division between customers and the utility, of the benefit of the use of interest-free funds, and the effect of the methods that have been in most common use has been to give to the utility the smaller part, if any, of the benefit. A rate

that was used by the Federal Power Commission in the past and was adopted by a number of other U.S. regulatory commissions was 1½%.

As stated earlier, the Board does not regard the amount of the Applicant's accumulated tax deferrals, \$6,500,200, as any less firm, in a rate-making proceeding, than if it had been set up in a separate account. Nevertheless, the Board does recognize that much of it was accumulated during a time when the Applicant was getting established as a profitable gas distributor. Consequently the Board finds, in exercising its discretion as to an appropriate return allowance on the accumulated tax deferrals of the Applicant, the rate should be 3%.

(d) Reasonable Return - Common Share Equity Capital and Over-all.

With the weight given to embedded costs in determining the appropriate return for debt and preference share capital, the need for the exercise of judgment, in determining a "fair" or "reasonable" over-all rate of return, becomes heavily concentrated in the area of the fair return on common share equity capital.

The general principles have been laid down by the Courts. The Supreme Court of Canada, in the Northwestern Utilities case, 1929, 2 D.L.R., stated that

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

The American jurisprudence provides three tests of a fair return, namely, the attraction of capital standard, the maintenance of integrity of investment standard, and the comparable earnings standard. However, these standards are not mutually exclusive.

Dr. Hanson said, in his evidence, that

"In a sense, the capital attraction principle subsumes other principles, for if earnings are not comparable to those in alternative investments deemed to be of similar risk, if they are insufficient to meet contractual obligations (financial integrity), and if regulatory policy is unpredictable, capital cannot be attracted to an enterprise except on exorbitant terms."

In applying the principles laid down by law it is necessary to consider many financial and other characteristics of the utility under study and a broad array of data pertaining to alternative investments. In the present case, the Board has had the benefit of the data compiled in the Joseph and Hanson "Rate of Return" studies and the interpretation of the data by expert witnesses. In addition, the Board has of course had the whole body of evidence to rely on when considering the particular financial and other characteristics of the Applicant that are relevant to the studies.

In looking at the results of other companies for guidance as to what rate of return is fair, it is generally agreed that comparability is affected by a number of important factors. Upon cross-examination by counsel for the Intervenor, Mr. McElfresh mentioned equity ratio, risk (presumably business risk), kind of industry, size of company, outlook for the company, market environment, regulatory attitude, past performance, accounting policies and financing policies. Another factor, related to equity ratio but sometimes considered separately, is the interest coverage ratio.

The Board has carefully examined the data compiled by Mr. Joseph and Dr. Hanson and the testimony of the expert witnesses both on the initial presentation of the material and on cross-examination. Further, the Board has found it necessary to review their testimony in the light of the Board's own treatment of capital structure and of returns other than on common share equity capital. In this connection, it should be observed that the Board has determined capitalization ratios and rates of return on debt and preference share capital that it deems appropriate for the Ontario operations of the Applicant and that the figures are different from those deemed appropriate by Mr. Joseph (resulting from use of the corporate financial statements) or by Dr. Hanson (resulting from use of the consolidated financial statements). The Board's approach has the effect of producing figures for the embedded cost of debt and preference share capital that are lower

than the figures of Mr. Joseph or Dr. Hanson. The Board considers that, to be consistent, its allowance on common share equity capital should take account of the business and financial risks of Ontario operations alone, but the Board recognizes that, as Dr. Hanson said (in Exhibit 145), "investors cannot buy into the Ontario gas utility as a separate entity". The conclusions of Mr. Joseph and Dr. Hanson as to the reasonable rate of return on common share equity capital might well have been different if they had used the same approach that the Board has used.

The conclusion of Mr. Joseph and Mr. McElfresh, after a review of a wide range of alternative investments in the United States and Canada, was that a return on the Applicant's common equity capital of 14% would be reasonable.

Dr. Hanson's study was of much the same kind and scope as Mr. Joseph's but his comparison groups were not all the same and he drew somewhat less specific conclusions from the data. However, it appears to the board from a perusal of his evidence on cross-examination that, in his view, 12½% would be a reasonable rate to allow for the Applicant's return on common share equity capital. In a draft of his study, which had been prepared in July, 1970, and distributed to interested parties early in the proceedings, Dr. Hanson had indicated his opinion that, with a common equity ratio of 25%, a return of up to 14% on the Applicant's common share equity capital might be appropriate. In explaining, on cross-examination, why he used a lesser figure in his study prepared in September, (Exhibit 145), he said (at page 3908 of the transcript) that

"The basic answer is that was the period of very great uncertainty in the stock market and the New York market was scraping bottom. The Canadian market was scraping bottom and a number of people expected the market to go down some more; nobody knew whether it was at the bottom or not, but now that uncertainty has been reduced and the common stock prices have gone up."

On cross-examination Dr. Hanson agreed that a low equity ratio, other things being equal, calls for a higher rate of return

on common share equity capital, but said he no longer thought that a wide spread in rates of return was needed. He thought a spread from 11½% to 14% for Canadian gas distributors was appropriate and might even be exceeded in rare cases for special reasons, such as the need to provide for adequate interest coverage. He agreed that earnings higher than 14% are actually achieved by some Canadian gas distributors which have a relatively high common equity ratio (as compared to the Applicant), but indicated that in his view those earnings are higher than necessary to meet the tests of a fair return.

In making its own determinations from all the evidence, including the opinions of expert witnesses, the Board has had to give special attention to several matters that deserve particular comment. One of these is the common equity ratio.

The conclusion of the Applicant's expert witnesses that 14% would be a reasonable rate of return for the Applicant to earn on its common share equity capital was undoubtedly influenced by the common equity ratio they used, viz. 30.96%.

Dr. Hanson agreed that his figure for common equity ratio (i.e. 25%), was relatively very low for a gas distributor and also that the Applicant's interest coverage (i.e. times debt charges earned before income tax) was not very satisfactory. He indicated his view that a coverage ratio of two times, although not essential, would be desirable for a gas distributor and he agreed that the Applicant has fallen short of this.

According to the data furnished in the Joseph and Hanson studies, the common equity ratio for gas distributors tends to fall in the range of 30% to 40% and, according to the evidence, the rate of return on common equity capital tends to be noticeably higher for a low equity ratio than for a high one. This is because of the greater financial risk associated with a lower equity ratio. Very few gas distributors have a common share equity ratio as low

as 24%, the ratio found by the Board to be appropriate for use in these proceedings, and this circumstance strongly supports the need for a relatively high rate of return on the Applicant's common share equity capital.

Another matter that would have affected the conclusions of the Applicant's witnesses and of Dr. Hanson was their inclusion of the cost of sweeteners (common share purchase warrants and rights to convert preference shares to common) in their calculations of the embedded costs of debt and preference share capital. In the opinion of the Board, the cost to the Applicant of the sweeteners is a cost resulting from potential dilution of the value of the common shares and some allowance for this cost should be provided for in the return on the common share equity capital. It is not possible to determine a precise amount to allow, but it is worth noting that the allowances made by both Mr. Joseph and Dr. Hanson in calculating the annual cost of debt and preference share capital were very substantial. The Board recognizes that determination of a fair rate of return for the Applicant by reference to earnings of other companies takes sweeteners into account to some degree, because some of the other companies would presumably have share purchase warrants or conversion rights, or both, outstanding. However, when it is known that the Applicant has kept down its costs of debt and preference share capital by issuing a very substantial amount of warrants and conversion rights, with some consequent potential dilution of the value of its common shares and therefore of the ability of the Applicant to raise new common share capital on reasonable terms, it seems obvious that this is a special circumstance that must be taken into account in determining a reasonable rate of return on the Applicant's common share equity capital.

Another important factor to consider in this case, when comparing the Applicant's return on common share equity capital with returns earned by other companies, is business risk. The

Applicant submitted that its business risk is somewhat greater than that of many other gas distributors because of the very high percentage of its sales to large industrial users, in many instances in relatively small communities. The mere fact of a high percentage of sales being made to industrial customers suggests some degree of business risk, and that such risk exists in the case of the Applicant is apparent from the effect of major strikes in 1969. Further, another aspect of the matter deserves consideration in this case; it was expressed as follows (transcript, page 4665) by counsel for the Applicant:

"Furthermore, Northern and Central is peculiarly liable because of the nature of its market to the loss of residential and commercial customers as a result of an industrial shutdown. In other words, I am suggesting that the testimony indicates that unlike what I said in general, an economic downturn resulting in an industry closing in a large city like Toronto probably doesn't have any material effect on the amount of gas sold to the people that used to work for that particular industry that's either laid off people or closed. They go and find other jobs, but in any event they stay in Toronto and continue to heat their homes.

I submit that many of the communities served by Northern are totally dependent upon a single large industry. The closing of a mine or substantial production cutbacks by industry in such a community - now, I am not referring here to Sudbury or Thunder Bay but to the smaller communities that have grown up around a paper mill or mine - the closing of such mine or production cutbacks by such an industry would result in an abandonment of the area by the residential customers who have lost their jobs."

Upon careful consideration of all the evidence, the Board is of the opinion that a 14% rate of return would be fair and reasonable for the Applicant to earn on common share equity capital (other than accumulated tax deferrals). This would result in an over-all rate of return of 8.6% in accordance with the following formula:

	<u>Ratio</u>	<u>Rate of Return</u>	<u>Weighted Rate of Return</u>
Debt	59%	7.5%	4.43%
Preference Share Capital	12%	5.5%	.66%
Accumulated Tax Deferrals	5%	3.0%	.15%
Common Share Equity Capital (other than A.T.D.)	24%	14.0%	<u>3.36%</u>
<u>Over-all Rate of Return</u>			<u>8.60%</u>

F. Rate Changes to be Approved

The Board finds that rate changes as proposed by the Applicant, that were expected to increase revenues by \$1,342,365, would produce a return on the rate base that is excessive but that rate changes designed to increase revenues by \$156,000 in the test year would produce a return on the rate base, 8.6%, that is reasonable.

The Board accordingly will keep this proceeding open to enable the Applicant to present prior to the 31st day of December, 1971, for Board approval, rate schedules designed in such a way that they would increase revenues by not more than \$156,000 in the test year. Upon receipt of such schedules the Board will issue a notice of further hearing in this proceeding to determine whether the rate increases provided for in the schedules are within the limits as to over-all revenue increase hereby approved and are not unduly discriminatory. The Applicant will then be required to serve on the respondents in this proceeding and on counsel for the Intervenor copies of the proposed rate schedules and of the Board's notice of hearing.

The Board understands that the Applicant wishes to rename its service areas and the Board sees no objection to the new names being used in the new rate schedules. The changes would be as follows:

<u>Service area as designated in the 1970 application</u>	<u>New name</u>
Twin City Division	Western Region
Northern Ontario Division	Northern Region
Lakeland Division	Eastern Region
Sault Ste. Marie Division	Sault Ste. Marie Region

In the event that any of the rate schedules of the Applicant provide for a range of rates within which contracts may be negotiated the Board will require that all contracts made pursuant to such rate schedules shall be filed with the Board prior to delivery of gas thereunder.

The application requests that the Board include in its Order a provision for an automatic adjustment in the Applicant's rates in the event that its costs of gas from its supplier are changed as a result of regulatory Board orders.

The Applicant explained that the cost of purchased gas is its largest single item of operating expense, representing 88% of such expense during 1969. The National Energy Board is currently hearing an application by the Applicant's supplier, TransCanada Pipelines Limited, for a substantial rate increase but a final decision is not expected until mid or late 1972.

The Applicant submitted that, due to the present and anticipated period of rising costs of purchased gas, a growing number of regulatory agencies in the U.S.A. have approved the addition of a "purchased gas adjustment clause" to the rate schedules of gas distribution companies. The Applicant suggested a clause (transcript, page 128) which would, if approved, allow it to increase or decrease its rates by an amount equal to the amount of any increase or decrease resulting from an order of the National Energy Board or any other regulatory body having jurisdiction over the gas supply rates. The suggested clause further provides that the calculation of such increase or decrease would be subject to approval by the Ontario Energy Board.

The Applicant, in its contracts with certain large volume industrial customers, does have the right to pass on, in whole or in part, gas cost increases. It submitted, however, that these increases could be passed on to all customers only through the use of a purchased gas adjustment clause or by an order of this Board following a full scale rate hearing. Counsel for the Applicant observed that the Act does not clearly give the Board power to grant interim rate increases under these circumstances and that it could be necessary for it to determine a rate base and a reasonable rate of return. This would require, he added, a long, complex

and costly proceeding and the expense involved would be eventually charged to the customers. He also suggested that an increase in the rates charged by TransCanada would affect not only the Applicant but also The Consumers' Gas Company and Union Gas Company of Canada, Limited, and that it was likely that the Board would therefore be faced with rate increase applications from these companies as well. He concluded that these hearings would require many months to complete and would result in financial hardship to the companies.

Counsel for the Intervenors submitted that the Act does not make it clear that the Board has jurisdiction to approve a purchased gas adjustment clause and he added that on principle it might be just as reasonable for the Board to include, for example, an interest rate adjustment clause in a period of widely fluctuating interest rates. He observed that both the Manitoba Public Utilities Board and the Quebec Gas and Electricity Board had refused to approve purchased gas adjustment clauses and that, if the Ontario Energy Board approved such a clause, it would tend to load any increases on the Ontario customers as opposed to the Manitoba and Quebec customers. He concluded by stating that, while the Board should cooperate with the Applicant in expediting approval of any necessary increases due to higher gas costs, it should not approve the requested clause.

The Board is of the opinion that, for the Applicant to continue earning a fair return on its rate base in the near future, it should be enabled to pass on to its customers without much delay any increase, resulting from an order of the National Energy Board, in the charges made by TransCanada PipeLines Limited for gas supplied to the Applicant. The Board has considered the Applicant's proposal to include a purchased gas adjustment clause in its rate schedules. However, the Board has decided that the better way to handle the matter, in this proceeding, is to keep the proceeding open so as to enable the Applicant to submit for approval of the Board, without redetermination of rate base and

rate of return, rate schedules designed to pass on to the Applicant's customers all or part of any increased gas costs resulting from an order of the National Energy Board made before the end of 1972.

G. Revision of the Applicant's Accounts

A number of accounting rulings have been postponed pending the Board's decision on the Applicant's rates. These are now being made in a separate proceeding under the Uniform System of Accounts for Gas Utilities.

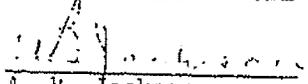
H. Costs

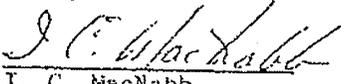
In accordance with past practice, an Order will be made charging the costs and expenses of the Board to the Applicant.

Counsel for the Intervenor asked the Board to award costs to the Intervenor, a group of municipalities, and this request has been carefully considered. The Board welcomes the interest and participation of municipalities in a rates case as representative of their inhabitants. However, the Board thinks that, except in extraordinary circumstances, a municipality so participating should neither be awarded costs nor risk being charged with costs. In accordance with this view, which is consistent with past practice, the Board has decided not to award costs to the Intervenor.

DATED at Toronto this 29th day of October, 1971.

ONTARIO ENERGY BOARD


A. B. Jackson
Vice Chairman


I. C. MacNabb
Vice Chairman

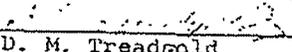

D. M. Treadgold
Commissioner

TABLE 1
NORTHERN AND CENTRAL GAS CORPORATION LIMITED
ONTARIO OPERATIONS

NET OPERATING INCOME
For The Year Ended December 31, 1969 - As Adjusted
(on the basis of the present level of rates and charges)

<u>Description</u>	<u>Exhibit 11</u> <u>Sec. 5, Page 1</u> <u>(Note 1)</u>	<u>Adjustments</u> <u>Amount</u> <u>Ref.</u> <u>(Note 2)</u>	<u>As</u> <u>Adjusted</u>
1 Operating Revenues			
2 Gas Sales Revenue	\$48,948,192	} 992,050 App.A	52,069,176
3 Other Revenue	<u>2,128,934</u>		
4 Total Operating Revenues	<u>51,077,126</u>	<u>992,050</u>	<u>52,069,176</u>
5 Operating Revenue Deductions			
6 Operating Expenses			
7 Cost of Gas	33,490,149	} 377,302 App.B	38,459,054
8 Operations Expense	1,190,539		
9 Maintenance Expense	471,401		
10 Sales Expense	648,857		
11 Customer Accounting Expense	1,088,388		
12 Administrative and General Expense	<u>1,192,418</u>		
13 Total Operating Expenses	38,081,752	377,302	38,459,054
14 Amortization Expense	9,347	267,381 App.C	276,728
15 Depreciation Expense	2,412,262	12,532 App.D	2,424,794
16 Taxes Other Than Income	1,026,558		1,026,558
17 Income Taxes	<u>11,300</u>		<u>11,300</u>
18 Total Operating Revenue Deductions	<u>41,541,219</u>	<u>657,215</u>	<u>42,198,434</u>
19 Net Operating Income	<u>\$ 9,535,907</u>	<u>334,835</u>	<u>9,870,742</u>

Note 1 Does not include adjustments proposed by Applicant in Exhibits 11 and 28.

Note 2 Refer to Appendices for details of adjustments. These adjustments include those proposed by Applicant in Exhibits 11 and 28 to the extent that they have been approved by the Board.

APPENDIX A to TABLE 1

OPERATING REVENUE ADJUSTMENTS

<u>Description</u>	<u>Amount</u>
1 Normalization for weather	\$(96,094)
2 Normalization for major strikes	242,769
3 Normalization of Augusta revenues to reflect full year	54,411
4 Normalization of Augusta revenues for 1969 pay-back arrangements	55,000
5 Share of carrying charges of Augusta acquisition chargeable to affiliate (GMI)	145,000
6 Share of return on LNG plant chargeable to Le Gaz	13,184
7 Adjustment for underpricing of gas sold to Le Gaz	78,430
8 Share of customer accounting expense chargeable to Le Gaz	10,400
9 Share of engineering expense chargeable to Le Gaz	1,000
10 Normalization for delayed-payment penalties	178,763
11 Increases in rental charges	<u>309,187</u>
<u>Total</u>	<u>\$992,050</u>

Explanatory Notes

<u>Line</u>	<u>Source</u>
1	Exhibit 11, section 5, page 1
2	Exhibit 28, schedule 2, page 1
3	Intervenors' Income Adjustments, item 14 (transcript, pages 5097-5100)
4	Board estimate
5	Board estimate
6	Exhibit 28, schedule 2, page 1
7	Intervenors' Income Adjustments, item 16 (transcript, pages 5105-5133)
8	Board estimate
9	Board estimate
10	Exhibit 11, section 5, page 2
11	Exhibit 11, section 5, page 2

APPENDIX B to TABLE 1

OPERATING EXPENSE ADJUSTMENTS

<u>Description</u>	<u>Amount</u>
1 Disallowance of charitable donations	\$(9,445)
2 Reduction in share of head office expense	(27,702)
3 Reduction in rental expense due to moving Ontario Operations offices	(23,396)
4 Increase in rates by TCPL re AGTL increase	36,398
5 Normalization for 1969 wage increases	81,191
6 Normalization for subsequent wage increases	122,523
7 Amortization of hearing costs not provided for in 1969 accounts	53,000
8 Understatement of 1969 gas costs	<u>144,733</u>
<u>Total</u>	<u>\$377,302</u>

Explanatory Notes

<u>Line</u>	<u>Source</u>
1	Intervenors' Income Adjustments, item 18
2	Board calculation based on allocating approximately 15% of total to CIGOL and one-third of remainder to Ontario Operations
3	Exhibit 28, schedule 2, page 1
4	One-third of \$109,193 claimed by Applicant in Exhibit 28, schedule 2, page 8
5	Exhibit 11, section 5, page 7
6	One-half of \$245,046 claimed by Applicant for 1970 and 1971 in Exhibit 11, section 5, page 7
7	Board estimate
8	Exhibit 15, line 4

APPENDIX C to TABLE 1

AMORTIZATION EXPENSE ADJUSTMENTS

<u>Description</u>	<u>Amount</u>
1 Sault Ste. Marie Acquisition 2% per year on \$1,860,620	\$ 37,212
2 Augusta Acquisition 5% per year on \$3,003,389	150,169
3 Lakeland Acquisition 2% per year on \$4,000,000	80,000
<u>Total</u>	<u>\$267,381</u>

APPENDIX D to TABLE 1

DEPRECIATION EXPENSE ADJUSTMENT

<u>Description</u>	<u>Amount</u>
1 Provision for depreciation at Board approved rates in effect in 1970 and subsequently	\$2,424,794
2 Amount provided for in books in 1969	2,412,262
3 <u>Adjustment</u>	<u>\$ 12,532</u>

Explanatory Notes

<u>Line</u>	<u>Source</u>
1	Exhibit 28, schedule 2, page 5
2	Exhibit 11, section 5, page 1

TABLE 2

NORTHERN AND CENTRAL GAS CORPORATION LIMITED
ONTARIO OPERATIONS

RATE BASE
At December 31, 1969 - As Adjusted

	<u>Description</u>	<u>Exhibit 11</u> <u>Sec.4, Page 1</u> <u>(Note 1)</u>	<u>Adjustments</u> <u>(Note 2)</u>	<u>As</u> <u>Adjusted</u>
1	Utility Plant			
2	Gas Plant in Service	\$116,990,993	(672,585)	116,318,408
3	Construction Work in Progress in Service	2,932,683		2,932,683
4	Retirement Work in Progress	1,180,723		1,180,723
5	Lakeland Organization Expense	444,048		444,048
6	Acquisition Adjustment (as amortized to end of 1968)	12,752,535	(8,832,535)	3,920,000
7	Amortization of Acquisition Adjustment (1969)	(296,012)	216,012	(80,000)
8	Contributions in Aid of Construction	(885,107)		(885,107)
9	Total	<u>133,119,863</u>	<u>(9,289,108)</u>	<u>123,830,755</u>
10	Accumulated Depreciation			
11	Gas Plant	11,148,125	(28,213)	11,119,912
12	Adjustment	8,446	(8,446)	-
13	Amortization of Franchises	251,104	(26,511)	224,593
14	Total	<u>11,407,675</u>	<u>(63,170)</u>	<u>11,344,505</u>
15	Net Utility Plant	121,712,188	(9,225,938)	112,486,250
16	Working Capital	4,399,181	(299,181)	4,100,000
17	Unamortized Deferred Rate Hearing Expense	192,452	(192,452)	-
18	<u>Rate Base</u>	<u>\$126,303,821</u>	<u>(9,717,571)</u>	<u>116,586,250</u>

Note 1 Does not include adjustments proposed subsequently by Applicant in Exhibit 28.

Note 2 Refer to "Explanatory Notes" for details of adjustments. These adjustments include those proposed by the Applicant in Exhibit 28 to the extent that they have been approved by the Board.

EXPLANATORY NOTES TO TABLE 2

<u>Line</u>			
2	This adjustment reflects in the Rate Base for the test year the consequences of the move of Ontario Operations in 1970 to less expensive space. The amount of the reduction is derived from Exhibit 28, schedule 1, page 1, as follows:		
	Investment in leasehold improvements, furniture and fixtures at 150 Consumers' Road		\$ 41,992
	Elimination of investment at Toronto-Dominion Centre		
	Leasehold improvements	\$503,439	
	Furniture and fixtures	<u>211,138</u>	
	<u>Net adjustment</u>		<u>714,577</u> <u>\$(672,585)</u>
6	The Applicant's claim at December 31, 1968 is the total of the following amounts:		
	Twin City	\$ 1,730,530	
	Lakeland	<u>11,022,005</u>	
			\$12,752,535
	The Board's allowance at December 31, 1968 is as follows:		
	Twin City	\$ Nil	
	Lakeland	<u>3,920,000</u>	
	<u>Net reduction</u>		<u>3,920,000</u> <u>\$ 8,832,535</u>
7	The Applicant's proposed amortization for 1969:		
	Twin City	\$ 40,169	
	Lakeland	<u>255,843</u>	
			\$ 296,012
	The Board's amortization for 1969:		
	Twin City	\$ Nil	
	Lakeland	<u>80,000</u>	
	<u>Net adjustment</u>		<u>80,000</u> <u>\$ 216,012</u>
11	The adjustment to the depreciation reserve consists of the following two items:		
	(i) Adjustment to reflect the use of Board approved depreciation rates in 1969		\$ 12,532
	(ii) Adjustment re removal of property at the Toronto-Dominion Centre		(40,745)*
	<u>Net Adjustment</u>		<u>\$(28,213)</u>
	*This adjustment is complementary to that in line 2; it represents the accumulated depreciation on the property at Toronto-Dominion Centre, shown in Exhibit 28, schedule 1, page 4, as follows:		
	Leasehold improvements	\$30,206	
	Furniture and fixtures	<u>10,539</u>	
	<u>Adjustment</u>	<u>\$40,745</u>	
12	The manner in which the Board has calculated the principal item of Accumulated Depreciation - Gas Plant (line 11) renders the "adjustment" item of \$8,446 unnecessary. Accordingly, it is removed from line 12.		<u>\$(8,446)</u>

Line

13 The amounts included in Gas Plant in Service for intangible plant are \$3,003,389 for Augusta and \$1,860,620 for Sault Ste. Marie.

The Applicant's claim for accumulated amortization is as follows:

Augusta	\$158,073
Sault Ste. Marie	<u>93,031</u>

\$ 251,104

The Board's approved accumulated amortization is as follows:

Augusta, 1 year @ 5%	\$150,169
Sault Ste. Marie, 2 years @ 2%	<u>74,434</u>

224,593

\$ 26,511

Net reduction

16 The Applicant's initial claim of \$4,399,181 for working capital allowance was increased later to about \$4,600,000 and the Board has allowed \$4,100,000, i.e. about \$500,000 less. However, Table 2 starts (column 1) with the initial claim of \$4,399,181 and accordingly the downward adjustment from this figure is

\$ (299,181)

17 Applicant's claim disallowed as Rate Base item.

\$ (192,452)

TABLE 3
(Copy of Exhibit 123)

NORTHERN AND CENTRAL GAS CORPORATION LIMITED
CALCULATION FOR ONTARIO COMPANY CAPITALIZATION
(Thousands of Dollars)

	Parent Company Capitalization December 31, 1969	1970 Financing	Pro Forma	Eliminations Not Applicable to Ontario		Ontario Capitalization Pro Forma	Percentage
Short Term Debt	69,950	(62,071)	7,879	(1)	(7,879)	-	-
Long Term Debt	124,251	45,196	169,447	(2)	(20,000)	75,831	56.2%
				(3)	(48,827)		
				(4)	(23,599)		
				(5)	(1,190)		
First Preference Shares							
First Series	7,352		7,352			7,352	
Second Series	2,015		2,015			2,015	
Second Preference Shares							
Series A	6,480		6,480			6,480	15,847
Series B	32,939		32,939	(6)	(32,939)		
Common Shares	56,177	16,875	73,052	(7)	(13,914)	30,946	43,284
				(8)	(26,371)		
				(9)	(1,821)		
Retained Earnings	22,402		22,402	(10)	(10,064)	12,338	32.1%
Paid-in Surplus	7,775		7,775	(11)	(7,775)		
	<u>329,341</u>	<u>-</u>	<u>329,341</u>		<u>(194,379)</u>	<u>134,962</u>	<u>100.0%</u>

NORTHERN AND CENTRAL GAS CORPORATION LIMITED

ASSUMPTIONS FOR ONTARIO CAPITALIZATION

- (1) Short-term funds assumed used for advances to Gaz Metropolitan, Inc. etc.
- (2) Issue of 9½% Debentures in 1970.
- (3) \$37,327,000 Canadian 8½% U.S. Bonds - Gaz Metropolitan, Inc.
\$ 5,000,000 Canadian 8½% Bonds - Greater Winnipeg Gas Company
\$ 6,500,000 Canadian 8% Bonds - Greater Winnipeg Gas Company
- (4) December 31, 1969 balance - 6½% Debentures due 1988 \$23,599,000
Assumed proceeds used for advances to Gaz Metropolitan, Inc., etc. None allocated to Ontario.
- (5) First Mortgage Bonds (8% Series 1989) issued for Champion Pipe Line Corporation Limited property additions
\$1,990,000 60% = \$1,190,000
- (6) Second Preference shares issued for Gaz Metropolitan, Inc. acquisition.
- (7) Greater Winnipeg Gas Company share exchange.
- (8) Canadian Industrial Gas & Oil Ltd. share exchange.
- (9) Common share issue expense.
- (10) Calculated Ontario Division retained earnings.
- (11) Paid-in surplus (Canadian Industrial Gas & Oil Ltd. - none to Ontario Division).

TAB 25

CAARS

CPCN to Purchase Plants and Cominco Exemption April 2, 1982

IN THE MATTER OF THE UTILITIES COMMISSION
ACT, S.B.C. 1980, c. 60; and

IN THE MATTER OF AN APPLICATION BY COMINCO LTD.
for an Exemption under Section 103(3); and

IN THE MATTER OF AN APPLICATION BY WEST
KOOTENAY POWER AND LIGHT COMPANY, LIMITED
for a Certificate of Public Convenience
and Necessity

SUMMARY OF REASONS AND DECISION

These reasons and the decision which follows arise out of two complementary applications heard by the Commission in August, September and October, 1981. The transaction underlying the applications is a proposed sale by Cominco Ltd. ("Cominco") of hydroelectric Plants Nos. 2 "Upper Bonnington", 3 "South Slocan" and 4 "Corra Linn" on the Kootenay River, and associated facilities, to its wholly-owned distribution utility, West Kootenay Power and Light Company, Limited ("WKPL"). The parties proposed that the purchase price be \$20 million payable by a debenture issued by WKPL to Cominco, carrying interest at 16% and repayable over a 15-year term. There is also an associated agreement dealing with the electricity generated from Cominco's Plants Nos. 5 "Brilliant" and 6 "Waneta" which is surplus to Cominco's requirements.

The complementary applications were:

1. An application by WKPL under Section 51 of the Utilities Commission Act (the "Act") for a Certificate of Public Convenience and Necessity authorizing the purchase of the

plants and associated facilities. Approval of the proposed debenture would also be required pursuant to Section 57 of the Act. Both the issuance of the Certificate and the approval of the debenture are within the jurisdiction of the Commission.

2. An application by Cominco under Section 103(3) of the Act for an order exempting the company from all of the provisions of the Act excepting Part 2 thereof. The Commission can only grant an exemption if the prior approval of the Lieutenant Governor in Council is given.

An application by WKPL for interim and permanent rate relief was heard at the same time. The rate decision is wholly within the jurisdiction of the Commission. It is not dealt with in these reasons. It will be the subject of a separate decision.

For the reasons explained in detail in the Reasons for Decision which follow, and after having given appropriate weight to the various aspects of the public interest implicit in the proposed transaction, the Commission concluded:

1. That the sale of Plants Nos. 2, 3 and 4 and associated facilities to WKPL should be approved.
2. That the purchase price should be \$9.2 million determined on the basis of historic cost net of depreciation.
3. That electric power from Cominco's Plants Nos. 5 and 6 which is surplus to Cominco's industrial requirement, now and in future, some of which is now being exported, should pass on a staged basis to WKPL.

4. That WKPL should have the opportunity to, and have funds to assist it to, expand the generation capability at Brilliant and Waneta from time to time to meet its increasing load requirements.

5. That revenues available to WKPL from the sale of surplus electric power should be set up in a special fund for the purpose of assisting in the financing of the aforesaid expansion of generation capability at Brilliant and Waneta.

6. That Cominco should be granted exemption from the provisions of the Act excepting Part 2, and Sections 47 (limited to apply to Plants Nos. 5 and 6), 51 and 133 (limited to these proceedings).

The Commission's decision therefore is that with the approval of the Lieutenant Governor in Council it will grant Cominco an exemption and issue to WKPL a Certificate of Public Convenience and Necessity upon conditions which will accomplish the above objectives. The precise conditions are spelled out under the subheadings "Decision on Exemption Application", "Decision on Certificate Application" and "Decision on Debenture Issue" of this Decision.

REASONS FOR DECISION

THE APPLICATIONS

Commencing on August 11, 1981 and concluding on October 16, 1981, the Commission heard interrelated applications by Cominco and WKPL, based upon a proposed transaction between the parties involving three of Cominco's hydroelectric plants on the Kootenay River, namely, No. 2 "Upper Bonnington", No. 3 "South Slokan" and No. 4 "Corra Linn". The transaction put forward in the applications has three linked components:

1. Pursuant to a conditional agreement dated June 4, 1981 ("the Sale of Plants Agreement"), a sale by Cominco to WKPL of Plants 2, 3 and 4, and related facilities, licences and permits for \$20 million payable by a debenture issued by WKPL to Cominco. The Sale of Plants Agreement provides that it does not become operative until a Certificate of Public Convenience and Necessity approving the transaction is issued to WKPL by the Commission.
2. A subordinated, unsecured debenture issued by WKPL to Cominco for \$20 million at 16% repayable over 15 years in annual instalments of \$800,000 with a final "balloon" payment of \$8 million. This instrument cannot be issued by WKPL without Commission approval under Section 57 of the Utilities Commission Act.
3. The sale by Cominco to WKPL under an agreement dated November 21, 1980 (the "Sale of Surplus Power Agreement") of electric power from Plants Nos. 5 ("Brilliant") and 6 ("Waneta") which is surplus to Cominco's load requirements,

under certain conditions, at a price of 6.227 mills per kilowatt-hour increased or decreased from time to time in accordance with a formula.

There is another agreement which, although not a part of the proposed transaction is nonetheless of significance. It is an agreement dated November 21, 1980, and entitled "Plant Use Agreement". Under the Plant Use Agreement WKPL has exclusive use of and exclusive right to the electricity from Plants 2, 3 and 4 together with associated facilities in return for a monthly payment of \$291,666. If the sale of plants under the Sale of Plants Agreement goes forward the Plant Use Agreement will terminate. On the other hand if the sale of plants does not go forward the Plant Use Agreement will continue in force subject to summary termination if "Cominco's electric power facilities become regulated as a utility".

The application by Cominco is expressed in a letter dated January 30, 1981, (Exhibit 12) as follows:

"Cominco Ltd. hereby makes application for an exemption pursuant to Section 103(3) of the Utilities Commission Act. The details of our application are being prepared and will be forwarded to you as soon as possible. We anticipate that the details will be available within one month."

On July 6, 1981 Cominco supplied additional information in a document marked Exhibit 13 at the hearing.

Section 103(3) of the Act provides:

"(3) The commission may, on conditions it considers advisable, with the prior approval of the Lieutenant Governor in Council, exempt a person, equipment or facilities from the application of all or any of the

provisions of this Act, other than Part 2, or may limit or vary the application of this Act, other than Part 2."

The WKPL application (Exhibit 3) filed on June 4, 1981, addressed the Commission as follows:

"Pursuant to certain proposals made to the Commission to provide West Kootenay Power and Light Company, Limited with a secure source of power, West Kootenay Power has negotiated and concluded an agreement (Sale of Plants Agreement) covering the purchase by the Company of Cominco Ltd.'s Plants Nos. 2, 3 and 4 and related facilities. Implementation of the agreement is subject to the receipt from the Commission of a Certificate of Public Convenience and Necessity approving the purchase. Accordingly, West Kootenay Power and Light Company, Limited hereby applies pursuant to Section 51(1) of the Utilities Commission Act, for a Certificate of Public Convenience and Necessity in respect of the said Sale of Plants Agreement."

Section 51(1) of the Act provides:

"(1) Except as otherwise provided, no person shall, after this section comes into force, begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation."

The applications were heard in public at Kelowna in 1981, August 11 through 14, August 18 through 21 and August 25 through 28, and in Vancouver September 2, 3 and 4, September 21 through 24, October 5, 6, 8, 9, 13, 14 and 16. An application by WKPL for rate relief, and for disposition of interim rate orders issued by the Commission from time to time, was dealt with at the same time because the details of the rate relief application were, in some respects, related to the sale of plants transaction.

THE 1980 ENERGY COMMISSION DECISIONS

In complementary decisions dated May 30, 1980, entitled "Cominco Ltd., Exemption Application" (the 1980 Cominco Decision) and "West Kootenay Power and Light Company, Limited, Certificate Application" (the 1980 WKPL Decision) respectively, the British Columbia Energy Commission (the Energy Commission), predecessor to the British Columbia Utilities Commission (the Commission) dealt with complementary applications by Cominco and WKPL.

The Energy Commission found that the applications were interdependent and that one could not succeed without the other.

The basis of the applications was a proposed Plants and Surplus Energy Agreement under which WKPL would acquire the exclusive use of Plants 2, 3 and 4 for a period of 25 years through a long term lease. WKPL was and is the owner of Plant No. 1 "Lower Bonnington".

The agreement provided WKPL with an option to purchase Plants Nos. 2, 3 and 4, and to purchase from Cominco interruptible power from Plants 5 and 6 which was surplus to Cominco's requirements. Implementation of the agreement was contingent upon Cominco being granted exemption from the provisions of the Energy Act, since repealed and replaced by the Utilities Commission Act, pursuant to Section 101(3) of the Energy Act, now Section 103(3) of the Utilities Commission Act.

The applications were by Cominco for the aforesaid exemption and by WKPL for a Certificate of Public Convenience and Necessity approving the agreement. The application of WKPL was within the power of the Energy Commission to grant or

refuse whereas the application of Cominco could only be granted by the Energy Commission "with the prior approval of the Lieutenant Governor in Council".

The operative part of the 1980 Cominco Decision recites that the Energy Commission would, with the approval of the Lieutenant Governor in Council, exempt Cominco from regulation under the Energy Act and approve the Plants and Surplus Energy Agreement, upon the following conditions:

1. That on or before December 31, 1980, Cominco Ltd.:
 - (i) Satisfy the Commission that the ownership of Plants 2 (Upper Bonnington), 3 (South Slokan), and 4 (Corra Linn), and all related and associated generation and transmission facilities have been transferred to West Kootenay Power and Light Company, Limited for a price not to exceed \$10.4 million.
 - (ii) Provide to the Commission evidence that all licenses, permits and approvals necessary to enable West Kootenay Power and Light Company, Limited to exercise all rights of ownership and operation have been similarly transferred at a consideration agreed upon between the parties and forming part of the aforesaid price.
2. That Cominco Ltd. assist West Kootenay Power and Light Company, Limited in the financing of the purchase as aforesaid, by acquisition of equity stock in West Kootenay Power and Light Company, Limited or by such other means as may be deemed appropriate by Cominco Ltd. but in such manner that the terms, conditions and carrying charges associated with the financing be not more onerous than West Kootenay Power and Light Company, Limited would be required to assume if it were an energy utility dealing at arms length with financial institutions.
3. That on or before September 1, 1980, Cominco Ltd. enter into and file with the Commission for approval, an Agreement with West Kootenay Power and Light Company, Limited providing for the sale of firm power

from Plants 5 (Brilliant) and 6 (Waneta), surplus to the industrial requirements of Cominco Ltd., on the declining scale shown under Tab 3 of Exhibit 6 in the West Kootenay Power and Light Company, Limited certificate hearing, at a price calculated as described in the Plants and Surplus Agreement, subject only to interruption for use in the industrial operations of Cominco Ltd. by reasons of force majeure in such circumstances as would otherwise cause an interruption in the industrial operations of Cominco Ltd., and providing further that any power in excess of that shown on the declining scale, which is surplus to the requirements of Cominco Ltd. in its industrial operations, will first be offered for purchase by West Kootenay Power and Light Company, Limited upon the same terms and at the same price as the "firm surplus", before being disposed of to others.

4. That Cominco Ltd. confirm by resolution of its Board of Directors, filed with the Commission on or before September 1, 1980, the following undertakings:
 - (i) That without first obtaining the approval of the Commission, Cominco Ltd. will not dispose of Plants 5 and 6 or the associated generation and transmission facilities, licenses, permits, concessions or privileges by sale, lease, transfer, amalgamation, merger or otherwise.
 - (ii) That it will support and facilitate any application made by West Kootenay Power and Light Company, Limited for approval to expand the generating capacity at Plants 5 and 6, or either of them, for the purpose of increasing the power supply to West Kootenay Power and Light Company, Limited.

5. That commencing with the month of October, 1980, Cominco Ltd. file with the Commission a monthly report on each of Plants 5 and 6 identifying:
 - (i) total energy, by generation or entitlement - in Mwh.
 - (ii) energy sold to West Kootenay Power and Light Company, Limited - in Mwh and dollars.
 - (iii) energy sold to, exchanged with, or stored with Others (to be identified) - in Mwh.

6. That on or before December 31, 1980, Cominco Ltd. enter into and file with the Commission for approval, such agreements with West Kootenay Power and Light Company, Limited, for the common use of transmission and switching facilities to the end that systems owned by each can be operated together as one integrated system."

In the 1980 WKPL Decision the Energy Commission decided that it would issue a Certificate of Public Convenience and Necessity to WKPL on the following conditions:

1. That on or before December 31, 1980, WKPL satisfy the Commission that it is the owner of Plants 2, 3 and 4 and all related and associated generation and transmission facilities, approvals necessarily incidental to full ownership and power to operate, all having been acquired at a price not to exceed \$10.4 million.
2. That on or before September 1, 1980, WKPL enter into and file with the Commission for approval, an Agreement with Cominco providing for the sale of firm power from Plants 5 (Brilliant) and 6 (Waneta), surplus to the industrial requirements of Cominco, on the declining scale shown under Tab 3 of Exhibit 6 in the WKPL certificate hearing, at a price calculated as described in the Agreement, subject only to interruption for use in the industrial operation of Cominco by reasons of force majeure in such circumstances as would otherwise cause an interruption in the industrial operations of Cominco, and providing further that any power in excess of that shown on the declining scale, which is surplus to the requirements of Cominco in its industrial operations, will first be offered for purchase by WKPL at the same price and on the same terms as the "firm surplus", before being disposed of to others.
3. That WKPL advise the Commission on or before the 1st day of May, each year, of its plans for increasing its power supply for the purpose of meeting its expanding load, including its plans for the expansion of Plants 5 and 6.

4. That on or before December 31, 1980, WKPL enter into and file with the Commission for approval such agreements with Cominco as may be reasonably necessary and appropriate for the common use of transmission and switching facilities to the end that the systems owned by each can be operated together as one integrated system."

In the result the Lieutenant Governor in Council did not approve the Cominco application for exemption. Accordingly, by Orders Numbered G-42-80 and G-43-80 respectively, dated June 23, 1980, the Energy Commission denied both applications.

The parties thereupon restructured their intercorporate arrangements into the form presented for Commission approval in the 1981 hearings.

CORPORATE BACKGROUND

Cominco was incorporated in 1906 as a federal company under the name of The Canadian Consolidated Mines Limited, by the amalgamation of two mining companies active on the Red Mountain copper deposit. Six months later the name was changed to The Consolidated Mining and Smelting Company of Canada Limited and in 1966 to Cominco Ltd. From its inception the company has been controlled by the Canadian Pacific Railway Company or affiliated companies. The head office of Cominco is in Vancouver and there are district offices in Trail, Calgary and Yellowknife.

In British Columbia, Cominco is engaged primarily in mining, metallurgical and fertilizer operations. Lead smelting was introduced in the Trail area in 1899 and an electrolytic zinc plant was built in 1916. Fertilizer production commenced

in 1931. Copper mining commenced in the Trail area in 1890; lead-zinc at Moyie Lake in 1892. Cominco's major mine, the Sullivan lead-zinc mine at Kimberley, began operations in 1910. Today, the Trail smelter treats concentrates not only from local mines in the Kootenay area but also from mines in other parts of Canada, its principal sources being the Sullivan and Pine Point (Yellowknife, NWT) mines. The company's lead-zinc smelter at Trail is one of the largest in the world. As well as lead and zinc it also produces such other metallurgical products as gold, silver, cadmium and bismuth.

Cominco witnesses testified that, at present, the company has underway a \$700 million capital programme to improve the efficiency and environmental quality of its mining, milling, metallurgical and fertilizer operations in the Kootenay areas and to expand output at Trail.

Cominco's operations in the East and West Kootenay areas form an important part of the economic base of these regions. The company employs some 6,000 people with an annual payroll in excess of \$100 million. Cominco is the largest employer in the area and the company's Trail operations are the most important single industrial activity in the region.

WKPL was incorporated in British Columbia by provincial statute in 1897. It was a pioneer in the development of hydroelectric energy in the West Kootenay area through the construction of Plant No. 1 in 1898 which was rebuilt in 1925. Throughout the years additional hydroelectric generation was developed as follows:

<u>Plant No.</u>	<u>Name</u>	<u>Capacity M.W.</u>	<u>Energy Average M.W.</u>	<u>Year</u>
2	Upper Bonnington	59.4	49.0	1907
3	South Slocan	53.2	48.3	1929
4	Corra Linn	51.2	39.1	1932
5	Brilliant	128.9	97.4	1944
6	Waneta	373.9	281.4	1954

In 1916 Cominco acquired the common shares of WKPL which has been a wholly-owned subsidiary of Cominco since then. During the period to 1947, however, Cominco continued to be an industrial customer, and indeed by far the biggest customer, of WKPL.

The evidence is that in 1947 WKPL sold Plants 2, 3 and 4 and related licences, permits and facilities to Cominco for the then book value of approximately \$8 million. Shortly thereafter WKPL paid approximately \$6 million back to Cominco by way of a dividend on the common shares and transferred the Waneta Water Licence to Cominco. The purchase of the three plants from WKPL effectively reversed the roles of Cominco and WKPL for Cominco ceased to be a customer of WKPL and instead WKPL became a customer of Cominco as the WKPL load requirements increased beyond the capability of Plant No. 1. At one stroke WKPL was deprived of its major generating capacity, its only significant industrial customer and three quarters of the purchase price of the plants and related assets.

Since 1947 Cominco has allocated the electricity generated from Plants 2 through 6 to meet its own industrial requirements and to meet the WKPL ever-increasing load requirements, and the balance remaining has been sold by Cominco into the export market for its own account. Although WKPL operates the plants as agent for Cominco and for a fee, it has been regarded by Cominco as a division of the Cominco industrial complex, and managed accordingly.

THE STATUS OF THE PARTIES

In Section 1 of the Act, public utility is defined in part as follows:

"'public utility'

means a person, or his lessee, trustee, receiver or liquidator, who owns or operates in the Province, equipment or facilities for

- (a) the production, generation, storage, transmission, sale, delivery or furnishing of electricity, gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or"

There is no dispute about WKPL being a public utility as defined. In the Commission's view, it cannot be seriously argued that Cominco is not a public utility. It is clear from the evidence that Cominco owns equipment and facilities in the Province for the production, generation, storage, transmission, sale, delivery and furnishing of electricity to or for the public or a corporation for compensation. It follows therefore that Cominco is within the four corners of the definition.

A continuing theme underlying the issues in the proceedings, and in the proceedings which culminated in the 1980 decisions, is whether or not Cominco, even though within the definition of a public utility, is sheltered from regulation under Part 3 of the Act, Regulation of Public Utilities, by reason of the provisions of Section 27. If Section 27 is a shelter to Cominco, two consequences seem to follow. Firstly, Cominco would not be exposed to the regulatory constraints about which it expressed apprehension. Secondly, an exemption order under Section 103(3) would not appear to be necessary to protect Cominco from regulation. In the Commission's view the application of Section 27 to the Cominco circumstances must be resolved as a first step since, if Section 27 is a bar to regulation of Cominco as a public utility, the merits of the Cominco application for exemption need not be addressed.

Section 27 provides:

- "27. Where a corporation generates electricity primarily for its own industrial purposes, that corporation is not subject to this Part for electric service furnished to others if
- (a) the furnishing of that service is wholly incidental to the industrial purposes of the corporation and is not in competition with a public utility that is subject to the jurisdiction of the commission and that is capable of supplying and willing to supply that service, and
 - (b) the service furnished to persons other than itself, its employees and tenants does not use more than 15% of the electricity generated by the corporation."

It is the Commission's conclusion that Cominco is not protected from regulation by Section 27. Cominco furnishes electric service to others, WKPL and export customers, which is not wholly incidental to its industrial purposes. In furnishing the electric service to those others Cominco is in competition with a public utility, British Columbia Hydro and Power Authority ("B.C. Hydro"), which is subject to the jurisdiction of the Commission. B.C. Hydro would be capable of supplying the service to those others and although there was no evidence of "willingness", the Commission notes that there are existing arrangements between B.C. Hydro and WKPL for the supply of incremental electric energy from time to time. Furthermore, on any reasonable, common sense test it seems to be abundantly clear that the supply of electric service by Cominco to others has exceeded 15% of the electricity generated by Cominco.

Given these conclusions, the Commission is obliged to assess the Cominco exemption application on the merits. At this point, the Commission notes, in passing, that none of the Intervenor's at the hearing opposed the granting of an exemption to Cominco providing suitable conditions were attached. For the reasons which will appear, the Commission concurs that an exemption from certain of the provisions of the Act should be granted subject to conditions which will be specified, and it will so recommend.

THE JUSTIFICATION FOR COMINCO EXEMPTION

In the 1980 Cominco Decision the Energy Commission characterized the Cominco position as follows:

"The basis for the Cominco application was its apprehension that regulation would hamper its industrial operation and lead to erosion of its low-cost power resources.

In support of its application Cominco outlined the extent to which its British Columbia operation is dependant upon inexpensive power. It was suggested that its renovation and expansion program in the province might hinge in large measure on the continuation of its favorable competitive position in the international scene, attributable to low-cost power."

That description is equally accurate when applied to the 1981 Cominco application. Cominco's position at the hearing was that low-cost hydroelectric power was the primary reason for the initial location and subsequent expansion of the company's operations in the Kootenay region. Cominco testified that the economic disadvantage of its location within British Columbia is overcome only by the advantage of its low-cost power supply by virtue of its hydro generation capability. Cominco argued that electrical energy plays a very significant role in the costs of its finished products and illustrated this position by asserting that one ton of zinc requires 4600 kWh of power with the result that an increase of 10 mills per kWh produces an increase of \$46 per ton. In 1979 Cominco utilized 1700 GWh of power with the result that every increase of 10 mills per kWh the average cost would increase by \$17 million per year. Cominco testified that electrical power is vital to its modernization programme at Trail and Kimberley. This programme, upon completion, will require, in Cominco's evidence, a 40% increase in electrical power requirements.

In summary Cominco argued that an assured supply of low-cost hydroelectric power has been and continues to be of paramount importance to the company's industrial operation.

Cominco's position is that an exemption order under Section 103(3) of the Act is a necessity in order to secure certainty of supply of low-cost hydroelectric power and thereby justify its continued investment in industrial production facilities in the Kootenays. The company contends that the continued prospect of future challenges to its status and its obligation to supply power from Plants 5 and 6 poses a serious threat to the economic viability of continued investment in the Trail metallurgical facilities and the Sullivan mine. It would appear from the evidence of Mr. Marcolin that the company's current expansion programme was dependent upon obtaining an exemption from the provisions of the Act. Mr. Marcolin, chief policy witness for Cominco, testified that the Cominco decision was based as follows:

"A utility has a duty to provide service to everyone who needs it. If the generating plants of Cominco were to become a utility it seems Cominco would just become another of the many customers and one whose requirements would have a low priority. I would not have recommended the current expansion program on that basis."

Mr. Marcolin also raised doubts about Cominco's future in the Trail area if it were regulated, saying:

"If Cominco became a regulated public utility in my view, Cominco as an industrial corporation in Trail would fade away."

He stressed that in his view it is simply untenable for a company engaged in a fluctuating free enterprise competitive market to be subject to regulation.

Mr. Marcolin's evidence was consistent throughout with a response from Cominco to an information request by the Commission that Cominco summarize the reasons why, in its view, the Commission should recommend an exemption. The response, in Exhibit 14, was:

- "(1) To enable West Kootenay to obtain the maximum surplus power at the most favourable rate of all the alternatives actually or potentially available to it.
- (2) To provide Cominco with continuity to enable it to continue with its investment in industrial facilities in the Kootenays. The exemption will remove the possibility of Cominco's industrial plans being fettered by allegations of regulatory jurisdiction over Cominco. Such regulatory jurisdiction would seriously affect the economic viability of present and future investments in the Trail and Kimberley operations."

It appears to the Commission that Cominco's apprehensions are exaggerated and proceed upon an assumption that insufficient regard for the needs of the Cominco industrial base would be given under the regulatory process. Doubtless the perception is honestly held but it seems to the Commission more to be grounded upon the present uncertainty of Cominco's status than upon a likelihood that the supply required by industrial operations, present and planned, would be diverted elsewhere. In any event, the Commission is satisfied that Cominco is entitled to be assured that it will not be deprived of the self-generated electric power it requires for its current industrial operations and for those projects that are

integral to the current modernization programme. Reluctance to invest large sums of money in the present state of uncertainty is understandable.

As a counter balance however the Commission must have regard to the statutory obligations of WKPL as a distribution utility and to the legitimate interests of the residential, commercial and industrial customers of WKPL. On the one hand the public interest requires that the ability of WKPL to continue to serve its customers at reasonable rates be preserved. On the other hand the public interest also requires that the continuation of the Cominco industrial operation, to the extent that it is dependent upon a long-term source of inexpensive electricity, should not be impaired.

THE ISSUES

In the 1980 WKPL Decision the Energy Commission expressed itself with respect to the issues as follows:

"The Energy Act provides that the Commission shall not give its approval for a certificate unless it determines that the privilege, concession or franchise proposed to be granted is necessary for the public convenience and properly conserves the public interest. The Commission has determined that the following are the issues to be resolved, keeping in mind that WKPL is a wholly-owned subsidiary of Cominco and in such a clearly non-arms-length relationship all agreements between the parent and its subsidiary must be thoroughly examined:

- Security of Supply and Cost of Power - Arbitration
- Price
- Financial Integrity
- Surplus Power
- Future WKPL Access to Power from Plants 5 and 6."

In the Commission's view those words are equally applicable to the 1981 applications except that Arbitration is no longer an issue. However, a matter which, although not referred to by the Energy Commission as an issue, became of importance during the 1981 hearings is that of the long range objective of enabling WKPL to become independent of Cominco.

SECURITY OF SUPPLY

The sale of Plants 2, 3 and 4 by Cominco to WKPL as reflected by the sale of Plants Agreement overcomes, in large part, the concern of the Energy Commission in the 1980 WKPL Decision that the lease arrangement then in contemplation did not "significantly enhance WKPL's security of supply". With exclusive, non-terminable ownership of Plants 1, 2, 3, and 4 and associated facilities and the electricity output therefrom, WKPL would have a firm base which for calendar year 1981, would have represented approximately 72% of the WKPL 1981 base load. An additional portion of WKPL load can be satisfied by surplus available from Plants 5 and 6.

On balance the Commission is of the opinion that the sale of Plants 2, 3 and 4 to WKPL, at the price discussed later in these reasons, is in the public interest.

PRICE AND COST OF POWER

In the 1980 WKPL Decision the Energy Commission held that the sale price of Plants 2, 3 and 4 and related facilities should be "no greater than \$10.4 million". The \$10.4 million was calculated on the basis of the energy entitlements of Plants 2, 3 and 4 as a proportion of the energy entitlements of Plants 2 to 6 inclusive multiplied by the value of Plants 2 to 6 inclusive (\$39.2 million). It is apparent that "value" was determined by the original cost methodology and is to be related to the year in which "value" was calculated.

On August 13, 1981, during the Kelowna sessions of the 1981 hearings, Mr. Macintosh, Counsel for WKPL, speaking for WKPL, advised the Commission as follows:

"MR. MACINTOSH: Next, Madam Chairman, Mr. Wallace asked us to calculate the original cost less depreciation, plus capital replacements of plants 2, 3 and 4, as though we had kept the plants as part of the utility continuously from 1947 onward. The current value of those assets would be \$9.2 million on that method of assessment, on that method of valuation, and that includes all the assets which are the subject of the current Sale of Plant Agreement that's before the Commission."

It is the Commission's opinion that \$9.2 million is the appropriate sale price of Plants 2, 3, and 4. It represents the most recent calculation of adjusted original cost for those plants, it is "no greater than \$10.4 million", and it is consistent with utility accounting principles.

The Commission is seriously concerned that payment by WKPL of a sum greater than \$9.2 million would adversely affect the financial integrity of WKPL. In respect of this kind of transaction the Uniform System of Accounts provides:

"Where the utility purchases property from another company, the difference between the purchase price paid by the utility and the original cost of the property, less accumulated provisions for depreciation, amortization and depletion, shall be recorded in Account No. 114, 'Utility Plant Acquisition Adjustments'".

The effect of recording the difference in Account No. 114 is that it is unlikely to qualify for rate base treatment. Where, as here, the transaction is not at arm's-length, the normal disposition of the acquisition adjustment would be to regard it as an income deduction chargeable against the equity element of the capital structure. Given the current condition of WKPL's financial affairs, the Commission cannot find that it would be in the interest of the company or its customers to impose such an income deduction.

Another consequence which would arise should the plants and related facilities be transferred at the price contemplated by the parties, is that the capital cost to WKPL for income tax purposes (i.e. the cost base for future capital cost allowance deductions) will be determined by the manner in which the transfer is structured for taxation purposes. The capital cost allowance base resulting from the non-arm's-length transfer will be restricted to an amount elected for tax purposes as deemed proceeds of disposition. This amount may differ from the transfer price as determined by this decision. The Commission accordingly recommends that the parties be required to deem the proceeds of disposition and resultant capital cost to WKPL for tax purposes to be an amount equal to the original cost to Cominco of the assets to be transferred (i.e. approximately \$8 million).

For all of these reasons the Commission cannot approve the proposed \$20 million purchase price, whereas it finds \$9.2 million to be fair and reasonable to WKPL and, given the present and historical circumstances, not unfair or unreasonable to Cominco.

With the transfer of Plants 2, 3 and 4, and associated facilities to WKPL at a price of \$9.2 million there would be a likelihood of a reduction in the utility's future cost of service as compared to the cost of the current arrangements. The Commission finds that potential future annual savings should not be directed in reducing current rates but rather provide funds for the planning and construction of additional generation at Waneta and Brilliant. Accordingly WKPL will be directed to record such annual savings as "Special Customer Contributions" for regulatory and financial accounting purposes, and to utilize contributions for the purpose aforementioned.

FINANCIAL INTEGRITY

Cominco and WKPL responded to the Energy Commission's concern, expressed in the 1980 WKPL Decision, about the ability of WKPL to finance the purchase price of Plants 2, 3 and 4 by proposing the subordinated, unsecured debenture device as a solution in the 1981 applications. The Commission regards this as a responsible method, although not the only method, of responding to the Energy Commission conclusion that Cominco should "facilitate the necessary financing by WKPL of the purchase of Plants Nos. 2, 3 and 4".

The Commission would be prepared to approve the debenture, pursuant to Section 57 of the Act, on the terms and conditions put forward by the parties with changes to reflect the following:

1. A principal amount of \$9.2 million.
2. A term of not less than 10 years.
3. Principal repayment in equal annual instalments.

Having regard to the passage of time since the parties agreed upon the interest rate to be employed in the debenture, and having regard to the volatility of the capital markets, the Commission would not find it to be unreasonable if the parties chose to substitute for the 16% debenture interest rate the interest rate which a utility with financial integrity would have to pay if it were borrowing \$9.2 million for 10 years from the financial institutions it customarily deals with for borrowings for a similar term of years. The Commission would also be prepared to consider the acquisition by equity financing.

SURPLUS POWER

The fair and reasonable treatment to be accorded to "surplus power", that is to say electricity generated from Plants 5 and 6 that is in excess of the industrial load requirements of Cominco, is difficult to resolve. The Sale of Surplus Power Agreement provides to WKPL a first right of refusal of the surplus power, limited by the caveat that WKPL cannot take more than it can use by way of "resale within the West Kootenay service area". Effectively this means that any electric power generated from Plants 5 and 6 which is surplus

to the load requirements of Cominco and WKPL is left with Cominco to sell elsewhere. Elsewhere, in the past, has been the export market from which Cominco has received gross export revenues over the five-year period ending 1980 of \$111.46 million. The Cominco licence to sell into the export market will expire at the end of 1982. Given that it is necessary to obtain an energy removal certificate under Section 22 of the Act as a condition to removing electricity from the Province and that it is necessary to obtain a licence under Part VI of the National Energy Board Act as a condition to exporting electricity from Canada there can be no certainty that exports after 1982 will continue.

In past years Cominco has enjoyed substantial revenues from the sale of electric power into the export market and, in the view of the Commission, it would not be appropriate to interfere with those revenues during the balance of the licence which is the instrument through which the revenues are received, that is to say, export revenues received to the end of 1982. It follows that the Commission finds the method of handling surplus power in the Sale of Surplus Power Agreement to be satisfactory to the end of 1982.

Because of the uncertainty of the fact of, the level of, and the price of, exports of electricity after 1982, it appears unlikely to the Commission that Cominco can have placed much reliance on export revenues after 1982 as an essential element in their projected revenue stream. Support is lent to this conclusion by the provisions of the Sale of Surplus Power Agreement under which all surplus will flow to WKPL if WKPL requires it for use in its own market area. The only certainty which could be attached to sale of surplus power revenues, in view of the provisions of the Sale of Surplus Power Agreement,

is the level of revenues which would be realized from the sale of surplus power to WKPL at the price specified in the Sale of Surplus Power Agreement.

It appears to the Commission therefore that there could be a post 1982 allocation of surplus power from Plants 5 and 6 which confers maximum long term benefits upon WKPL and its customers without unduly interfering with Cominco's future revenues and without impairing Cominco's industrial operations.

The current modernization programme, which is scheduled to utilize increasing amounts of power, is claimed by Cominco to be important to the continuing economic viability of its B.C. operation. Cominco stated that the programme will result not only in increased metal production levels but also in improved productivity, the latter being essential in the competitive world metal markets. Cominco also claimed that a resource essential to the programme is a stable supply of low-cost electrical energy. The Commission concurs that both of these claims are valid.

It is apparent that Cominco's modernization programme is not a firm programme with a definite plan of projects all with approved budgets. Rather the programme is in a state of flux. It contains some projects that have firm, approved capital budgets. Some of these have in fact been completed or are currently under construction. The programme also contains projects that are still in the feasibility study stage and hence require management consideration and approval.

Since the programme was announced in 1979, additional projects have been added that in the opinion of the Commission are not integral to the success of the programme. These

include magnesium, ferrosilicon and silicon metal production and a 25-30% increase in zinc metal production. In Cominco documents filed at the Hearings these new projects were listed and the cost of the overall programme including the new projects was stated to be \$700 million.

Because of the importance of the modernization programme to Cominco's economic well-being and the livelihood of its employees, the resulting impact on the West Kootenays and the Province, and because of the importance of secure electrical energy to this programme, the Commission finds it is essential that Cominco be assured sufficient additional electrical energy to successfully carry out its plans to improve efficiency. A difficulty, however, arises in determining with accuracy the amount of power required and hence the allocation of surplus power from Plants Nos. 5 and 6 between Cominco and WKPL. The starting point for considering a fair allocation after 1982 is the load forecast in Cominco's Exhibit 14:

		<u>Average Annual MW of Energy</u>
1980 Actual		226
1981 Changes	- additional zinc production	16(*)
	- mine ventilation	1(*)
	- miscellaneous projects	1(*)
		<u>18</u>
		244
1982 Changes	- additional zinc production	5(*)
	- mine ventilation	2(*)
	- concentrator improvements	6(x)
		<u>13</u>
		257
1983 Changes	- additional zinc production	5(*)
	- zinc residue leach plant	28(x)
	- concentrator improvements	3(x)
		<u>36</u>
		293

		<u>Average Annual MW of Energy</u> (Cont'd)	
1984 Changes	-magnesium/ferrosilicon operation	50(x)	
	-new lead smelter	16(x)	<u>66</u>
			359
1985 Changes	-additional zinc production	39(x)	
	-concentrator improvements	4(x)	<u>43</u>
			402
1986 Changes	-		<u>0</u>
1987 Changes	-electronic grade silicon operation	30(x)	<u>30</u>
			<u>432</u>

(Note: The loads marked (*) are those which on August 26, Mr. Marcolin put in the company-approved category. Those marked (x) had not, according to Mr. Marcolin, received company approval).

From the evidence it is apparent that these projects can be divided into various categories:

- (a) firm - approved at the time of the Hearings.
- (b) likely - unconfirmed at the time of the Hearings but judged by the Commission as likely to be implemented.
- (c) speculative - projects related to existing operations but judged to have a high degree of uncertainty.
- (d) new ventures.

Using these categories it is then possible to assign arbitrary degrees of uncertainty to Cominco's future power needs as follows:

	<u>Average Annual MW of Energy</u>	
1980 Actual load		226
(a) Firm approved projects:		
1981 - additional zinc production	16	
- mine ventilation	1	
- miscellaneous	1	
1982 - additional zinc production	5	
- mine ventilation	2	
1983 - additional zinc production	5	<u>30</u>
		256
(b) Likely projects:		
1982 and 1983 concentrator changes	9	<u>9</u>
		265
(c) Speculative projects:		
1983 - zinc residue leach plant	28	
1984 - new lead smelter	16	<u>44</u>
		<u>309</u>
(d) New ventures:		
1984 - magnesium/ferrosilicon	50	
1985 - additional zinc production	43	
1987 - silicon metal	30	<u>123</u>
		<u>432</u>

Using these categories it can be concluded that Cominco's requirements will almost certainly increase from the 1980 actual load of 226 MW to 256 MW and, in all probability, to 265 MW. Should the speculative parts be completed on schedule the total modernization programme exclusive of "new ventures" would utilize 309 MW by 1984.

The total of 1980 actual plus "approved" and "likely" additions through 1983 is 265 average annual megawatts of energy. It is noteworthy that the average annual megawatts from Plant 5 is 97.4 and from Plant 6 is 281.4. Accordingly, Plant 6 would be more than sufficient to meet the likely requirement of 265 through 1983. If the transaction had involved the sale of Plant 5 to WKPL as well as Plants 2, 3 and 4, the parties could have been independent of each other in terms of supply and it is probable that the Sale of Surplus Power Agreement would have been unnecessary.

Another figure to be kept in mind in addition to the 265 calculated above, is the total load requirement of 309 MW should the modernization programme be fully carried out without the "new ventures". It is the Commission's understanding that as all components of the modernization without the new ventures have not yet been fully approved it cannot be said at this time that ultimately all will be implemented. If it turns out that the programme is performed in its entirety the plan is to be complete in 1984. Completion dates of major construction being notoriously uncertain, the Commission prefers to regard 1987 as a more probable completion year. By the end of 1987, if modernization is fully carried out, the load will total 309 average annual megawatts, comprising 1980 actual load (226), plus new approved projects (30), plus likely projects (9) and speculative projects (44).

The difference between the 1984 projected Cominco load of 309 average annual megawatts and the total capability of Plants 5 and 6 of 378.8 average annual megawatts is 69.8 average annual megawatts, or approximately 72% of Plant 5. In the Commission's opinion the 69.8 average annual megawatts should be designated "firm surplus" for the period 1983 through 1987. For the period after 1987, the remainder after subtracting 309 or the normalized 1987 load, whichever is the least, from 378.8 should be designated "firm surplus". The normalized load shall be inclusive of projects in an advanced stage of construction.

The Commission is of the view that equity between the parties will be achieved, that the public interest will be served, and that Cominco's industrial requirements into the foreseeable future will be guaranteed by requiring Cominco to sell and WKPL to purchase all firm surplus. WKPL should also be given a right of first refusal to purchase any interruptible surplus that is required for the use of WKPL's own utility customers or for disposal elsewhere.

The Commission concludes that an orderly phasing of export entitlement will be achieved by an allocation of 1983 net export revenues on an equal percentage basis to Cominco and WKPL. In 1984 the Cominco share should reduce to 25% of the net total.

After 1984 WKPL would benefit from the sale of any surplus power. WKPL will be required to accumulate funds derived from the resale of power outside of its service area, net of costs, into a special rate equalization reserve fund. The purpose will be to provide capital for the projected Brilliant and Waneta expansions as discussed below. WKPL's collection of

such funds will not impact on dividends payable or on rates properly chargeable to customers to pay for the utility service as presently provided.

With respect to price it is the Commission's conclusion that the 6.227 mills per kilowatt hour agreed upon by the parties in the Sale of Surplus Power Agreement should be the price paid by WKPL for all delivered surplus power purchased from Cominco regardless of which of the above designated categories such power falls into, provided that any adjustments to the price are to be restricted to increases or decreases in operating costs as provided in Paragraph 3 of Schedule "One" to the Sale of Surplus Power Agreement.

Being of the view that protection of Cominco's industrial load requirements so as to enable Cominco to continue its industrial operations is of prime importance, and being of the view that if the transaction is restructured in accordance with these reasons that end will be achieved consistent with what is just and reasonable to WKPL and its customers, the Commission has had regard to what, if anything, should be done in the event that there is an interruption in Cominco's industrial operations in and around Trail. It appears to the Commission that in those circumstances the respective entitlements of Cominco and WKPL should be re-examined.

FUTURE WKPL ACCESS TO PLANTS 5 AND 6

In the 1980 WKPL Decision the Energy Commission expressed some concerns in respect of the possible or probable expansion of generation facilities at Plants 5 and 6. Some months after that decision the Act was proclaimed. It would seem to be clear

that any expansion of either Plant 5 or Plant 6 would fall within the definition of "regulated project" in Section 16 and would be dealt with under Part 2 of the Act. The identity of the applicant, the economic and technical feasibility of the project and the disposition of the electricity to be generated would all be dealt with in the Part 2 proceedings. However, because the long-term security of supply to WKPL is a matter of continuing concern to the Commission it would expect, as did the Energy Commission in the 1980 Cominco Decision, to receive an undertaking from Cominco that Cominco will support and facilitate any application made by WKPL for approval to expand the generating capacity at Plants 5 and 6, or either of them.

WKPL INDEPENDENCE

In Exhibit 13 Cominco referred to the desirability of assisting "West Kootenay to attain the economic base necessary to achieve independent development of West Kootenay". Also this passage appears in the Cominco 1980 Annual Report:

"...in March 1981 Cominco and West Kootenay announced a plan to make West Kootenay independent of Cominco. Subject to obtaining the required regulatory approvals, the plan contemplates West Kootenay will acquire three of Cominco's power plants and raise funds for its ongoing capital requirements by offering its shares to the public. When this plan is completed, Cominco will own 50 percent or less of West Kootenay."

During the proceedings the Commission heard evidence about the proposed plan of independence. Evidently it is intended also to achieve a better balance of debt and equity in the WKPL capital structure, and to convert the sizeable short-term bank borrowing into long-term debt.

Of necessity the refinancing plan will have to be shaped to meet the conditions of the capital markets at the time of issue. As well it will have to accommodate this decision and the decision on rate relief to be issued shortly.

The Commission expects that within a reasonable time from the decision being served upon WKPL the company will present its financing plan for approval.

CONTINUED APPLICATION OF PARTS OF THE ACT

In the Status of the Parties section of these reasons the Commission used the expression "an exemption from certain of the provisions of the Act". That is because of the Commission's view that the discharge of the statutory responsibilities conferred on it by the Act requires that it exercise some continuing supervision over Plants 5 and 6, although not to the extent that there will be interference with Cominco's industrial operations or the supply of inexpensive power to those operations. Also, the Commission is of the opinion that, although Cominco undertook development of the Plants 5 and 6 at its own risk, it must be recognized that there is a large element of public interest inasmuch as the rivers and water flowing in the rivers are public resources.

The Commission believes that it can discharge its responsibilities and that Cominco's industrial activities will not be impaired by excluding the following sections of the Act from any exemption which is approved:

Section 47 prohibition against ceasing operations (of Plants 5 and 6) without first obtaining Commission permission.

Section 51 provisions relating to Certificates of Public Convenience and Necessity for new construction or operation, or extensions of construction or operation of public utility plant.

Section 133 power to order payment of costs of proceedings (limited to these proceedings).

DECISIONSDECISION ON THE EXEMPTION APPLICATION

With the approval of the Lieutenant Governor in Council as required under Section 103(3) of the Utilities Commission Act, the Commission will exempt Cominco Ltd. from regulation under the Utilities Commission Act, except Part 2 and Sections 47, 51, and 133 (limited to costs of these proceedings), and approve the Sale of Plants Agreement and the Sale of Surplus Power Agreement upon the following conditions:

1. That on or before October 31, 1982, Cominco Ltd.:
 - (i) Satisfy the Commission that the ownership of Plants 2 (Upper Bonnington), 3 (South Slocan), and 4 (Corra Linn), and all related and associated generation and transmission facilities have been transferred to West Kootenay Power and Light Company, Limited for a price of \$9.2 million.
 - (ii) Provide to the Commission evidence that all licences, permits and approvals necessary to enable West Kootenay Power and Light Company, Limited to exercise all rights of ownership and operation have been similarly transferred at a consideration agreed upon between the parties and forming part of the aforesaid price.

2. That Cominco Ltd. and West Kootenay Power and Light Company, Limited, on or before June 30, 1982:

(i) File with the Commission for approval the Sale of Surplus Power Agreement amended to reflect the following changes:

- remove for the period after 1982 the restriction on WKPL to the purchase of only that amount of surplus power required by it "for resale within...the service area" and clarify that Cominco's load requirements are limited to the requirements of its industrial operations
- change the sub-clauses of Clause 1 to reflect the Commission's views and opinions as to the appropriate treatment of surplus after 1982 as set forth in the Surplus Power portion of these reasons
- change the expiry date to a date which will permit performance in accordance with these reasons.

(ii) File with the Commission for approval the sale of Plants Agreement amended to reflect the following changes:

- change purchase price to \$9.2 million, allocated as the parties see fit between real property, dams and equipment, and buildings

- change the closing date to a date that will enable the transfer of assets to be completed not later than October 31, 1982
 - change Clause 12(b) to provide that the continued application of some sections of the Act to Cominco shall be deemed not to be regulating Cominco as a utility
 - million repayable over not less than 10 years in equal annual instalments at the interest rate determined in accordance with the Commission's finding under the Financial Integrity portion of these reasons.
- (iii) File with the Commission the subordinated, unsecured debenture amended to reflect the following changes:
- change to conform to the above described changes to Schedule "B" to the Sale of Plants Agreement
 - as an alternative to the debenture form of purchase, file with the Commission for approval such other plan of purchase financing as set forth in the Financial Integrity portion of these reasons.

3. That on or before October 31, 1982, Cominco Ltd. enter into and file with the Commission for approval, agreements with West Kootenay Power and Light Company, Limited, for the common use of transmission and switching facilities to the end that systems owned by each can be operated together as one integrated system.
4. That on or before October 31, 1982, Cominco Ltd. file with the Commission an undertaking that it will support and facilitate any application made by West Kootenay Power and Light Company, Limited for approval to expand the generating capacity at Plants 5 and 6, or either of them, for the purpose of increasing the power supply to West Kootenay Power and Light Company, Limited.
5. That Cominco Ltd. shall not without the prior approval of the Commission sell, assign, transfer or otherwise dispose of Plants Nos. 5 and 6 and associated facilities to any party other than West Kootenay Power and Light Company, Limited.

DECISION ON CERTIFICATE APPLICATION

Providing that the Lieutenant Governor in Council approves the issuance by the Commission of an exemption order with conditions as aforesaid, and provided the conditions are met, in timely fashion, by Cominco Ltd., the Commission will issue the Certificate of Public Convenience and Necessity for which West Kootenay Power and Light Company, Limited made application.

DECISION ON DEBENTURE ISSUE

Providing the Lieutenant Governor in Council approves the issuance by the Commission of an exemption order with conditions as aforesaid, and provided the conditions are met, in timely fashion, by Cominco Ltd., the Commission will approve the issuance of the subordinated, unsecured debenture by West Kootenay Power and Light Company, Limited pursuant to Section 57 of the Utilities Commission Act, or give consideration to an appropriate plan of equity financing.

COSTS

In due course, by Order, the Commission will direct what costs of these proceedings are to be paid and by whom to whom, in accordance with Section 133 of the Act.

DATED at the City of Vancouver, in the Province of British
Columbia, this day of April, 1982.

M. Taylor, Chairman

J.D.V. Newlands, Deputy
Chairman

B.M. Sullivan, Commissioner.

IN THE MATTER OF THE
UTILITIES COMMISSION ACT,
S.B.C. 1980, c. 60

and

IN THE MATTER OF AN APPLICATION BY COMINCO
LTD.(COMINCO) FOR THE SALE
OF SURPLUS POWER SERVICE AND AN EXEMPTION
FROM PROVISIONS OF PART 3 OF THE ACT

SALE OF SURPLUS POWER SERVICE AND EXEMPTION ORDER

WHEREAS during the months of August, September and October, 1981, the British Columbia Utilities Commission (the Commission) heard two complementary applications made, on the one hand, by Cominco for an exemption from the provisions of the Act other than Part 2 and, on the other, by West Kootenay Power & Light Company Limited WKPL) for a Certificate of Public Convenience and Necessity to purchase certain assets of Cominco;

AND WHEREAS the transactions underlying the applications were a proposed sale by Cominco of hydroelectric Plants Nos. 2 (Upper Bonnington), 3 (South Slocan) and 4 (Corra Linn) on the Kootenay River to WKPL more particularly described in a Sale of Plants Agreement dated the 4th day of June, 1981 (Sale of Plants Agreement) and in an associated agreement entitled Sale of Surplus Power Agreement between Cominco and WKPL dated the 21st day of November, 1980, dealing with electricity generated from Cominco's Plants Nos. 5 (Brilliant) and 6 (Waneta) to WKPL which is surplus to Cominco's requirements;

AND WHEREAS on the 2nd day of April, 1982, the Commission made certain recommendations to the Lieutenant Governor in Council concerning these applications;

AND WHEREAS the Lieutenant Governor in Council has considered the recommendations of the Commission but due to circumstances which have changed since the Commission heard the applications the Lieutenant Governor in Council is unwilling to approve the exemption on the terms and conditions prescribed by the Commission;

AND WHEREAS Cominco is a person who produces a power service primarily for its own purposes under the provisions of the Act;

AND WHEREAS pursuant to section 27 of the Act the Minister of Energy, Mines and Petroleum Resources is empowered to authorize the sale of surplus power service and to exempt the person selling the power service from provisions of Part 3 specified in the order subject to terms and conditions described therein;

AND WHEREAS the Minister considers it to be in the public interest that the proposed sale by Cominco to WKPL of hydroelectric Plants Nos. 2 (Upper Bonnington), 3 (South Slokan) and 4 (Corra Linn) as aforesaid be completed in accordance with the terms of this Order.

THE MINISTER OF ENERGY, MINES AND PETROLEUM RESOURCES pursuant to section 27 of the Act hereby authorizes Cominco to sell its surplus power service in accordance with the provisions of this Order and exempts Cominco from the provisions of Part 3 of the Act with the exception of sections 47, 51 and 53 subject to the following conditions, namely:

CONDITIONS

1. On or before the 31st day of October, 1982, Cominco shall file with the Commission for approval:
 - (a) amendments to the Sale of Plants Agreement providing for:
 - (i) the transfer of ownership of Plants Nos. 2 (Upper Bonnington), 3 (South Slokan) and 4 (Corra Linn) and all related and associated generation and transmission facilities, together with all licences, permits and approvals necessary to enable the exercise of all rights of ownership and operation, to WKPL for a purchase price of Twenty Million Dollars (\$20,000,000), such consideration to be paid and satisfied by the issue of two hundred thousand (200,000) common shares of WKPL;
 - (ii) the allocation of the purchase price between real property, dams and equipment, and buildings as the parties see fit;
 - (iii) a closing date that will enable the transfer of assets to be completed on or before the 31st day of December, 1982;
 - (iv) the change of Schedule B to reflect the method of payment of the purchase price;

(b) amendments to the Sale of Surplus Power Agreement providing for:

- (i) a procedure whereby WKPL may, until the 31st day of December, 1990, elect to purchase from Cominco, and Cominco shall be required to sell as firm energy up to 75 average annual megawatts, (a.a.m.w.) on a calendar year basis;
- (ii) a right of first refusal to WKPL of any further surplus;
- (iii) a procedure whereby Cominco and WKPL will contract in five year intervals for the sale and purchase of interruptible power during the period commencing on the 1st day of January, 1991, and terminating on the 30th day of September, 2005;
- (iv) the price for power to be paid by WKPL shall be as set out in the Sale of Surplus Power Agreement;
- (v) a force majeure proviso;
- (vi) a mechanism to adjust the price for reasonable actual contribution to replacement of capital costs in Schedule 1;
- (vii) a grant of a right of first refusal in favour of WKPL to acquire Plants Nos. 5 (Brilliant) and 6 (Waneta) or either of them, together with any associated facilities until the 30th day of September, 2005;
- (viii) dates which will permit performance in accordance with the foregoing amendments;

(c) agreements with WKPL for the common use of transmission and switching facilities so that facilities owned by each can be operated together as one integrated system.

2. On or before the 31st day of December, 1982, Cominco shall provide the Commission with evidence of the transfer of ownership of Plants Nos. 2 (Upper Bonnington), 3 (South Slocan) and 4 (Corra Linn) and all related and associated generation and transmission facilities, together with all licences, permits and approvals necessary to enable the exercise of all rights of ownership and operation, to WKPL for a purchase price

of Twenty Million Dollars (\$20,000,000), such consideration to be paid and satisfied by the issue of two hundred thousand (200,000) common shares of WKPL.

3. Cominco shall not sell or otherwise dispose of Plants Nos. 5 (Brilliant) and 6 Waneta) or either of them without the prior approval of the Commission.
4. (a) WKPL shall forthwith submit to the Commission for its approval proposals to refinance WKPL to provide a better balance of debt and equity in the WKPL capital structure and to convert the sizeable short term bank borrowing into long term debt.

(b) Cominco shall forthwith inform the Minister of its long term plans to reduce Cominco's equity in WKPL to not more than fifty per cent (50%).
5. (a) Cominco shall provide to the Minister not later than the 31st day of July in each year of the term of this Order with a report as to its industrial load requirements and expansion plans projected for a period of five years.

(b) Cominco shall provide to the Minister not later than the 31st day of March in each year during the term of this Order a record of the previous calendar year transactions with WKPL under conditions 1(b)(i), (ii) and (iii).
6. Cominco shall
 - (a) file with the Minister on or before the 31st day of October, 1982, its undertaking to support any application made by WKPL for approval to expand the generating capacity at Plants Nos. 5 (Brilliant) and 6 (Waneta) or either of them, for the purpose of increasing the power supply to WKPL; and
 - (b) provide reasonable assistance to WKPL, not including the provision of or guarantee of funding, for any such application.
7. Cominco shall be permitted to sell to any customer outside of the Province of British Columbia, subject to obtaining an energy removal certificate, or any utility within the Province of British Columbia on an interruptible basis any part of the power service that is surplus to its requirements and to the requirements of WKPL imposed by this Order and the Sale of Surplus Power Agreement.

8. WKPL shall have obtained a Certificate of Public Convenience and Necessity for the purchase of Plants Nos. 2 (Upper Bonnington), 3 (South Slocan) and 4 (Corra Linn).
9. The approval of the Commission pursuant to section 57 of the Act shall be obtained to the issue of 200,000 common shares of WKPL to Cominco, being the consideration for the sale of Plants Nos. 2 (Upper Bonnington), 3 (South Slocan) and 4 (Corra Linn), not later than the 31st day of October, 1982.
10. This Order ceases to have effect on the 30th day of September, 2005.

Dated the 28th day of July , 1982.

Minister of Energy, Mines
and Petroleum Resources

IN THE MATTER OF THE UTILITIES COMMISSION
ACT, S.B.C. 1980, c. 60; and

IN THE MATTER OF AN APPLICATION BY COMINCO LTD.
for an Exemption under Section 103(3); and

IN THE MATTER OF AN APPLICATION BY WEST KOOTENAY POWER
AND LIGHT COMPANY, LIMITED
for a Certificate of Public Convenience
and Necessity

DECISION

April 2, 1982

Before M. Taylor, Chairman; J.D.V. Newlands, Deputy
Chairman; and B.M. Sullivan, Commissioner

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APPEARANCES

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K.E. GUSTAFSON	City of Nelson
D. PEARCE	D. Pearce
R.B. WALLACE	Atco Lumber Ltd. B.C. Timber Ltd. Kalesnikoff Lumbering Co. Ltd. Pope and Talbot Ltd. Slocan Forest Products Ltd. Weyerhaeuser Canada Ltd. Wynndel Box and Lumber Co. Ltd.
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A.C. MICHELSON	Hearing Secretary
R.J. FLETCHER S.S. WONG J. HAGUE	Commission Staff
ALLWEST REPORTING LTD.	Court Reporters

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TAB 27

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-116-05**

SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. V6Z 2N3 CANADA
web site: <http://www.bcuc.com>



TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

**IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473**

and

**An Application by Kinder Morgan, Inc. and 0731297 B.C. Ltd.
for Approval of the Acquisition of the Common Shares of Terasen Inc.**

BEFORE: R.H. Hobbs, Chair
L.A. Boychuk, Commissioner November 10, 2005
R.W. Whitehead, Commissioner

O R D E R

WHEREAS:

- A. On August 17, 2005, Kinder Morgan, Inc. ("KMI") and 0731297 B.C. Ltd. ("Subco") ("collectively the Kinder Morgan Companies") applied pursuant to Section 54 of the Utilities Commission Act ("the Act") for an Order approving the acquisition of the common shares of Terasen Inc. ("Terasen") which would cause the Kinder Morgan Companies to have indirect control of certain public utilities regulated by the British Columbia Utilities Commission ("the Application"); and
- B. The public utilities are Terasen Gas Inc. ("TGI"), Terasen Gas (Vancouver Island) Inc. ("TGVI"), Terasen Gas (Whistler) Inc. ("TGW"), Terasen Gas (Squamish) Inc. ("TGS"), and Terasen Multi-Utility Services Inc. ("TMUS") (collectively the "Terasen Utilities"); and
- C. TGI, TGVI, TGW, TGS and TMUS are, directly or indirectly, wholly-owned subsidiaries of Terasen; and
- D. KMI, Subco and Terasen have entered into an August 1, 2005 Agreement under which Subco, a wholly-owned subsidiary of KMI, will acquire all of the issued and outstanding common shares of Terasen; and
- E. Section 54(9) of the Act states:

"The commission may give its approval under this section subject to conditions and requirements it considers necessary or desirable in the public interest, but the commission must not give its approval under this section unless it considers that the public utility and the users of the service of the public utility will not be detrimentally affected."; and
- F. KMI and TGI jointly undertook a communication and consultation program in the TGI, TGVI, TGS, and TGW service areas and submitted a summary of the comments to the Commission as part of the materials filed in support of its Application; and

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-116-05 -**

2

- G. Following a Procedural Conference held on September 9, 2005, the Commission by Order No. G-86-05 established a Regulatory Timetable for the review of the Application in a written public hearing process with a deadline for Intervenor submissions of October 14, 2005 and KMI submissions of October 21, 2005; and
- H. By letter dated October 24, 2005 (Exhibit A-7), the Commission advised KMI, TGI and the Intervenors that the Commission Panel did not have questions arising from the written submissions and the oral phase of submissions would not be held on November 2, 2005; and
- I. The Commission has considered the Application and the evidence all as set forth in the Decision issued concurrently with this Order.

NOW THEREFORE the Commission, for the reasons stated in the Decision, orders that the Application is approved subject to the conditions contained in the Decision accompanying this Order.

DATED at the City of Vancouver, in the Province of British Columbia, this 10th day of November 2005.

BY ORDER

Original signed by:

Robert H. Hobbs
Chair

Submission Date: September 19, 2005

KINDER MORGAN, INC.
("Kinder Morgan" or "KMI")

APPLICATION FOR APPROVAL FOR THE
ACQUISITION OF THE COMMON SHARES OF TERASEN INC. ("Terasen")
(the "Application")

RESPONSE TO
LOWER MAINLAND LARGE GAS USERS ASSOCIATION and the
COMMERCIAL ENERGY CONSUMERS ASSOCIATION OF BRITISH COLUMBIA
(collectively, the "Intervenors")
INFORMATION REQUEST NO. 1
(This document is referred to as the "Response")

1. **REFERENCE: Page 1**

At page 1, paragraph 2(a) of the Application the Applicant states that "the financial capabilities of the Terasen Utilities will not be reduced or impaired" by the Transaction. In response to BCUC Information Request #1, Question 1.3, the Applicant refers to commentary from the Dominion Bond Rating Service dated August 2, 2005 as evidence that the Transaction will not reduce or impair the ability of any of the Terasen Utilities to raise debt and equity capital. The Applicant chose not to reference credit rating given by Standard and Poors which put Terasen Gas Inc. on a BBB/Watch/NR as of August 2, 2005.

- 1.1 *Would the Applicant agree that at least one significant credit rating agency has indicated that this transaction may reduce or impair the ability of Terasen Utility to raise debt and equity capital?*

Response

Credit watch alerts were issued by Moody's and S&P following announcement of the Transaction. In response, Kinder Morgan developed specific "ring fencing" conditions, a copy of which is attached, pursuant to credit agency discussions that have taken place. Kinder Morgan will propose in its final submission that these conditions be included in the Commission Order approving the Transaction. These conditions should assure that the financing capabilities of the Terasen Utilities will not be reduced or impaired. The credit ratings of the Terasen Utilities will not be affected by the credit ratings of Kinder Morgan.

- 1.2 *Are there any other credit rating agencies which have as of August 1, 2005 put any Terasen related entities on credit watch?*

Response

Please see Response to 1.1. As of August 1, 2005, no other credit rating agencies have put any Terasen related entities on credit watch.

KINDER MORGAN, INC.
APPLICATION FOR APPROVAL FOR THE
ACQUISITION OF THE COMMON SHARES OF TERASEN INC.
RESPONSE TO
LOWER MAINLAND LARGE GAS USERS ASSOCIATION and the
COMMERCIAL ENERGY CONSUMERS ASSOCIATION OF BRITISH COLUMBIA
INFORMATION REQUEST NO. 1

earlier regulatory hearings). In addition incentive agreements include share options for many employees at the utility, not just executives.

Long term incentives: Under the language of the previously granted share option agreements the event of a "change of control" of Terasen Inc. causes the immediate vesting of all unvested options to the employee holder. Therefore this Transaction, upon closing, will result in such immediate vesting. However, the expense to Terasen Gas of issuing options has not been included as a cost of service item in Terasen's rate proceedings and any value received by option holders related to the Transaction will not be paid by utility rate payers.

Employment Agreements: Under the employment agreements no rights are immediately triggered by a "change of control". Certain rights do arise if within three months of a change of control an executive with an employment agreement is terminated.

There was a specific response to the Transaction in one area. In the past two years the utility has been increasingly concerned about retaining key employees in areas where other companies in BC are aggressively recruiting. Consequently when the acquisition was announced Terasen became concerned that headhunters would use that uncertainty as an opportunity to aggressively seek three key individuals at the utility who are employed in "hot skills" areas: Terasen, independent of Kinder Morgan but with their agreement, initiated retention bonuses for those three individuals. The aggregate quantum of the retention bonuses, if all stay through the Transaction and 3 months beyond, is approximately \$110,000.00.

6. REFERENCE: BCUC Commission Staff Information Request #1, Question 6.3.3

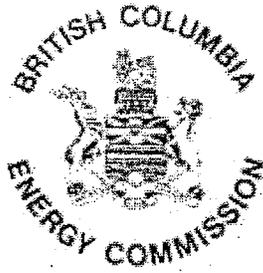
Please confirm that the response to the question acknowledges that the BCUC will set the appropriate rate of return for utilities regulated under the Act by utilizing the net book value of the assets.

Response

KMI and the utilities cannot speak for the BCUC as to how it will determine the appropriate rate of return and how it will be applied in the setting of rates for utilities under its jurisdiction.

However, KMI acknowledges that it does not intend to apply to recover from Terasen Gas utilities ratepayers any premium that it may be paying for the acquisition of the shares of Terasen Inc.

TAB 28



IN THE MATTER OF THE ENERGY ACT
AND
IN THE MATTER OF APPLICATIONS BY
CENTRAL HEAT DISTRIBUTION LIMITED

DECISION

OCTOBER 22, 1975

The Applications of Central Heat Distribution Limited dated December 5, 1973 for approval of certain financing and April 24, 1975 as amended August 5, 1975 for authorization to increase rates for steam service were heard in public in Vancouver, British Columbia on October 7th, 8th, and 9th, 1975.

The Commission was composed of Dr. A. R. Thompson, Chairman, and R. J. Ludgate, Commissioner.

I N D E X

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APPEARANCES

Central Heat Distribution Limited
Counsel

Witnesses

C. B. Johnson

F. A. Griffiths

H. S. L. Welsh

D. G. Usher

F. R. Wright

M. Dubnov

J. S. Barnes

British Columbia Energy Commission
Counsel

Witness

D. A. Farquhar

G. R. Meikle

LIST OF EXHIBITS

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tribution system.

the owner and operator of the steam generating and dis-
 tribution system, the Applicant in the present matter, became
 a holding company called Vancouver Central Investments
 Limited, and a new company Central Heat Distribution
 Limited, the Applicant in the present matter, became
 preference shares). In 1968, Central Heat Limited became
 (281,997 common shares and 50,000 cumulative redeemable
 Limited (422,997 common shares) and Central Heat Limited
 any were Trans Mountain Enterprises of British Columbia
 The initial shareholders of the Applicant com-
 English Bay and Burrard Inlet.

of operations as defined by False Creek, Gore Avenue,
 into with the City of Vancouver and encompasses the area
 thirty year agreement running from 1966 has been entered
 heating and cooling uses in the City of Vancouver. A
 bution system for the purpose of supplying steam for
 operate a steam generating plant and attendant distri-
 by the Public Utilities Commission to construct and
 Convenience and Necessity dated June 11, 1968 issued
 called the Applicant) holds a Certificate of Public
 Central Heat Distribution Limited (hereinafter

Background

I. INTRODUCTION

In November, 1968 the Applicant was authorized by the Public Utilities Commission to raise \$1,300,000. by the issue of additional preferred shares and by way of loans to be advanced by the existing shareholders.

In May of 1969 additional funds were required in the amount of \$817,000. and approval was given by the Public Utilities Commission on May 16, 1969.

The next major event in the financial background of the Applicant occurred on November 21, 1969 when the Public Utilities Commission issued an Order which varied the terms and conditions of preceding Orders dated November 29, 1968 and May 16, 1969 as follows:

"1. That the Order of this Commission dated November 29, 1968 approved by Order-in-Council No. 3837 dated December 2, 1968, be varied by the deletion of paragraph 3 thereof and the substitution therefor of the following:

3. That approval be and it is hereby given to Central Heat Distribution Limited to borrow the sum of \$750,000 from Trans Mountain Enterprises of British Columbia Limited. This amount is to be made up as follows: the sum of \$540,000 is to be repayable with interest at a rate per annum of 7 and 1/2%, the balance, being \$210,000, is repayable with interest at

a rate per annum equal to the prime rate charged by The Royal Bank of Canada from time to time for lending in Canadian Dollars, plus 1%. The above sums are to be secured by debentures issued under a Deed of Trust and Mortgage charging by specific charge certain property of Central Heat Distribution Limited and by a floating charge on all of that Company's remaining assets and undertaking. In addition to the above, approval is given to borrow the sum of \$360,000 from The Royal Bank of Canada repayable with interest at the same interest rate as is applicable to the above-mentioned \$210,000.

2. That the Order of this Commission dated May 16, 1969 and approved by Order-in-Council No. 1674 dated May 22, 1969 be varied by:
 - (a) The deletion of paragraph (1) thereof and by the substitution therefor of the following:
 - "(1) That the applicant is hereby authorized to issue One Million Eleven Thousand Six Hundred and Sixty Seven (1,011,667) Common Shares of Central Heat Distribution

Limited without nominal or par value;"

(b) By the deletion of paragraph (2) thereof."

In April 1973 the Public Utilities Commission was advised of the proposed transfer by Trans Mountain Enterprises of British Columbia Limited of all its shareholdings in the Applicant company to Vancouver Central Investments Limited. The Public Utilities Commission, after publication of notice, held a hearing on June 4, 1973 in Victoria to consider the proposed rates of the Applicant, the transfer of ownership of the Applicant and an evaluation of the assets of the Applicant for regulatory purposes.

The results of this hearing were that the proposed rate increase and the transfer of the shares were approved but the evaluation of the assets for regulatory purposes was left for future consideration.

This brings us to the Applications filed by the Applicant with the British Columbia Energy Commission which resulted in a hearing in Vancouver on October 7, 8, and 9, 1975.

The Applicant initially filed an Application with the Commission in December of 1973 seeking approval for certain financing and subsequently filed an Application on April 24, 1975 as amended August 5, 1975 seeking authorization to increase rates charged for steam service. Following the receipt of the initial Application in December, 1973

the Commission issued Order G-16-74 which requested the firm of Deloitte, Haskins & Sells, Chartered Accountants, to make an appraisal of the Applicant. During the period of time when the work pursuant to Order G-16-74 was underway the Applicant filed an Application dated April 24, 1975 to increase the rates on an interim basis subject to refund. This Application was subsequently amended on August 5, 1975. The amended Application was considered by the Commission and Order G-30-75 issued on August 8, 1975 denied the request for interim rates and the remaining Applications were set down for public hearing commencing October 7, 1975.

II. GENERAL ISSUES

Valuation of the Rate Base

The major issue addressed by the parties at the hearing concerns the valuation of the rate base. In its decision of June 20, 1973, the Public Utilities Commission expressly left open the question whether the rate base should be revalued downwards to reflect the transaction of March 29, 1973 whereby Vancouver Central Investments acquired the interest of Trans Mountain Enterprises at a substantial discount. More precisely defined, the issue is whether the rate base should be written down from the original cost less depreciation value now carried in the books of the Applicant for rate making purposes to a substantially lower sum to represent the value indicated by this transaction.

The relevant facts are set forth in the decision of the former Public Utilities Commission as follows:

"At a meeting of the Board of Directors of T.M.E. held in November 1972 advice was received that a further injection of capital in the company (the Applicant) of approximately \$500,000 was required for plant extensions. A decision was reached that T.M.E. would no longer continue to finance the company's capital requirements. T.M.E.'s Board decided to dispose of its interests in the utility company as soon as possible to a financially responsible purchaser and one willing to provide the additional funds.

At another meeting of Central Heat's Board of Directors in December 1972 it was unanimously decided that Mr. Dennis Culver, C. A. should be employed to assist in finding a purchaser of its system or alternatively a purchaser of the interest of T.M.E. or of both shareholders. The management of T.M.E. indicated that it was prepared to sell its interest at a substantial discount, however Vancouver Central Investments Ltd. (V.C.I.), the other partner, was unwilling to do so on the basis of the potential of the company (the Applicant) as a profitable investment. Mr. Culver was unsuccessful in obtaining a buyer and when V.C.I. made an offer to purchase the interests of T.M.E. the offer was accepted."

The gist of the agreement was that Trans Mountain Enterprises transferred to Vancouver Central Investments share capital and debt carrying a book value of \$4,529,000. for a consideration of \$1-1/2 million payable over time on terms which represented a present worth of approximately \$1,200,000.

Because of the importance of this issue on the matter of the value of the rate base, the staff of the Commission recommended that an outside consultant be engaged to appear at the hearing as an expert witness to assist the Commission in dealing with the principles of valuation which should be applied in these circumstances. Order G-16-74 appointed Deloitte, Haskins & Sells, Chartered Accountants, to provide such assistance. The Order, made under Section 59 of the Act, requested an appraisal of the Applicant's property and was later modified to confine the

appraisal to a valuation based on the agreement of March 29, 1973. Mr. G. R. Meikle conducted the study and his conclusion, supported by testimony, was that the share transaction justified a write-down of the rate base in the range of \$2,395,000. to \$3,329,000. to be effected by cancelling out the debentures, equity or loans transferred from Trans Mountain Enterprises to Vancouver Central Investments in the transaction of March 29, 1973 (Exhibit 16).

Mr. Johnson, counsel for the Applicant, responded to Mr. Meikle's advice and recommendation by presenting as expert witnesses Mr. Don Usher, a chartered accountant with extensive experience in the regulatory field, and Mr. F. R. Wright, an officer of the investment firm of Pemberton Securities Ltd.

Mr. Johnson presented his argument in three parts. First, he contended that Section 59 authorized only an appraisal of assets of the company on an historical cost basis and did not authorize an appraisal of a securities transaction, arguing further that Mr. Meikle's written appraisal, which was filed as Exhibit 16, could not be considered an appraisal within the meaning of Section 59.

Second he examined legal authorities in both Canada and the United States on the principles of valuation of public utilities to support his contention that original

cost is the appropriate method and that the value of securities transactions should not be taken into account.

Third, he argued that even if the securities transactions were to be taken into account as a factor affecting valuation of the rate base, in all the circumstances there would be no justification for writing down the rate base from the original cost less depreciation valuation that now appears on the books of the company. The circumstances to which he referred were those relating to the losses which had been incurred by the shareholders of the Applicant up to this time and to the risk which the shareholders of Vancouver Central Investments had taken in March 1973 when it acquired all the outstanding shares of the Applicant from Trans Mountain Enterprises.

Each of those shareholders had given personal guarantees on the refinancing loan with the Toronto-Dominion Bank and even at the present time it could not be said with certainty that the Applicant would soon come into a position where its earnings would provide a reasonable return on investment.

The most significant circumstance in dealing with this evaluation question is that the rates for steam charged by the Applicant and approved for regulatory purposes have, from the inception of the company's operations in 1969, always been determined by competitive forces

and have never provided a reasonable return on investment. Even the higher rate for which approval is sought in this Application will yield a return of only 3.99% on the original cost rate base and of only approximately 8% on the reduced rate base recommended by Mr. Meikle as a compromise position.

The Applicant expects to achieve further economies of scale by extending service to new customers during the next three years, and the prospect is for improved earnings. Even so, it is not clear that the company will achieve a reasonable return on the original cost rate base. The Applicant's customers are located in the downtown Vancouver region. Many of these customers have standby facilities and therefore can switch to alternative heating arrangements if the Applicant's rates become non-competitive. Prospective new customers can choose as between the Applicant's facilities and the alternative of production of heat on an individual basis.

The fact is, that at this time, competition prevents the Applicant from earning any higher rates than those it presents for approval. Since these rates are below a reasonable rate of return on any basis of evaluation, the Commission announced at the conclusion of the hearing that such rates would be approved to be effective October 1st, 1975. Therefore, the valuation issue is

presented not in terms of what current rates should be but in terms of the rate base which should be carried forward on the books of the company for future rate-making purposes.

The issue cannot be regarded as merely hypothetical, however, because the amount of this rate base is a major factor right now in terms of the willingness of the shareholders to commit capital for expansion and of the willingness of lending institutions to provide funds. The utility is far from reaching a saturation point in its market and there are sound public interest reasons why it should be encouraged to expand. The evidence has shown that the provision of central steam heat reduces pollution levels in the urban area and provides increased efficiency in the use of energy, both clearly important objectives of public policy.

Mr. Farquhar, counsel for the Commission, explained to the Commission his interpretation of the legal authorities on the question of valuation and how they should be applied in the circumstances of this case.

Mr. Johnson did not press his first point very strongly, nor do we agree with it for nowhere in the Energy Act is the Commission restricted to any particular method of evaluation of utility property, and further, Section 59 explicitly authorizes the Commission to "inquire into every fact which, in its judgement, has any bearing on that value".

Mr. Farquhar agreed with Mr. Johnson's point that Mr. Meikle's appraisal could not be regarded as the appraisal provided for in Section 59 because that appraisal must be made by the Commission. We agree that Mr. Meikle's report is to be regarded as in the nature of expert opinion evidence. We regard the transaction of March 29, 1973 as a fact which we should take into account in making an appraisal of the Applicant's property under Section 59. Mr. Meikle's evidence, together with the evidence of the Applicant's expert witnesses, must be considered along with the legal principles of valuation to arrive at a decision as to what value should now be recorded and approved for rate base purposes.

Mr. Johnson's main argument was based on showing that the tendency of public utilities commissions in the United States, following the decision in Smythe v. Ames, 169 U.S. 466 (1898), to determine "fair value" by capitalizing earnings or considering stock transactions, had been discredited almost universally. The case of Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944) finally ended this tendency by holding that "fair value is the end product of the process of rate-making, not the starting point; rates cannot be made to depend upon fair value when the value of the going enterprise depends on earnings under whatever rates may be anticipated" (headnote, 51 PUR (NS) 193).

This rejection of Smythe v. Ames was based on the logical fallacy of arguing from earnings to rate base and from rate base to rates (earnings). Mr. Johnson contended that the Commission would be guilty of the same circular reasoning if it were now to reduce the Applicant's rate base because its low earnings have resulted in a transaction whereby the current shareholders have acquired a large portion of their interest at a substantial discount.

He almost went so far as to urge that only original cost can be taken into account in determining rate base, and in support he cited the decision of the former Public Utilities Commission In Re British Columbia Electric Railway Company Limited, 53 PUR (NS) 438 (1943). In that case the Commission stated (p.449).

"Under the powers thus given the Commission after having given full consideration to other measures of value such as reproduction cost and exchange value has come to the conclusion that historic cost, i.e., cost to the present utility when prudently invested, less depreciation, is the fairest measure of value which can be used in this appraisal."

It is true that, following the Hope case, utilities commissions in the United States generally favoured historical cost as the basis for ratemaking and that Canadian regulatory bodies followed suit. But, Mr. Justice Wilson warned in Re West Canadian Hydro Electric Corporation Ltd. [1953] DLR 321 (B.C.), that formulaic calculations of value, while attractive, cannot be a

substitute for judgement. While that case was one dealing with expropriation, in which courts have traditionally favoured valuation based on reproduction cost rather than original cost, he made it clear that his reasoning would apply equally in a rate base case. Indeed he concludes that

"I do not construe the British Columbia Electric decision as setting a rigid rule to be adhered to in all later cases (p. 413)."

It is our view that the rate-making sections of the Energy Act, which are reproduced with only minor modification from the provisions in the former Public Utilities Act, charge us, not with applying any specific valuation theory, but with determining rates that are just and reasonable. Adopting the language in the Hope case, we believe that it is "the result reached not the method employed, which is controlling" (51 PUR (NS) 200). In that case it was said that determining just and reasonable rates involves a balancing of the investor and consumer interests. This same conclusion was reached by the Supreme Court of Canada in B.C. Electric Railway Co. Ltd. v. Public Utilities Commission of British Columbia (1960), 33 WWR 97 where it was decided that rates must be neither excessive for the service nor insufficient to provide a fair return, but must recognize a balancing of interests.

At the same time, to sustain investor confidence,

to protect the interest of lenders and to enable customers to plan their affairs with reasonable expectations as to what utility services will cost, we believe that the Commission's approach to valuation should be clearly stated and maintained with consistency.

We agree with the former Public Utilities Commission that historic cost is appropriate for standard rate base determinations. But factors such as transaction values will also be considered in unusual cases if they are shown to affect the question of what are just and reasonable rates.

Turning to the particular issue in this case, we disagree with Mr. Johnson's contention that it would be circular reasoning to allow the value of the transaction of March 29, 1973 to affect the rate base. That argument is irrefutable where the value of the transaction reflects rates determined as a function of a just and reasonable return on rate base. But where, as here, the transaction value reflected low earnings resulting from a competitive market for the Applicant's service, there is no such circularity. The transaction value truly reflected the value of the Applicant's service in the marketplace.

But that does not determine the issue. It only permits us to consider transaction value without being guilty of logical absurdity. Now the question is whether the rate base should be reduced because of the transaction value having in mind that the goal is to achieve just and

reasonable rates that balance the interests of the Applicant and its customers.

Mr. Johnson argued that in no case that he could find had an adjustment been made in rate base to reflect transaction value where the transaction dealt with acquisition of shares and securities of the utility rather than of its assets. While agreeing that it would be impractical to attempt to track the stock market in the rate base, we are not impressed by the absence of such cases. Where the transaction represents acquisition of a majority of the shares and securities of the utility it is as singular as a takeover of its assets and justifies close scrutiny. The fact that adjustments have normally been sought in the case of asset transactions probably reflects normal accounting practices where the rate base carried in the books is a calculation of historic cost less depreciation. Even in these cases, the adjustment has usually been approved in the circumstance of an acquisition of assets at higher than historic cost less depreciation only where it has been shown that the utility's customers have benefited from the transaction.

The October 29, 1971 decision of the Ontario Energy Board in the Northern and Central Gas Corporation Case (unreported) is the only one cited by counsel where an adjustment in rate base had followed from a transaction in shares rather than a transaction in assets. There the Board was satisfied that the transaction would benefit

the customers because economies of scale would be achieved through the acquisition by a large utility of the shares of a smaller one at a price substantially above the book value of the shares. Consequently it allowed a portion of the premium to be included in the rate base.

We conclude that we must determine the question whether the rate base should be written down to reflect the transaction of March 29, 1973 by weighing the effects of such a write-down on the interests of the shareholders of the Applicant and of its customers.

Neither the shareholders nor the customers will be immediately affected whether or not a write-down of the rate base is made because the ceiling for rates is now being determined by competition in the marketplace. Only at some future time will a write-down of the rate base have a depressing effect on rates and thereby benefit the customers. The probability is that this future time is only two or three years away but it could be much longer should the Applicant's market not expand as presently predicted.

The utility shareholders have never enjoyed an adequate return on their investment from its inception in 1968. It was this fact and the need to invest further capital that induced the majority shareholder, Trans Mountain Enterprises to sell its interests at such a high discount. The current shareholders, who acquired these interests, and who themselves have been shareholders from the

beginning, hoped that with this reorganization and a fresh infusion of capital better prospects were in store. They have taken considerable risk up to now and still face risk that they will not receive a fair return on their investment. With respect to the acquired securities, they have waived interest payments until now and must continue to do so even at the proposed new rates to keep the Applicant whole. The customers, on the other hand, have had the benefit of the shareholders' ill fortune through the availability of a reliable service at competitive prices.

At the time of the transaction of March 29, 1973, these shareholders must have relied on the book value of the rate base as a factor inducing their new investment though they also became aware in June that the Public Utilities Commission was questioning the need for a write-down. The new lender at that time, the Toronto-Dominion Bank, also completed the transaction with this knowledge.

Another factor to be considered is that this utility has a large market into which to expand to the advantage of all its customers through benefits gained from economies of scale. Therefore, it will have increasing needs for additional investment capital. A write-down of the rate base would decrease the attractiveness of the utility to lenders and investors.

Having considered all these circumstances the Commission concludes that the rate base should be that shown as the adjusted balance on Schedule 3 attached and should not be written down as a consequence of the transaction of March 29, 1973. If the utility's prospects improve so much that the shareholders are soon making returns on their investments that are higher than normal, this gain can be considered a recompense for the years of no return and a reward for the risks taken when reviving the utility in 1973. In our decision of January 7, 1975, in the matter of Vancouver Island Gas Company Limited (VIGAS), we held that shareholders of a utility should not expect full return on equity where the utility's financial affairs have turned out badly. The other side of the coin is that shareholders should benefit if and when the utility's outlook improves.

In reaching this conclusion we have not been unmindful that the many customers represented by The Building Owners and Managers Association of Vancouver have expressed written support for the Applicant's system and for the higher rates sought in this Application.

Finally, it was suggested at the hearing that the very large discount from book value reflected in the transaction of March 29, 1973 might be considered as evidence that the assets of the utility were, to a substantial extent,

imprudently acquired and should be devalued. This question was settled by the Decision of the former Public Utilities Commission dated June 20, 1973. The Commission found that:

"The evidence showed conclusively that during the period of construction there were large over-runs of capital costs in building the system. Exhibit 3 in a letter addressed to the Commission on May 28th, 1969 detailed reasons. Many obstacles of an unknown nature existed under the streets of Vancouver. Some of these consisted of utility structures for which there had either been improper blueprints or none at all. This situation resulted in deepening and re-routing of the mains in many places. Inflation had a deleterious affect. It was also pointed out that labour strikes, while not unduly delaying construction, greatly prolonged the acquisition of customers as projected, so that the anticipated revenues were much lower than estimated.

The Commission in 1969 and at the time of the Hearing was reasonably satisfied that the over-runs, while increasing the capital cost of the plant enormously, in all the circumstances were unavoidable. Further evidence showed that during the period 1969 to 1972 labour costs increased by almost 50%. Fuel costs also escalated. There is no doubt that the Company had the greatest of difficulty in building its system in the core of Vancouver City. The result of all these difficulties has been the emergence of a distressing financial situation. Meanwhile Trans Mountain (T.M.E.), the senior partner in the utility, assumed the major responsibility for its financing."

Test Year

The Applicant presented rate base and cost of service data based on the period January 1 through December 31, 1974 (hereinafter referred to as the test year). The test year is appropriate because it reflects the most recent plant investment, revenues, and expenses and is also the Applicant's fiscal year. The volumes of steam and expenses were normalized for the test year to take into account certain known changes that would reasonably occur in the period immediately following the test year. In addition, annualization adjustments were made to deal with elements which arose during the course of the test year (Exhibit 1, Tab 4 and Exhibit 8).

III. RATE BASE

The Applicant submitted evidence of a total rate base of \$5,501,886 as shown in Schedule 1 attached hereto. This figure represents the actual original cost of plant in service as recorded on the books of the company adjusted for depreciation and working capital requirements. The Applicant agreed during the hearing that a change should be made in the working capital calculation. This change has been reflected in Schedule 1 along with the deduction of "Construction Work in Progress" from the depreciated value of plant in service.

IV. COST OF SERVICE

The Commission has considered the presentation of the Cost of Service made by the Applicant and shown in Exhibit 1, Tab 4, and Exhibit 8. The Applicant agreed during the hearing that certain changes should be made in the cost of service and these changes are reflected in Schedule 3.

V. RATE OF RETURN

The rate of return requested by the Applicant (approximately 4%) was not an issue in this proceeding. If in the future the Applicant is able to achieve higher earnings, the Commission can deal with the question at that time.

VI. RATES

The rates proposed in Exhibit 1, Tab 2 of the Application will become effective on and after October 1, 1975.

The Applicant has proposed an amendment to the purchase fuel adjustment clause which will allow the Applicant to recover the increased cost of natural gas when incurred. The original purchase fuel adjustment clause provided for the recovery over a 12 month period of increased costs associated with natural gas and oil. The proposed amendment to the fuel cost adjustment clause is approved subject to the insertion of the following:

"In addition the Utility shall file a monthly reconciliation of unrecovered additional fuel costs to date. The fuel cost adjustment amount shall be modified in any period during which an over-recovery of additional fuel costs will occur."

VII. OTHER MATTERS

Approval of Borrowing

The Applicant received \$1,555,000 from the Toronto-Dominion Bank in November, 1973 by way of a Demand loan, unsecured by the assets of the Applicant, but guaranteed by the principal shareholders. In December, 1973 an Application was made for approval by the Commission of the pledging of utility assets to secure this loan.

The proceeds of this loan were used to repay earlier bank loans and shareholder loans and to provide funds for the construction of a fourth boiler. These transactions have taken place and the additional boiler is in operation.

The Commission finds that it is in the public interest for that financing to be approved.

Reorganization of Capital Structure

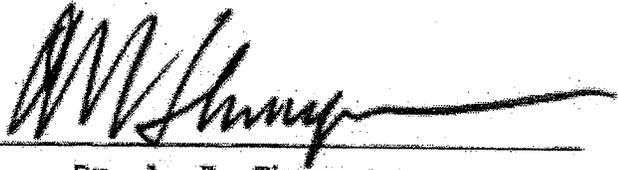
The owners of the Applicant, Vancouver Central Investments Limited, on completion of the transaction of March, 1973 became the holder of secured and unsecured debts of the Applicant as follows:

At the hearing, Mr. F. A. Griffiths, speaking for the shareholders of Vancouver Central Investments Limited, agreed that these shareholder loans could create difficulties for the Applicant in the future when attempting to obtain funds for expansion. He expressed the shareholders' willingness to arrange an exchange of these loans for an issue of preferred shares.

We agree with the proposal and recommend that an issue of 6.75% non-cumulative preferred shares be created to replace the total debt reflected in the foregoing table.

Interest - 8-1/4% per annum, maturing June 1, 1977 and originally repayable in equal annual instalments commencing June 1, 1972	\$1,645,000
Interest - 7-1/2% per annum, maturing June 1, 1988 and repayable in equal annual instalments commencing June 1, 1978	540,000
Interest - at prime bank lending rate plus 1% per annum, maturing June 1, 1988 and repayable in equal annual instalments commencing June 1, 1978	210,000
Open account, non-interest bearing	534,500
	<hr/>
	\$2,929,500

Dated at the City of Vancouver, in the Province
of British Columbia, this 22nd day of October, 1975



Dr. A. R. Thompson,
Chairman



R. J. Ludgate,
Commissioner

CENTRAL HEAT DISTRIBUTION LIMITEDMean Depreciated Rate Base

	<u>As Reported</u> <u>(Exhibit 14)</u>	<u>Adjustments</u> <u>(See notes)</u>	<u>Adjusted</u> <u>Balance</u>
Average investment in depreciated gas plant	\$5,278,196	(a) (\$32,436)	\$5,245,760
Working Capital			
Prepaid items - insurance	6,263		6,263
- municipal taxes	16,292		16,292
Inventory of fuel oil	28,521		28,521
Allowance for cash working capital requirements	172,614	(b) (65,039)	107,575
	<u>\$5,501,886</u>	<u>(\$97,475)</u>	<u>\$5,404,411</u>

Notes:

- (a) Disallowance of average value of "gas plant under construction" per the company's 1974 annual report to the Commission.
- (b) Adjustment required to reduce cash working capital requirement to that recalculated per schedule 2.

CENTRAL HEAT DISTRIBUTION LIMITED

Summary of "Lag Study" Calculation

	<u>LAG DAYS</u>	<u>AMOUNT</u>	<u>EXTENDED</u>	<u>AVERAGE LAG DAYS</u>
<u>Revenue</u>				
Steam sales	38.8	\$1,275,917	\$49,505,580	
Other income	38.8	36,000	1,396,800	
Gas recovery	38.8	173,553	6,733,856	
Oil recovery	221.3	157,657	34,889,494	
		<u>\$1,643,127</u>	<u>\$92,525,730</u>	<u>56.3</u>
<u>Expenses</u>				
Fuel - natural gas	30.0	\$ 514,661	\$15,439,830	
- fuel oil	30.0	197,922	5,937,660	
Water	40.0	18,144	725,760	
Chemicals	25.0	14,061	351,525	
Power	40.0	12,115	484,600	
Salaries and wages	7.0	351,587	2,461,109	
Benefits	20.0	28,127	562,540	
Operating, maintenance and administration	28.8	46,057	1,326,442	
		<u>\$1,182,674</u>	<u>\$27,289,466</u>	<u>23.1</u>
Lag Study Allowance	$\frac{56.3 - 23.1}{365}$	X	\$1,182,674	= \$ <u>107,575</u>

CENTRAL HEAT DISTRIBUTION LIMITED

Adjusted Utility Income and Rate of Return

As Reported (Exhibit B) Adjustments (See Notes) Adjusted Balance

Revenue	As Reported	Adjustments	Adjusted Balance
Steam sales	\$1,275,917		\$1,275,917
Other	36,000		36,000
Fuel cost recovery	331,210		331,210
	<u>1,643,127</u>		<u>1,643,127</u>

Expenses	As Reported	Adjustments	Adjusted Balance
Fuel - natural gas	514,661		514,661
- fuel oil	197,922		197,922
Water	18,144		18,144
Chemicals	14,061		14,061
Power	12,115		12,115
Labour Costs	290,795		290,795
Other operating and maintenance	32,000		32,000
General and administrative	139,156	(a) \$(8,231)	127,463
Taxes, other than income	100,723	(b) (3,462)	100,723
Depreciation	123,515	(c) (4,232)	119,283
	<u>1,443,092</u>	<u>(15,925)</u>	<u>1,427,167</u>

Expenses	As Reported	Adjustments	Adjusted Balance
Mean depreciated rate base	\$ 200,035	\$ 15,925	\$ 215,960
Earned return as a percentage of depreciated rate base	\$5,501,886	\$ (97,475)	\$5,404,411
	<u>3.63%</u>		<u>3.99%</u>

Notes:

(a) Removal of overhead capitalized in last year.

(b) Reduction in normalized insurance expense as proposed by the Applicant.

(c) Depreciation adjustment necessary to place Applicant on a "year end balance" depreciation basis as opposed to a "month end balance" basis.

CENTRAL HEAT DISTRIBUTION LIMITED

Case Law and reference material considered in Central
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(1943) 53 P.U.R. (NS) 438 - B.C. P.U.C.
2. Re West Canadian Hydro Electric Corp. Ltd.
(1950) 3 D.L.R. 321 - B.C.S.C.
3. British Columbia Electric Co. Ltd. v. P.U.C.
(1957) 25 W.W.R. (NS) 269 - B.C.C.A.
4. Niagara Falls Power Co. v. F.P.C.
(1943) F 2d 787 - U.S. Court of Appeals
5. Simpson v. Shepard (Minnesota Rate Cases)
(1913) 230 U.S. 352
57 - 58 L. ed. 1511 - U.S.S.C.
6. F.P.C. v. Hope Natural Gas Co.
(1944) 320 U.S. 591
51 - P.U.R. (NS) 193
7. Re Minnesota Power & Light Co.
(1948) 77 P.U.R. (NS) 253 - F.P.C.
8. Re Chesapeake & Potomac Telephone Co.
(1950) 84 P.U.R. (NS) 175 - Maryland P.S.C.
9. State of North Carolina v. General Telephone Co.
of the Southeast
(1972) 189 S.E. 2d 705 - S.C. of N.C.
10. Re New York Telephone Co.
(1954) 5 P.U.R. 3d 33 - New York P.S.C.
11. General Telephone Co. of Upstate New York v. Lundy
(1966) 218 N.E. 2d 274 - New York C. of A.
12. Re Capital Transportation Co.
(1952) 93 P.U.R. (NS) 146 - Arkansas P.S.C.
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15. Idaho Public Utilities Commission
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Re: Lexington Water Company,
Case #4856, January 31, 1968
17. Missouri Public Service Commission
Re: Jefferson County Sewer Co. Inc.,
Case #16270, January 22, 1971
18. Washington Metropolitan Area Transit Commission
Re: D.C. Transit System, Inc.,
Order #98, October 17, 1969
19. Florida Public Service Commission
Re: Broward Water Supply Company,
Order #4420, September 11, 1968
20. Iowa State Commerce Commission
Re: Davenport Water Company,
Docket V-138, September 27, 1968
21. Northern and Central Gas Corporation Limited
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22. Re: Henderson Telephone Company
(1960) 36 P.U.R. 3d 458
23. Re: Henderson Telephone Company
(1961) 41 P.U.R. 3d 248

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Economic Theory of Regulatory Constraint	Elizabeth E. Bailey	D. C. Heath & Co. 1973
Reforming Regulation	Roger G. Noll	The Brookings Institution 1971
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Trends & Topics in Utility Regulation	George E. Turner	Public Utilities Reports 1969
The Economics of Regulation	Alfred E. Kahn	John Wiley & Sons 1970

TAB 29



IN THE MATTER OF

FORTISBC INC.

AND

**AN APPLICATION FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
FOR THE OKANAGAN TRANSMISSION REINFORCEMENT PROJECT**

DECISION

October 2, 2008

Before:

**A.W. Keith Anderson, Panel Chair and Commissioner
Nadine F. Nicholls, Commissioner
Michael R. Harle, Commissioner**

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APPENDICES

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1.0 BACKGROUND AND REGULATORY PROCESS

On December 14, 2007 FortisBC Inc. ("FortisBC" or the "Company") filed an application ("Application") with the British Columbia Utilities Commission ("Commission" or "BCUC") for an Order issuing a Certificate of Public Convenience and Necessity ("CPCN") for its proposed Okanagan Transmission Reinforcement project ("OTR Project") to upgrade the capacity of the transmission system and related infrastructure in the Kelowna to Oliver corridor.

1.1 The Applicant

FortisBC is an investor-owned, integrated utility engaged in the business of generation, transmission, distribution and sale of electricity in the Southern Interior region of British Columbia. The Company serves approximately 152,000 customers directly and indirectly, and employs approximately 570 people. It was incorporated in 1897, and is regulated by the BCUC under the *Utilities Commission Act* ("UCA" or "Act") of British Columbia.

1.2 The Application

FortisBC Inc. applied to the BCUC, pursuant to Sections 45 and 46 of the *UCA*, for a CPCN for its OTR Project. In its 2007-2008 Capital Expenditure Plan ("2007/08 Capital Plan"), the Company proposed a CPCN process for the OTR Project. The Company has filed this Application pursuant to Commission Order G-147-06 approving the 2007/08 Capital Plan.

1.3 OTR Project Description

FortisBC states that the OTR Project proposed by the Company "will result in the completion of a 230 kV transmission backbone in the Okanagan region by replacing the existing 161 kV transmission 40 Line between Vaseux Lake and Oliver and 76 Line between Vaseux Lake and Penticton with 230 kV lines, and adding a second 230 kV line, 75 Line, between Vaseux Lake and Penticton. The OTR Project includes modifications to the Oliver, Vaseux Lake, RG Anderson, FA Lee and DG Bell

Terminal stations, as well as the construction of the new Bentley Terminal station in Oliver.”
(Exhibit B-1-1, Executive Summary, p.2) The OTR Project is described in more detail in Section 3.

The primary limitations of the existing Kelowna-Oliver system network which are driving the need for this project are stated by FortisBC to be:

1. Capacity limitations at the British Columbia Transmission Corporation (“BCTC”) Vernon Terminal to supply FortisBC areas during peak load periods;
2. South-to-North (Vaseux Lake-Penticton-Kelowna) transmission capacity limitations and bottleneck at Penticton due to overloading of RG Anderson Transformer 1 and Transformer 2;
3. Capacity limitations of the 161 kV, Vaseux Lake - RG Anderson Transmission 76 Line; and
4. Unavailability of Reactive Compensation facilities in the Okanagan System Network. (Exhibit B-1-1, Executive Summary, p. 1)

1.4 Regulatory Background and Process

In 2005 the South Okanagan Reinforcement Project (“SOK Project”) was approved to improve the power supply to the Okanagan region. It was approved on the basis that there would be a net provincial benefit and it was the first of a two stage development identified in the Okanagan System Impact Studies (FortisBC—October 2002) filed to support the SOK Project. The second stage of development is the OTR Project, the subject of this Application. The OTR Project is also referenced in the BCTC 2006 South Interior Bulk System Development Plan. Its components were outlined in FortisBC’s 2005-2024 System Development Plan and its 2007/08 Capital Plan.

After receipt of the Application from FortisBC, the Commission established a Procedural Conference and Regulatory Timetable by Order G-160-07. A letter from the Commission on January 9, 2008 to FortisBC and Registered Intervenors explained that a list of preliminary issues to be discussed at the Procedural Conference would be issued, and invited Intervenors to provide

additional matters for consideration at the Conference. No additional matters were provided by these parties prior to the Conference. The Preliminary Issues List was provided to FortisBC and Registered Intervenors on February 21, 2008, again providing the opportunity to raise additional issues in writing by February 25, 2008 or at the Procedural Conference.

The Procedural Conference was held on February 27, 2008. Intervenors were provided the opportunity to comment on FortisBC's reliance on previous BCUC decisions. The Commission Panel notes that no submissions were made during the Procedural Conference to revisit the previous decisions.

The Commission issued a series of Information Requests to FortisBC on January 22, March 27, and April 24, 2008. Several Intervenors issued Information Requests to FortisBC. The Commission also issued Information Requests to various Intervenors on May 29, 2008.

An Issues List and updated Regulatory Timetable were established by Order G-35-08. The Order established the date of an Oral Public Hearing. The Order indicated that discussion of issues during the Oral Public Hearing would be limited to those items on the Issues List; all other issues would be addressed through written submission as identified in the Regulatory Timetable. The Order provided that the review of matters related to electric and magnetic fields ("EMF") would be limited to evidence and developments that are subsequent to the evidence considered by the Commission in the Vancouver Island Transmission Reinforcement Project ("VITR") proceeding.

The Commission notes that no additional issues were identified by Intervenors within the Regulatory Timetable. Intervenor Mr. Alan Wait raised a number of concerns in his Argument; however, these were not consistent with the Regulatory Timetable, and were not supported by any evidence.

The Oral Public Hearing was held on June 23 and 24, 2008 in Penticton and a Community Input Session ("CIS") was held during the evening of June 23, 2008. Following the Hearing, on June 24, 2008 the Commission Panel toured sections of the existing right-of-way ("ROW"), including the

Heritage Hills area, with the aid of a map provided by Intervenors and discussed during the Hearing (Exhibit A2-1; T3: 553-56).

FortisBC filed its Argument on July 3, 2008, Intervenor Arguments were submitted on July 17, 2008 and FortisBC filed its Reply on August 1, 2008.

1.5 Consultation Process

FortisBC undertook public consultation for the OTR Project to ensure interested stakeholders and First Nations had the opportunity to review the OTR Project plan and to provide feedback prior to filing the Application. This process was designed to create dialogue with stakeholders, to explain the need for the OTR Project, to present FortisBC's preferred proposal, and to ensure that interested parties were aware that FortisBC must consider environmental impacts, constructability, and rate impacts.

As part of its public consultation process FortisBC established a number of communications objectives, established messaging to support these, identified stakeholders and First Nations to be included in the public consultation process, and defined key issues to be included in the public consultations. The public consultation process followed by FortisBC is described in section 1.5 and Appendix J of the Application, and summarized below.

Public consultation included open houses for local area residents in Oliver, Okanagan Falls, and Penticton on March 6, 7, and 8, 2007 and on May 22, 23, and 24, 2007. Displays, orthographic photos, and brochures were available at the first series of open houses and these were updated for the second series. Attendees were encouraged to complete questionnaires expressing their opinions, concerns, and suggestions. FortisBC and BC Hydro and Power Authority ("BC Hydro") engineering, technical, environmental, and public consultation staff members were available at these events to respond to questions and to explain the OTR Project.

Section 1 of the *UCA* as amended by the *UCAA 2008* defines the “government’s energy objectives” as:

- “(a) to encourage public utilities to reduce greenhouse gas emissions;
- (b) to encourage public utilities to take demand side measures;
- (c) to encourage public utilities to produce, generate and acquire electricity from clean or renewable sources;
- (d) to encourage public utilities to develop adequate energy transmission infrastructure and capacity in the time required to serve persons who receive or may receive service from the public utility;
- (e) to encourage public utilities to use innovative energy technologies
 - (i) that facilitate electricity self sufficiency or the fulfillment of their long term transmission requirements, or
 - (ii) that support energy conservation or efficiency or the use of clean or renewable sources of energy;
- (f) to encourage public utilities to take prescribed actions in support of any other goals prescribed by regulation.” [Emphasis added.]

2.3 Public Interest

Sections 45 and 46 of the *UCA* authorize the Commission to issue, refuse to issue, or issue with conditions, a CPCN for a project such as the OTR Project. In deciding whether to issue a CPCN, the Commission must determine whether a project meets the test of public convenience and necessity, and properly conserves the public interest. The *UCA* does not define public convenience and necessity, or public interest.

The Commission has considered the issue of what constitutes the public interest and public convenience and necessity in several recent decisions. In the Vancouver Island Generation Project Decision (“VIGP Decision”) the Commission concluded that “the test of what constitutes public convenience and necessity is a flexible test” (VIGP Decision, p. 76). In the VITR Decision, the Commission found “that there is a broad range of interests that should be considered in determining whether an applied-for project is in the public convenience and necessity” and “that it

is both impractical and undesirable to attempt a precise definition of general application” (VITR Decision, p. 15). In the Amended and Restated Long-Term Energy Purchase Agreement Decision (“LTEPA+Decision”), the Commission reiterated the foregoing conclusions and added that it “should not exclude from consideration in determining the public interest any class or category of interests which form part of the totality of the general public interest” (LTEPA+ Decision, p. 29).

In this proceeding, there were no comments or debate which specifically addressed the scope of the public interest. Consistent with previous decisions, the Commission Panel accepts that there is a broad range of interests that should be considered in determining whether the OTR Project is in the public interest. Socioeconomic, environmental and other non-financial considerations may be relevant to a determination of public interest and are considered in Section 7 of this Decision.

TAB 30



IN THE MATTER OF

PACIFIC NORTHERN GAS LTD.

APPLICATION FOR APPROVAL

TO RECAPITALIZE UNDER AN INCOME TRUST

OWNERSHIP STRUCTURE

DECISION

SEPTEMBER 9, 2005

Before:

Robert H. Hobbs, Chair
Lori A. Boychuk, Commissioner
Robert W. Whitehead, Commissioner

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APPENDICES

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1.0 BACKGROUND

1.1 Pacific Northern Gas

Pacific Northern Gas Inc. ("PNG", "Utility" or "Company") is a publicly traded company financed by a combination of common and preferred shares listed on the Toronto Stock Exchange, and by third party secured debt. PNG's secured debt was issued pursuant to a Trust Deed dated April 15, 1982 which has been amended several times through supplemental indentures (Exhibit B-1, p. 5). PNG has three operating divisions. The PNG-West Division operates in the region west of Prince George to tidewater at Kitimat and Prince Rupert and delivers natural gas to approximately 22,300 customers. Pacific Northern Gas (N.E.) Ltd. ["PNG(NE)"] is a wholly owned subsidiary of PNG and is comprised of two operating Divisions: the Fort St. John/Dawson Creek Division which serves approximately 15,500 customers; and the Tumbler Ridge Division which serves approximately 1,100 customers in the town of Tumbler Ridge.

On December 17, 2004, PNG applied to the British Columbia Utilities Commission ("BCUC" or "the Commission") for approval to convert from its current capital structure to an income trust structure ("the Application"). As proposed, the PNG Income Trust would qualify as a mutual fund trust under the Income Tax Act (Canada). The structure would include the amalgamation of PNG, PNG(NE) and Pacific Northern Gas Transition Ltd. ("PNGT") as one company under the name Pacific Northern Gas Ltd. PNGT has been incorporated for the purpose of facilitating the conversion of the income trust structure. The new operating company would continue to own and operate all of the existing natural gas transmission and distribution assets and would continue to be regulated by the Commission (Exhibit B-1, p. 11). PNG would not become an income trust itself but would be restructured to minimize taxes and flow income up to the sole owner, the PNG Income Trust.

Concurrently, PNG filed its 2005 Revenue Requirement Application ("PNG 2005 RR") for its PNG-West Division, seeking *inter alia* approval to increase the allowed common equity ratio from 36 percent to 51 percent. The Commission agreed to review the Application along with the cost of capital component of the 2005 Revenue Requirement Application by way of an oral public hearing held in Vancouver, B.C. from May 10, 2005 to May 13, 2005.

1.2 History of PNG

In May 2000, PNG's largest industrial customer, Methanex Corporation ("Methanex") announced closure of its methanol plant for 12 months. Methanex had accounted for 70 percent of PNG's total gas throughput and 40 percent of its total distribution margin. In response, PNG suspended dividend payments in mid 2000 and by the end of 2000 completed an internal reorganization to reduce its operating costs which led to a 40 percent reduction of its workforce (Exhibit B-1, pp. 5-6).

Debt rating of PNG's third party secured debt by Dominion Bond Rating Service ("DBRS") was reduced in two stages over the 2000 to 2001 period from BBB(high), an investment grade, to BB(high), which is below investment grade. By April 2001, the value of PNG's common shares traded at a low of \$6.50 per share in comparison to a high of over \$32 in earlier years (Exhibit B-1, p. 6).

Methanex restarted the methanol plant in July 2001; however, PNG's second largest industrial customer, Skeena Cellulose filed for bankruptcy protection and shut down its pulp mill operations in Prince Rupert in September 2001. By the end of 2001 PNG was able to arrange financing of \$12 million to repay its Debentures that were coming due in mid 2002 but the terms and interest rates were much less favourable than previous long-term financing (Exhibit B-1, p. 6). In March 2002, PNG and Methanex entered into a Memorandum of Agreement for a new transportation service agreement for a seven-year term from November 2002 to October 2009 which provided for a fixed demand charge of \$0.50 per Gigajoule. With this new agreement, Methanex represented approximately 25 percent of PNG's total distribution margin.

By the end of 2002, PNG had successfully reduced its operating costs through reorganization, entered into a seven year gas transportation service agreement with Methanex, and raised additional debt financing. In response, DBRS upgraded PNG's third party secured debt rating to BBB (low), which is the lowest investment grade rating (Exhibit B-1, p. 9).

PNG and its financial advisors concluded that in order to stabilize and improve PNG's financial situation, recapitalizing PNG under an income trust structure would be the best option to address PNG's financing challenges over the long-term. On January 30, 2004, PNG filed its first application with the Commission to recapitalize PNG under an income trust ownership structure. That application proposed that the Commission regulate PNG on a "deemed" capital structure equal to the capitalization prior to the proposed conversion. The Commission in its July 29, 2004 Decision denied PNG's recapitalization application, concluding *inter alia* that:

“deeming a capital structure at such wide variance with the underlying reality of the actual capital structure would be a material departure from the Commission’s past regulatory practice” and that “deeming a component of the cost of service equivalent to income taxes otherwise previously payable by a taxable corporation that had put in place a financial structure to minimize those taxes would establish a regulatory precedent with unknown implications” (BCUC Decision-July 29, 2004, pp. 30-31).

The Commission, while denying PNG’s recapitalization application due to the magnitude of deeming for the capital structure and an income tax component, did encourage the Company to continue to find a resolution in addressing its current business risks. PNG’s current Application removes the deeming components and attempts to resolve PNG’s financing challenges.

1.3 Income Trusts in General

PNG outlined the general nature of income trusts in Tab 1 of its Application (Exhibit B-1, pp. 1-7). Income trusts are hybrid investment vehicles that allow investors to participate in the equity of an underlying business through the issuance of units. An income trust owns securities, both debt and equity issued by its underlying business. Typically, the underlying business, based on the cash flow generated, pays a large portion of cash distribution as interest and dividends on the debt and common shares held by the income trust. The operating business maintains financial flexibility with the ability and discretion to retain a prudent level of cash reserves to maintain and enhance the quality of the asset base. The income trust, in turn, would distribute the cash paid by the operating company to the unit holders which allows the trust to avoid paying corporate income tax. The income flows through to the unit holders and is taxed in their hands. Similar to a common share investment, an income trust does not have a contractual obligation to make distributions to its investors.

As noted by PNG, the income trust market in Canada started in the mid 1980’s and was dominated by oil and gas royalty trusts. With the changes in tax laws and greater investor demands in the early 1990’s, the market has since evolved to other energy-related assets, real estate assets and diversified business trusts. By 2004, the income trust market had grown to consist of 164 entities with an aggregate market capitalization of \$111 billion compared to 51 entities with an aggregate market capitalization of \$15 billion in 1997 (Exhibit B-1, Tab 1, p. 3). There are four broad types of income trusts currently in the market: pipeline and power assets, real estate, specialty businesses, and oil and gas (Exhibit B-1, Tab 1, p. 4).

The Application stated that the income trust market represents approximately 10 percent of the total equity capital market and the future for income trusts will continue to be a substantial and sustainable segment of the market (PNG 2005 RR, Exhibit B-1, Tab 1, p. 8).

1.4 PNG Income Trust

The Application stated that PNG's actual capital structure includes 51 percent common equity but its deemed common equity is only 36 percent of the capital structure. Given the difference between actual and deemed common equity, PNG's shareholders are receiving a reduced return on equity. However, if the allowed return on common equity for the higher common equity component is paid, PNG's costs would rise which would mean an increase in customer rates. PNG's solution to keeping customer rates from rising while providing investors with a fair rate of return on their investment, is to convert to an income trust structure (Exhibit B-1, pp. 1-2).

In addition, PNG and its experts testified that given PNG's business risk, the Company cannot obtain the debt necessary to reduce the equity component to the existing deemed ratio of 36 percent. In order for the Company to refinance its long-term debt over the next five years, PNG submits it should be allowed to earn a return on a higher equity component of 51 percent, or convert to an income structure (T3: 52).

2.0 BUSINESS RISKS AND ACCESS TO CAPITAL

PNG submits that it faces the highest level of business risk of any mature utility in Canada (PNG 2005 RR, Exhibit B-5, p. 17) since approximately 42 percent of PNG's 2005 margin is derived from only three large industrial customers with inherently unstable operations (i.e. Methanex Corporation, West Fraser Mills Ltd., Alcan Primary Metals Ltd.) (PNG 2005 RR, Exhibit B-6, p. 4).

The largest and most unstable of these three large industrial customers is Methanex, which operates a methanol plant in Kitimat. This contract alone accounts for 32 percent of PNG's 2005 margin and the contract expires in October, 2009 (PNG 2005 RR, Exhibit B-6, p. 4). Additionally, Methanex has the option of terminating the contract earlier by the payment of a termination fee that varies directly with the amount of time remaining on the contract (Exhibit B-5, BCOAPO IR 87, 88). Methanex has stated that it may close the Kitimat facility and terminate the natural gas transportation contract if its operation is no longer cash positive (T3: 87).

PNG contends that the potential of a Methanex closure in the near future has created much uncertainty with financial lenders, creating the situation where PNG can no longer access long-term debt on reasonable terms. Reasonable terms, in PNG's submission, are where the cost of debt is less than the cost of equity on a tax adjusted basis, and where the debt is structured such that it does not increase the risk of default on existing debt (T3: 110).

PNG states it has been unable to access sufficient third party debt to match its deemed capital structure. Instead, it has used retained earnings to replace third party debt (T4: 213; PNG 2005 RR, Exhibit B-3, BCUC IR 16.2), resulting in a capital structure comprising 51 percent common equity instead of 36 percent. PNG submits it has in the last few years pursued all avenues available to it in respect of obtaining debt financing, including approaching non-conventional lenders. Of these, only RoyNat Inc. ("RoyNat"), lastly in 2002, was willing to provide debt financing. The terms of the loan, however, are not typical for a regulated public utility, and include straight line amortization and a floating interest rate 300 basis points above Bankers' Acceptances (PNG 2005 RR, Exhibit B-6, p. 6).

PNG further submits that most utilities do not have the stringent financing restrictions that PNG does. PNG indicates that prior to 2000, it could use its line of credit for bridge financing until sufficient short-term debt built-up to justify its replacement with a long-term debt issue, which is a common practice for utilities. However,

PNG is now precluded from doing so and, thus, it has no access to additional short-term debt to allow it to finance the deemed short-term debt component of its regulated capital structure with actual short-term debt (Exhibit B-5, BCOAPO IR 218).

Since the last RoyNat issue, PNG states that it has continued to attempt to obtain more third party debt on reasonable terms, but to no avail (PNG 2005 RR, Exhibit B-6, p. 7).

BCOAPO believes that the deal PNG entered into with RoyNat was unnecessarily onerous and created issues that now restrict PNG's ability to acquire debt (BCOAPO Argument, p.19-20). However, PNG notes that the RoyNat financings were reviewed by the Commission and approved at that time (PNG Reply Argument, p. 7).

PNG attributes its inability to access on reasonable terms sufficient debt to match its deemed capital structure to the perception by lenders that there is a high probability that PNG's cash flow will not be sufficient to service even its existing debt obligations because of the business risks described above. The predominant concern is that Methanex will shut down by 2009, rendering PNG with insufficient cash flow to meet its debt obligations (PNG 2005 RR, Exhibit B-6, pp. 8-9). PNG forecasts that in the event Methanex shuts down in 2009, the revenue available to service its debt in 2010 would fall short by about \$3.5 million (Exhibit B-5, BCUC IR 2, 54.2).

PNG also submits that without the Methanex contract it will be unable to finance the business without significantly increasing rates to its remaining customers. However, if it were to increase rates to other customers, PNG then incurs the risk that the delivered natural gas price may become unattractive relative to electricity, causing existing customers to switch to the lower cost energy alternative. Customers switching to alternative energy sources would exacerbate the problem for PNG by further reducing demand and creating the potential of a spiral into severe financial stress (Exhibit B-3, BCUC IR 1.0).

In support of the necessity and reasonableness of the current 51 percent common equity ratio, Ms. McShane on behalf of PNG notes, "What rational management would maintain a 51% common equity ratio when they have a 36% deemed common equity ratio, when they can't or aren't allowed to earn an equity return on the difference between 51 and 36%?" (T3: 156).

Because of the business risks it faces, PNG submits that in order for it to be permitted to earn a fair return, it requires a return on equity ("ROE") based on 51 percent common equity for 2005, climbing to 65 percent by 2009, or be allowed to convert to an income trust structure (T3: 134). If PNG converts to an income trust

structure, it plans to redeem approximately \$40 million of third party debt and preferred shares and replace it with subordinate debt (T3: 169).

Respecting the ratebase upon which PNG earns its return, BCOAPO submits that given the uncertainty related to Methanex, the issue of asset impairment pursuant to Section 55 of the Utilities Commission Act ("the Act") should be considered (T3: 71-72). PNG responds that all of its assets in ratebase are used and useful (PNG Reply, p. 15, para. 44) and Methanex has stated that it will continue to operate the plant as long as it is profitable (T3: 87).

Commission Panel Determinations

The Commission Panel acknowledges that PNG is in a difficult situation. It recognizes there is little that PNG can do to influence Methanex's decision respecting whether or not to continue operations since transportation costs are a small part of the total delivered natural gas cost to Methanex. In addition, natural gas prices have risen sharply relative to electricity over the past few years for residential and commercial customers. The Commission Panel accepts that conventional financial institutions are unwilling to extend new long-term financing on reasonable terms, given their concern that PNG may not have sufficient revenue to service debt in the future, as a result of the uncertainties surrounding the continued operation of Methanex's Kitimat plant and the possibility that remaining customers may switch to competing energy sources. **The Commission Panel accepts that PNG cannot access on reasonable terms new debt sources at the currently approved 36 percent common equity capital structure and given the restrictions in the RoyNat financing.** Although the RoyNat conditions are onerous, the Commission Panel rejects the arguments of BCOAPO in this regard because the approved financing was the best option available to PNG at the time.

With respect to the assets to be included in ratebase, the Commission is aware that there is a real risk that Methanex may terminate its contract earlier than 2009, possibly leaving some assets unused. However, the fact remains that the closure of the Methanex plant has not yet occurred and the termination payments by Methanex will substantially cover the costs of these assets through October 2009. For these reasons, **the Commission Panel determines that it is premature to consider removing the assets associated with Methanex delivery from ratebase.**

3.0 APPLICATION TO INCREASE EQUITY COMPONENT AND ROE

Introduction

PNG proposes that the cost of capital for inclusion in its 2005 revenue requirement be established on the basis of a conventional capital structure, comprising debt and equity. PNG applied for a common equity ratio of 51 percent for PNG-West, which is equal to its current actual common equity ratio. The approved common equity ratio for 2004 was 36 percent (PNG 2005 RR, Exhibit B-1, p. 23). The proposed 2005 after tax rate of return on common equity ("ROE") is 9.68 percent, and is determined based on the Commission's automatic Return on Equity ("ROE") formula, using a 65 basis point risk premium for PNG-West relative to the benchmark utility ROE of 9.03 percent. The approved ROE for 2004 was 9.80 percent (PNG 2005 RR, Exhibit B-1, p. 22). The pre tax return on common equity included in PNG's 2005 applied for revenue requirement is \$6,576,000, which is an increase of \$1,473,000 over the amount approved for 2004 (PNG 2005 RR, Exhibit B-3, Tab Application, p. 3).

PNG submits it was forced to finance approximately \$20 million of the capital deemed as debt in 2004 with equity because it does not have sufficient access to debt markets due to business risks associated in large part with the uncertainty of some of its large industrial customers (PNG 2005 RR, Exhibit B-1, p. 23).

PNG views this capital structure simply as a "stop gap" measure for 2005, in the absence of conversion to an income trust structure (PNG 2005 RR, Exhibit B-5, pp. 2-3; Exhibit B-7, BCUC IR 2, 36.0). PNG submits it is necessary that the Commission approve, for the purposes of setting rates in 2005, a common equity ratio equal to its actual of 51 percent. If this is not the case, PNG contends it will not be permitted to have the opportunity to earn a fair return (PNG Argument, Schedule A, pp. 1-2).

PNG and BCOAPO agree there is a statutory obligation upon the Commission to permit PNG the opportunity to earn a fair return on equity approved for PNG by the Commission (PNG Argument, p. 1; BCPOAPO Argument, p. 39). This is based on section 59(5)(b) of the Act, R.S.B.C. 1996, c.473 (the "Act"), which states:

"...a rate is unjust or unreasonable if the rate is insufficient to yield fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property..."

In order to reach a conclusion with respect to the appropriate return on equity, both in respect of the return on equity, and the common equity ratio, the Commission Panel considers that the following points need to be addressed:

- What constitutes a “fair and reasonable” return?
- Whether the actual equity ratio is relevant and/or should be approved for the purposes of setting the 2005 revenue requirement, and has PNG been prudent in its financing arrangements resulting in 51 percent equity?
- How can the reasonableness of the applied-for equity component be tested (i.e. other than by virtue of being the actual)?

The second point has been addressed in Section 2. The following sections discuss the remaining matters relevant to these questions.

The Fair Return Standard and Case Law

As part of the 2005 Revenue Requirement Application, PNG submitted expert testimony by Ms. McShane to support its proposal for the 2005 common equity ratio and ROE for ratemaking purposes (PNG 2005 RR, Exhibit B-5).

According to Ms. McShane’s evidence, fair return is defined as one that: gives the utility the ability to attract capital on reasonable terms; maintain its financial integrity; and earn a return on the value of its property commensurate with that of comparable risk enterprises. There is also generally an inverse relationship between the level of business risks faced and the proportion of debt that would be considered prudent financing (PNG 2005 RR, Exhibit B-5, pp. 3-4). It is PNG’s submission that, because of its business risks, it simply can not access sufficient debt on reasonable terms to achieve its common equity ratio of 36 percent.

Ms. McShane explains that it is not necessary for the Commission to deem a capital structure, that the practice of deeming a capital structure is primarily used in Canada, and, that deeming originated as a consequence of and at the time some utilities’ parent companies were diversifying, so as to enable regulators to establish an appropriate capital structure for the utilities on a stand alone basis (T4: 217-218).

On behalf of PNG, Ms. McShane submits it is reasonable that the actual 2005 common equity ratio be approved for ratemaking purposes since it is precisely because of PNG's business risks that the Company, as currently structured, is unable to lower its common equity ratio by going to the debt market. Under the current structure, PNG's only option is to replace its amortizing debt as it is repaid with retained earnings (PNG 2005 RR, Exhibit B-5, p. 19).

Exhibit B-5 provides evidence that the approved common equity ratios of other high risk, mature, small, Canadian utilities (i.e. those whose business risk profiles are similar to PNG's) are in the range of 45 percent to 50 percent (PNG 2005 RR, Exhibit B-5, pp. 18, 20). Ms. McShane's evidence goes further to note that in fact PNG has higher business risks than those utilities, which warrants a higher equity ratio (PNG 2005 RR, Exhibit B-7, BCUC IR 2, 37.0). To date, however, PNG has only been allowed to earn a return on a deemed common equity ratio of 36 percent, leaving it in a position where it has not had the opportunity to earn a fair return. PNG submits it has on average only earned 77 percent of the allowed return from 2001 to 2004 (Exhibit B-5, BCOAPO IR 1, 206).

PNG further supports the request to use the actual common equity ratio for ratemaking purposes on the basis of *Hemlock Valley Electrical Services Ltd. v. British Columbia (Utilities Commission)* (1992), 66 B.C.L.R. (2d) 1(C.A.). In that case, the Court of Appeal found that the Commission had correctly exercised its discretion to determine what a just and reasonable rate was but, in directing a three-year phase-in, had wrongly failed to permit the utility to charge a rate which gave it an opportunity to earn that return. In PNG's submission, the Court in *Hemlock Valley* also confirmed the necessity of allowing a utility the opportunity to in fact earn the return on equity found by the Commission to be fair and reasonable (PNG Argument, Schedule A, para. 18, p. 6).

PNG's legal submission, therefore, is that the Commission has a duty to allow PNG the opportunity to earn a fair and reasonable rate of return on common equity which it is unable to do when the approved equity is at only 36 percent and actual equity is at 51 percent and the Company cannot reduce its actual equity level. PNG submits that this legal issue would become a non-issue if the PNG Income Trust were approved (PNG Argument, para. 21, p. 7). PNG argues, accordingly, that so long as it retains a conventional capital structure, the only solution, apart from significantly increasing the allowed return on equity to compensate for the discrepancy between the actual and deemed common equity, is to increase the approved equity level to the level of the actual equity component of 51 percent (PNG Argument, Schedule A, para. 3, p. 1).

PNG also submits that a rate of return is to be established without regard to the impact it might have on customers (PNG Argument, Schedule A, para. 21, p. 7).

BCOAPO is of the view that PNG, with a deemed 36 percent equity ratio, has in fact been afforded the opportunity to earn a return on “equity approved by the Commission”, as required by the Act. BCOAPO attributes PNG’s inability to achieve the approved returns on ill advised financing arrangements with RoyNat, which BCOAPO suggests have prevented PNG from realizing the approved common equity ratio (BCOAPO Argument, p. 39).

BCOAPO draws a distinction between “opportunity” and what it suggests PNG is arguing for, and that is a “guaranteed entitlement” to fair returns. BCOAPO disagrees with PNG’s assertion that the only solution for the Commission to reach statutory compliance is to increase the approved equity to the actual level, as there is no statutory obligation for the Commission to match the allowed capital structure to whatever the actual structure the utility may choose. BCOAPO further notes that, if that was all that was required, there would be no need for regulators to exercise judgment on such matters (BCOAPO Argument, pp. 39-40).

BCOAPO notes that PNG has been advocating for higher returns in recent years, and that the Commission has rejected such requests. BCOAPO submits that PNG’s higher than average business risk (i.e. its dependency upon a few large customers) has already been recognized in past ROE awards, which have been higher than for the Commission’s benchmark utility (BCOAPO Argument, p. 40). BCOAPO submits that the 36 percent common equity ratio should be retained until the Methanex situation is resolved. However, BCOAPO also submits that if any adjustment is to be made, it should be moderate. More specifically, it could be similar to the 3 percent increase in equity Trans Canada Pipeline Ltd. recently received from its regulator, in order to maintain PNG’s relative position in the capital markets (BCOAPO Argument, p. 41, T6: 694).

PNG submits it has advocated increasing its return on equity in prior years primarily to be compensated for the business risks related to Methanex. PNG argues that, contrary to BCOAPO’s submission that the risks have simply become more proximate in time (BCOAPO Argument, p. 40), circumstances have changed dramatically due to the high commodity price of natural gas in recent years, resulting in a reduced ability to pass the loss of the Methanex margin on to remaining customers, thereby increasing its overall risk (PNG Reply Argument, p. 15).

Impact on Customer Rates

PNG acknowledges that increasing the common equity percentage of the capital structure would have an impact on customer rates (Exhibit B-3, BCUC IR 1, 1.0). Notwithstanding this impact, PNG submits that it is not a legal basis to deny or curtail the rate of return simply because allowing the Utility the opportunity to earn a fair rate of return will have an adverse impact on rates (PNG Reply Argument, p. 15).

While both the Ministry of Energy and Mines (“MEM”, “Ministry”) and BCOAPO accept that PNG should be afforded the opportunity to earn fair and reasonable returns, both parties submit that the Commission must nevertheless take into account the impact on ratepayers in its determination of just and reasonable customer rates (MEM Argument, p. 25; BCOAPO Argument, p. 42).

MEM submits that it is appropriate for the Commission to consider, among other things, the minimization of the cost of service for the benefit of consumers, in the development of an appropriate capital structure for PNG (MEM Argument, p. 25).

BCOAPO accepts that the Commission should not take impacts on ratepayers into account in establishing the appropriate capital structure and ROE in the first instance, but submits that, the Commission must take into account the impacts on ratepayers in establishing just and reasonable rates (BCOAPO Argument, p. 42).

Return On Equity

PNG proposes for 2005 that the equity risk premium (“ERP”) included in the ROE of PNG-West Division continues to be 65 basis points (PNG 2005 RR, Exhibit B-1, p. 22), which is the same as the ERP inherent in the ROE approved for 2004. Using the Commission’s automatic adjustment formula and a benchmark utility ROE of 9.03 percent, PNG arrives at a proposed 2005 ROE of 9.68 percent.

At the same time, Ms. McShane’s evidence submitted on behalf of PNG, suggests that an ERP of 125 basis points is commensurate with PNG’s business risks and the proposed 51 percent common equity ratio (PNG 2005 RR, Exhibit B-5, p. 29). The Capital Asset Pricing Model (“CAPM”) was relied on to support this determination (PNG 2005 RR, Exhibit B-5, p. 20). Ms. McShane suggests that the reason PNG proposed not to increase the ROE to incorporate a higher ERP was because of its concern about the impact on customer rates (T4: 231).

Commission Panel Determinations

The Commission Panel accepts that PNG simply cannot raise sufficient debt to balance its capital structure at a deemed common equity of 36 percent. Equally, PNG has 51 percent common equity in its 2005 actual capital structure and would, therefore, not have to raise debt this year if that actual capital were accepted for ratemaking purposes. However, it is not clear to the Commission Panel whether some other deemed capital structure with a common equity percentage between 36 percent and 51 percent would not allow PNG to borrow the remaining debt on reasonable terms, based on the improved cash flow of the higher deemed equity ratio. PNG did not lead compelling evidence in these circumstances to assist the Commission Panel to specify an optimal capital structure for 2005, or until an income trust structure can be put in place.

In the event that PNG's rates for 2005 are to be resolved by a Negotiated Settlement Process ("NSP"), the Commission Panel will allow the participants in that process to consider the most appropriate deemed capital structure to be approved for 2005. Commission Panel Determinations in Section 7.3 also address an NSP.

The Commission accepts PNG's request that the 2005 ROE for PNG-West be established at 65 basis points above the benchmark utility ROE (i.e. 9.68%).

4.0 APPLICATION FOR AN INCOME TRUST

4.1 Steps to be Taken to Recapitalize PNG

PNG acknowledges that “the income trust structure is new as a vehicle for utility regulation” (PNG Argument, para. 5, p. 2). If this Application is allowed, PNG would become the first income trust utility to be regulated in Canada (PNG Argument, para. 84, p. 22).

PNG has described the six steps which would be involved to recapitalize PNG under an income trust ownership structure (Exhibit B-1, para. 47, pp. 12-13, and Tab 2).

1. The PNG Income Trust would be created and would be the initial owner of PNGT. A Plan of Arrangement in respect of PNG would be approved by PNG’s shareholders and by the Supreme Court of British Columbia.
2. The existing common shareholders of PNG would exchange their shares of PNG for commons shares and subordinate notes of PNGT. As a result, PNGT would own all of the commons shares of PNG.
3. The PNG Income Trust would acquire all of the issued and outstanding common shares and subordinate notes of PNGT in exchange for units of the PNG Income Trust. As a result the former common shareholders of PNG would become the initial unit holders of the PNG Income Trust.
4. PNG, PNG(NE) and PNGT would be amalgamated under the name “Pacific Northern Gas Ltd.”. As a result, the assets and liabilities of PNG, PNG(NE) and PNGT would become the assets and liabilities of amalgamated PNG and the PNG Income Trust would become the sole shareholder and holder of subordinate notes of amalgamated PNG.
5. The PNG Income Trust would issue additional units for cash to new public investors through a public offering (“IPO”) of PNG Income Trust units. The PNG Income Trust would use the net proceeds of the IPO to invest in additional common shares and subordinate notes of amalgamated PNG.
6. Amalgamated PNG would use the proceeds from the issuance of additional common shares and subordinate notes to the PNG Income Trust to redeem approximately 36 percent of PNG’s existing third party secured long term debt (i.e. approximately \$31 million of a total of \$86 million) and to redeem all of PNG’s existing 6.75 percent preferred shares (\$5 million). The preferred shares require 30 days notice of redemption, which would be given (and the funds deposited with the transfer agent) upon completion of the IPO. Transaction costs, including third

party debt early redemption fees, legal, accounting and underwriting fees would be paid at that time (Application, para. 47, pp. 12-13).

Each of these six steps is also depicted in the diagrams set out under Tab 2 of the Application. Steps 2, 3 and 4 would occur under the terms of a Plan of Arrangement under the Business Corporations Act (British Columbia). The remaining steps 5 and 6 would be completed immediately following the completion of the Plan of Arrangement, which is conditional upon the completion of the IPO (step 5).

PNG estimates that it would incur total costs in the range of \$9 million to convert PNG to an income trust structure (Exhibit B-1, para. 49, p. 14).

The Application includes a Term Sheet related to Trust Deed Amendments and Debenture Holder Consent with respect to the Conversion (Exhibit B-1, Tab 3) and a draft Term Sheet for the subordinate notes (Exhibit B-1, Tab 4). PNG advises that the subordinate notes will be unsecured and subordinate to PNG's secured debt with terms that are less restrictive than PNG's secured debt (Exhibit B-1, para. 55, p. 17). The initial rate on the subordinate notes would be determined at the time of the initial IPO of PNG Income Trust Units, and PNG undertakes to file with the Commission, before the income trust conversion would be carried out, final details of the terms and conditions on which the various transactions will be undertaken. This would include, in the case of the subordinate notes, the principal amount and the term and interest rate on the debt and, in the case of the redemption of PNG's third party secured debt, the amount of debt to be redeemed (Exhibit B-1, para. 60, p. 18).

PNG advises that it has a verbal agreement with the existing debenture holders to redeem a portion of the outstanding debt. While the particulars of any "make-whole" reductions are commercially sensitive, PNG notes that it is very rare for fixed-rate lenders to negotiate such a reduction (Exhibit B-5, BCUC IR No. 2, 55). PNG has accepted that any "make-whole" payments to redeem existing third party debt will be a shareholder cost.

PNG confirmed its intent that the return on its common equity would continue to be fixed using the Commission's automatic adjustment formula (Exhibit B-1, para. 62(g), p. 21).

4.2 Capitalization with Income Trust

PNG's new capital structure would be made up of the third party secured debt remaining after the recapitalization, short term debt, unsecured subordinate debt (represented by the subordinate notes) and common

shares (Exhibit B-1, para. 51, p. 16).

The following table compares PNG's capital structure before and after conversion to an income trust.¹

	Actual Capital Structures under the Income Trust	Current Actual Capital Structure	2004 Capital Structure Deemed by the Commission
Third Party Secured Debt	30.0%	46.7%	54.8%
Short Term Debt	10.0%	(1.4%)	5.5%
Preferred Shares	n/a	3.7%	3.7%
Subordinate Debt	53.0%	Na	n/a
Common Shares	7.0%	51.0%	36.0%
Total	100%	100%	100%

Principal Changes

The recapitalization for which PNG is seeking approval in this Application is similar in structure to that proposed by PNG in its January 30, 2004 Application. The income trust structure proposed in this Application, however, is not conditional on the Commission approving rates for PNG based on a deemed capital structure and rates which include a deemed corporate income tax component. Rather, PNG is proposing that its rates be based on PNG's actual costs having regard to its actual capital structure, cost of capital and income tax expense under the income trust structure (Exhibit B-1, para. 45, p. 11).

Following conversion to an income trust structure, third party secured debt would be reduced from approximately \$86 million to \$54 million and all of the existing preferred shares would be redeemed. The two other principal changes would be the creation of subordinate debt, to occupy 53 percent of the structure and the reduction of common equity from the current actual level of 51 percent to 7 percent (Exhibit B-1, p. 16; PNG Argument, para. 4, p. 2).

¹ The current actual and 2004 Commission deemed capital structures shown above are in relation to the PNG-West operating Division. The proposed income trust actual capital structure would also apply to the PNG-West, Fort St. John/Dawson Creek and Tumbler Ridge operating Divisions post conversion for the purpose of determining the cost of capital for each Division.

These principal changes are discussed briefly below, followed by a discussion of the anticipated return/cost of capital under an income trust structure.

Redemption of Third-Party Debt

PNG's financial advisors believe that PNG can raise through the IPO approximately \$50 million to redeem outstanding preferred shares and a substantial portion of the Company's debentures (Exhibit B-4, p. 8). The \$50 million is a target amount for an offering in order to achieve a level of third party debt that would be sustainable on a long-term basis (Exhibit B-5, BCOAPO IR 1, 161, 166).

According to PNG, the redemption of a significant amount of its existing third party secured debt and its replacement with subordinate debt, is one of the main benefits to PNG and its customers of PNG converting to an income trust structure. The reduction in the proportion of secured debt on PNG's balance sheet (and the corresponding improvement in the credit quality of the remaining secured debt) would, according to PNG, significantly increase its financial flexibility and access to capital markets, particularly debt markets (Exhibit B-1, para. 54, p. 17).

PNG submits that the tax deductibility of servicing the subordinate debt reduces its income and therefore its tax burden by millions of dollars annually and this, in turn, can result in a capital structure containing approximately \$31 million less third party debt leading, at the same time, to reduced customer rates (PNG Argument, para. 67, p. 19).

Creation of Subordinate Debt

The subordinate debt, which would make up 53.4 percent of the capital structure, would be divided into two parts, a fixed rate portion with a cost of 12.0 percent (30 percent of the total subordinate debt) and a variable portion (70 percent of the total). The actual cost of the variable rate component would be based on the actual yields on the benchmark 30-year Canada bond plus a spread of 5.75 percent (Exhibit B-12, p. 3 of 13). PNG's financial experts have advised that the required yield range is between 10 percent and 12 percent.

PNG suggests that the subordinate debt that is incurred in the conversion has provisions that will not result in default as quickly as typical for senior debt, thereby providing PNG with additional time and flexibility to resolve

issues or refinance the business (PNG Argument, para. 77, p. 20). BCOAPO suggests, however, that the default terms of AltaLink appear to be more generous than those proposed by PNG (BCOAPO Argument, p. 12).

Equity Layer

What is unique in this application, is the unprecedented and in the submission of BCOAPO, ill-advised, proposed capital structure with a 7 percent equity layer (PNG Argument, para. 47, p. 14; BCOAPO Argument, p. 32).

Ms. McShane's expert opinion was that the 7 percent common equity under the income trust structure could not be compared to the minimum 51 percent common equity which she recommends for the conventional capital structure. She states that "what needs to be compared are the combined equity/equity-like capital structure components" and notes that "while the subordinate debt is not strictly common equity, its equity-like features more closely align it with the common equity than with the secured third-party debt for comparison with the conventional capital structure" (Exhibit B-12, p. 8, lines 14-18). She concludes that "it is the weighted average cost of the subordinate debt and the common equity combined that is relevant" (Exhibit B-12, p. 10, lines 3-4; PNG Argument, para. 29, p. 10).

BCOAPO submits that the subordinate debt is very much debt to the corporate PNG. In fact, it is essential to the tax efficiency that the subordinate debt should provide deductions to flow the cash to the trust (Exhibit C3-4, Question 29; BCOAPO Argument, p. 38).

Return/Cost of Capital

PNG is proposing that after completion of the income trust conversion, the Commission approve rates for PNG that are based on the actual capital structure ratios and costs of the capital structure components of the recapitalized company. At the time of conversion, it is anticipated that the actual structure ratios and costs of the capital structure components for PNG-West will be as follows:

Table 1

COST OF CAPITAL FOR PNG(WEST) UNDER INCOME TRUST STRUCTURE				
Capital Structure Component	Proportion	Cost	Pre-Tax Cost²	Weighted Pre-Tax Cost³
Short-Term Debt	9.8%	5.50%	5.50%	0.54%
Third-Party Secured Debt	29.8%	8.90%	8.90%	2.65%
Subordinate Debt				
Fixed Rate	16.0%	12.00%	12.00%	1.92%
Variable Rate	37.4%	11.28%	11.28%	4.22%
Common Shares	7.0%	9.68%	14.78%	1.03%
Total	100%		Total	10.36%

PNG suggests that the benchmark to assess the proposed capital structure should be the pre-tax weighted average cost of capital under the existing corporate structure of 11.95 percent as developed below (Exhibit B-12, p. 5):

COST OF CAPITAL FOR PNG(WEST) UNDER CONVENTIONAL CORPORATE STRUCTURE				
Capital Structure Component	Proportion	Cost	Pre-Tax Cost⁴	Weighted Pre-Tax Cost⁵
Short-Term Debt	(1.4%)	3.0%	3.0%	(0.04%)
Third-Party Secured Debt	46.7%	8.72%	8.72%	4.07%
Preferred Stock	3.7%	7.01%	10.70%	0.39%
Common Shares	51.0%	9.68%	14.78%	7.54%
Total	100%		Total	11.95%

PNG advises that the unit holders would receive a pre-tax return of approximately 11.4 percent per annum under the PNG Income Trust proposal (assuming IPO issuance at this same yield) and that the "required yield" would be a function of market conditions and would vary over time, as would the value of a units (Exhibit B-5, BCOAPO IR 1, 159).

² At the 34.5% statutory corporate tax rate

³ At the 34.5% statutory corporate tax rate

⁴ At the 34.5% statutory corporate tax rate

⁵ At the 34.5% statutory corporate tax rate

PNG suggested the higher amount of senior debt in this Application than the previous 2004 application (from \$53 to \$55 million) is beneficial to customers since it carries a lower cost than the subordinate debt and common equity (Exhibit B-8, BCOAPO IR 2, 242).

PNG explains that the income trust structure offers PNG a lower cost of capital assuming that PNG is allowed to convert to an income trust structure on the basis applied for and in comparison to the status quo scenario with a 51 percent common equity ratio (Exhibit B-5, BCOAPO IR 1, 158). On this basis, the total cost of capital (expressed on a pre-tax basis) would be approximately 13 percent lower under the income trust structure versus the conventional common share capitalization at 51 percent common equity.

4.3 Advantages of an Income Trust

PNG not only sees many advantages in the proposed conversion to an income trust structure, but the Utility's testimony identifies so many challenges facing it under its existing capitalization, that the conversion to an income trust structure may be seen as a salvation. Unless the income trust structure proposed in the Application is approved, PNG sees no solution to the tension between paying investors a fair rate of return on their investment and keeping customer rates from rising to potentially prohibitive levels. PNG testified that it had tried to think of every option to alleviate the business challenges facing PNG and the conversion to an income trust structure was the only satisfactory solution (T6: 564).

The Application claims four "substantial advantages" in the proposed conversion: a) it would allow the Commission to fulfill its statutory obligation under the Act to permit investors to earn a fair rate of return; b) it would reduce overall costs to consumers with the results that rates could be reduced and stabilized; c) it would allow the Commission to regulate PNG employing conventional rate-making principles, and limits the need for a deemed capital structure; and d) it would enable PNG to gain access to new sources of capital and to refinance, on reasonable terms and conditions, existing long-term debt which is maturing and which must be financed in the next few years. PNG responded to a Ministry Information Request with respect to the fair return standard to state that: "A fair return is one that provides the Utility with an opportunity to: a) earn a return on an investment commensurate with that of comparable risk enterprises; b) maintain its financial integrity; and c) attract capital on reasonable terms" (Exhibit B-8, MEM IR 2, 2.7).

PNG restated the expected benefits from the conversion by stakeholder group:

“Customers

Rates are expected to be more stable and lower under the income trust structure compared to the existing corporate structure.

Investors

Investors will receive a fair return on their investment compared to the current situation where investors are receiving a rate of return on common equity that is much lower than the allowed rate of return on common equity.

Debt Holders

The long-term debt holders will have less capital at risk after PNG converts to an income trust.

Government

An income trust structure will make PNG a financially stronger entity which will be better able to provide secure and reliable service to its customers. It is in the best interests of the government to have a healthy natural gas utility serving remote areas of British Columbia which will complement potential future economic growth in these areas” (Exhibit B-5, MEM IR 1, 7.5).

In many respects the advantages of the income trust structure are accentuated by the very difficult business circumstances facing PNG under conventional capitalization. PNG testified that the rates under the conventional capitalization proposed by PNG would be considerably in excess of residential electricity prices (T5: 472) and that both customer accounts and use-per-customer in the PNG West service territory are declining. Although PNG was unwilling to accept that a “death spiral” could result from the high consumer prices, it acknowledged that those high prices would cause serious problems for the Company (T5: 474).

Another critical concern for PNG is its ability to access long-term debt markets to refinance its maturing third-party long-term debt. Over the next ten years PNG must refinance approximately \$46 million of long-term debt, including \$4.4 million of debt in 2005 and \$4.9 million per year over the four year period from 2006 to 2009, inclusive. In its Application and as supported by the evidence of Mr. Bruce, PNG states that, “As currently

capitalized and with its significant business risk, including the uncertainty of whether Methanex will continue to operate its methanol/ammonia complex at Kitimat after its transportation service agreement with PNG expires in October 2009, PNG is simply not able to raise the debt necessary to refinance this existing debt as it matures” (Exhibit B-1, p. 8).

In addition to the benefits previously articulated, PNG stated that the financial flexibility resulting from the conversion to an income trust structure will allow it to return the deferred income tax credits to customers to help lower and smooth out any rate increases in the future. PNG summarized the cost of service reductions from the conversion to the income trust structure compared with a status quo scenario of a conventional utility with 51 percent common equity in 2005, growing thereafter to offset maturing long-term debt. These calculations are identified in the Application and indicate total cumulative cost of service savings over the five year period from 2005 to 2010 for the PNG-West Division of approximately \$23 million (Exhibit B-1, pp. 24-26).

The Commission and Intervenors asked a large number of Information Requests to test the assertions of PNG that the conversion to an income trust structure would be beneficial for all parties and appropriate in the circumstances. In response to a Commission Information Request to restate the financial tables in the Application using a test year 2005 based on the currently approved deemed capital structure and return on equity, PNG responded with a set of financials indicating that the pro forma 2005 Income Trust scenario was approximately equal to the financial results and cost of service under a test year 2005 based on a deemed equity of 36 percent (Exhibit B-3, BCUC IR 1, 27).

The Information Requests also attempted to measure the stability of the PNG Income Trust in the event of unfortunate circumstances and under several scenarios of plausible events (Exhibit B-3, BCUC IR 29, Exhibit B-6).

PNG’s response was that:

PNG has no flexibility today to deal with circumstances such as high interest rates, reduced industrial loads or higher natural gas commodity costs. PNG will have greater flexibility to deal with these types of circumstances in the future under the income trust structure as a result of the significant reduction in the proportion of secured debt on its balance sheet (and corresponding improvement in the credit quality of the remaining secured debt) and enhanced access to capital.

It is clear that the income trust structure would be significantly more stable than a corporate structure with a deemed common equity component of 36 percent. The income trust structure allows PNG to significantly reduce its third-party debt leverage without having to increase rates to customers. This combination of effects will allow PNG to:

- a) absorb reduced cash flows, if necessary, resulting from reduced industrial loads with a much lower risk that it would not be able to service interest and principal payments on its third-party debt;
- b) maintain lower rates for customers and therefore remain more competitive with alternative fuels in an environment of high natural gas commodity prices while continuing to earn a fair and reasonable return on its investment; and,
- c) have significantly improved access to capital which will allow PNG to maintain more stable rates and to weather short-term negative events such as line breaks.

The interest rate sensitivity of the subordinate debt and equity components combined, even assuming that a portion of the subordinate debt is periodically reset relative to long Canada bond rates as discussed in the response to question 28.3 above, will not be significantly greater than the interest rate sensitivity of the short-term debt and equity component of the 36 percent deemed equity capitalization. Again, since rates will be lower under the income trust structure, higher interest rates will have less detrimental effects on the competitiveness of PNG's rates under the income trust structure (Exhibit B-3, BCUC IR 29).

The expert witnesses of PNG claimed that income trusts provide improved access to capital markets for smaller companies like PNG.

PNG also identified the advantages that the New Debt Issuance Test and the Distribution Test that it had negotiated with existing third party debt holders:

“The New Debt Issuance Tests were negotiated between PNG and its debenture holders, in the context of recapitalizing under an income trust structure, to provide flexibility to PNG while giving additional certainty to the debenture holders with respect to ongoing credit quality of

PNG. Notably, PNG was able to maintain significant future flexibility to increase its third party debt leverage in the event that its business risks are reduced and its credit quality improves. For example, applying the tests using its 2004 financial results, PNG would have the ability to issue an additional \$20-25 million of third party long-term debt, depending on interest rates for the new issues, relative to the amount of long-term debt proposed to be initially left outstanding under the income trust structure. This is slightly more than PNG could issue under the existing test relative to its current long-term debt levels. While PNG could not reach third party debt leverage levels under the New Debt Issuance Tests which are as high as theoretically possible under its existing debt issuance test, this is simply a reflection of capitalization and other differences between the income trust structure and the existing corporate structure. PNG believes that the reduced third-party debt levels under the income trust structure are very beneficial to PNG and its customers through the lower overall cost of capital that can be achieved under that structure.

PNG currently has a Distribution Test in its short-term working capital facility but not in its Trust Deed. The proposed Distribution Test for the amended Trust Deed will not impact PNG's ability to raise debt in the future and will not add any risk for ratepayers. It is possible that a reduction in PNG's future cash flows would cause the Distribution Test to become restrictive requiring PNG to suspend payments on the subordinate debt and common equity held by the Trust under the income trust structure" (Exhibit B-3, BCUC IR 21.0).

Through Information Requests and cross-examination PNG provided an analysis of the impacts of six specific scenarios of possible events in the PNG service territory which could significantly impact the Utility (Exhibit B-6, T5: 518 to T6: 545). The impacts were evaluated based on the options of continuing the existing corporate structure or converting to an income trust structure.

The first scenario considered a possibility that Methanex would not renew its contract with PNG in 2009 and Skeena Cellulose would be permanently lost as a customer. PNG identified that under conventional capitalization, in 2010 it would have a cash shortfall for debt service of approximately \$3.5 million. In the income trust alternative the Utility would be able to meet its reduced third-party debt obligations and have minimal cash available to service its subordinate notes. Interest payments on the subordinate notes can be deferred without default.

The second scenario anticipated the potential rise in long Canada bond yields over the next five years to a level of 10 percent. PNG identified that under the existing corporate structure the rate of return on common equity would increase in lock step with the rise in long Canada bond yields and PNG would be required to finance existing debt that is coming due with even higher price common equity through retained earnings. However, it was noted that interest coverage ratios would be expected to improve somewhat under the higher interest rate environment, resulting from the higher rate of return on common equity which more than offsets the increased interest expense.

The income trust scenarios were differentiated between one scenario where 100 percent of the subordinate debt is at fixed interest rates and the second scenario where 70 percent of subordinate debt is issued at floating rates. The fixed-rate debt scenario at an interest rate of 12 percent is approximately \$2 million better than the scenario with 70 percent at floating rates. This obviously results from the floating rate subordinate debt rising in cost as interest rates rise. Even in the case where 70 percent of the subordinate debt is issued at floating rates, the before-tax cost of capital is similar to a conventionally structured utility with 36 percent deemed common equity and is approximately \$3.4 million better than the 51 percent actual common equity structure when long Canada bond yields reach 10 percent.

The third scenario considered a circumstance where natural gas commodity prices rise at a rate of 5 percent real per year for the next five years while electricity prices remain constant in real dollar terms. PNG acknowledges that this circumstance could be devastating for the PNG-West service area. Under the income trust structure the rise in natural gas prices would only be offset by the lower cost of capital in the Income Trust scenario and the ability to finance the drawdown of deferred income taxes to help offset the impact of higher gas prices.

The last three scenarios would all be beneficial for the Utility. They include the potential of a Liquefied Natural Gas terminal at Kitimat, an oil pipeline from Alberta to Prince Rupert along the PNG right-of-way and a new large industrial customer similar in load to the historic Skeena consumption. PNG claims an incremental benefit from being capitalized as an income trust structure to be its ability to negotiate terms of new agreements from a sounder and more stable financial footing (Exhibit B-6, p. 9).

PNG identified another benefit from the proposed conversion to be a single rate application for all the Divisions of PNG since they would be commonly owned by the Income Trust.

PNG identified that the only negative future business risk event it could think of which would be worse under an income trust structure compared to conventional capitalization would be a change in tax laws unfavourable to income trusts. However, this would be a shareholder risk and in PNG's view is extremely unlikely (T5: 517-518).

BCOAPO argues that the Commission should not approve the conversion to an income trust structure, though it does not dispute that there could be benefits to ratepayers as a result of the income trust conversion. Instead, BCOAPO's objections to the PNG Application focus on the unprecedented nature of the requested approval, the unresolved Methanex issue at this point in time, the difficulty in establishing an appropriate return on equity and interest rate on the subordinate notes and potential regulatory problems between the Commission's regulation of PNG and the income trust ownership. BCOAPO argues that if the Methanex issue were clarified with Methanex committing to being a long-term customer of PNG, the Utility could be capitalized with less equity than currently exists, and, if an income trust structure were approved at that time, the interest rate on the subordinate notes would be lower. Essentially then, the need to convert to an income trust structure would be diminished and advantages could flow to customers under either a conventional capital structure or an income trust conversion at that time.

The Ministry of Energy does not support or oppose the Application. However, the Ministry states that it "agrees with PNG's expert witness, Ms. McShane, that in the development of an appropriate capital structure, it is a common and established practice in Canada for regulators to consider minimizing the overall cost to customers" (MEM Argument, p. 1).

Commission Panel Determinations

The Commission finds that there are advantages to both shareholders and customers from the proposed conversion to an income trust structure. These significant economic advantages are offset to some extent by the regulatory and other challenges which are discussed in other sections of this Decision. **In the unique business environment in which PNG finds itself, the Commission Panel finds that the income trust structure is preferable to a conventional structure because it will provide a fair opportunity to earn a reasonable return and minimize rates to customers.**

5.0 THE INITIAL PUBLIC OFFERING ("IPO")

5.1 The Income Trust Conversion

The six steps to convert PNG to an income trust structure are shown schematically and discussed in Tab 2 of the Application. Although the six steps appear sequentially, PNG's expert witness testified that: "All of the steps become contingent on each other. So if the IPO is not completed the other steps that we have talked about don't happen. Everything basically gets lined up so that, you know, in a boardroom all of these things close concurrently. There is no redemption of the debt without the IPO proceeds. There is no conversion without the redemption. They're interlinked. So in effect, it all does depend upon the success in being able to raise the equity proceeds" (T5: 498-499).

In considering the appropriate capital structure, PNG has had to balance the interests of the existing third-party debt holders who demand that their financial exposure be reduced by approximately \$31 million before they will agree to the income trust structure conversion. At the same time the expected equity returns and interest on subordinate notes must be sufficient to induce the existing shareholders to exchange their shares for Income Trust units. Also, the income to the income trust needs to be sufficient to allow the IPO to be successful to obtain the funds to pay down the third-party debt and not dilute the interest of the existing shareholders unfairly. Finally, the common equity component is established considering the most efficient tax structure for PNG and the lowest rates possible for ratepayers.

With respect to the interest rate on subordinate notes, PNG stated:

"The appropriate interest rate on debt is determined with reference to a number of factors, including the level of debt in the capital structure, the interest rate environment, and the availability of capital. The interest rate on the subordinate debt must be reasonable and appropriate, having regard to the risk to which debt is exposed and to the requirements of investors in the Income Trust markets who will indirectly be the purchasers of the debt. PNG will require the approval of the Commission prior to issuing the subordinate notes" (Exhibit B-3, BCUC IR 1, 9.1).

In considering the appropriate amount of common equity in the income trust structure, PNG responded to another Information Request to state:

“The subordinate notes in the capital structure serves to support the secured debt which permits a lower common equity proportion than would otherwise be possible. The 7 percent common equity ratio is tailored to utilize the available income tax deductions (primarily capital cost allowance) within PNG in order to minimize PNG’s income tax expense” (Exhibit B-3, BCUC IR 1, 28.1).

In considering the appropriate proportion of long-term debt in the new capital structure, PNG’s financial advisors reviewed the stability of PNG’s cash flows and business risks relative to comparable income trusts in the market and concluded that the market would accept a third-party debt level of two times EBITDA. PNG’s experts agree that while the broad range of third-party debt in the capital structure could range from zero to four times EBITDA, the two times EBITDA was an upper limit in the case of PNG (Exhibit B-3, IR 1, 28.2). The PNG witness also agreed that the cash flow after the departure of Methanex was a “key consideration as to whether or not that third-party debt was sustainable” (T6: 648).

The elements of the proposed income trust structure were examined extensively through Information Requests and pursued vigorously by BCOAPO during the hearing. BCOAPO does not support the proposed conversion and believes that PNG has not met the onus upon it to establish that its Application meets the requirements of the Act, particularly taking into consideration the risks associated with the Methanex contract. BCOAPO believes that the reduction in the equity layer to 7 percent will result in a low equity layer unprecedented in Canadian regulatory experience and should be disallowed as being detrimental and not in the public interest, and runs the possibility of unanticipated consequences. BCOAPO is particularly concerned with the interest rates on the subordinate debt which it believes to be excessive. In addition, it opposes some of the terms and conditions on the subordinate notes, including the “make-whole” premium on the fixed rate subordinate debt.

PNG advised the Commission during the course of the proceeding that the “make-whole” provisions could be removed at the discretion of the Commission and that such removal would not impede the marketability of the PNG Income Trust. PNG states that the interest rate on the subordinate debt and return on the equity held by the PNG Income Trust must be at levels that will result in PNG’s shareholders approving the plan of arrangement to convert to an Income Trust. PNG had replied to an Information Request of BCOAPO to state that the gross margin shown in Tabs 6, 7 and 8 of the Application is the minimum margin required for PNG to have comfort

that the deal will be accepted by shareholders (Exhibit B-8, BCOAPO IR 230). PNG testified that the conversion would be expected to occur at about book value of rate base (Exhibit B-5, BCOAPO IR 1, 15 and Exhibit B-8, BCOAPO IR 1, 230).

Commission Panel Determinations

The Commission Panel recognizes that the establishment of the new capital structure for the Utility under an income trust ownership requires a careful consideration of the interests of all stakeholders. The Commission Panel finds that PNG and its financial advisors have balanced those interests. The existing third-party debt holders would see the interest payments to them falling to a level which can be sustained if Methanex leaves the system, the small level of equity is tax efficient to minimize rates for ratepayers and the level of income available to the income trust (which will be discussed further in the next subsection) should be no higher than needed to induce the existing shareholders to convert and to allow for a successful IPO. **The Commission accepts the proposed income trust structure.**

5.2 Forecast of Expected Yields to the Income Trust

It is common ground that at the income trust level, the return will be derived from the interest on the subordinate notes and the earnings on the common shares. This was perhaps best stated in the evidence of Mr. McCormick where he states that, "in economic terms, the subordinate notes appear to behave as a class of high yield tax deductible equity" (Exhibit C3-4, p. 22). He expanded on this statement in response to a Commission Information Request asking if common equity and subordinate notes should both be considered equity financing of PNG for regulatory purposes. The response indicates that the income trust structure would have a 60 percent effective equity layer in the Utility but that the subordinate notes should not be considered equity financing in the context of applying the BCUC equity return formula (Exhibit C3-5, BCUC IR 1, 15).

Equity Returns

The earnings of PNG will flow to the income trust by the interest payments on the subordinate debt and the earnings paid out on the 7 percent common equity.

PNG proposes that the return on PNG's common equity continue to be fixed using the Commission's automatic adjustment formula with a 65 basis points premium for PNG-West and Tumbler Ridge Divisions and 40 basis points for the Fort St. John/Dawson Creek Division (Exhibit B-1, p. 21).

The appropriate return on the new common equity was pursued in Information Requests and in cross-examination. In Exhibit B-5, PNG provided its rationale for the equity returns:

"...the cost rate on a 7 percent equity component is theoretically higher than the cost rate on the existing equity component, forecast to be 51 percent in 2005. However PNG chose not to request a different premium for the following reasons:

- (1) Given the relatively small common equity component under the income trust structure, PNG concluded that the analysis required to estimate the cost differential was not warranted.
- (2) The equity component maintained in PNG (the Corporation) under the income trust scenario will not be directly priced by the capital markets, rather it is the income trust units that will be priced. In other words, the 7 percent common equity component cannot be separated from the subordinate debt, and therefore it is the weighted average cost of the subordinate debt and common equity combined that is relevant.
- (3) While the true cost of equity at 7 percent common equity component would be, all other things equal, higher than the cost of equity at a 51 percent common equity component, there are offsetting benefits to PNG (e.g., improved access to capital) under the income trust structure. On balance, the cost of the 7 percent equity component would be at least as high as the cost of equity under PNG's existing corporate structure." (Exhibit B-5, BCUC IR 2, 36.1).

In cross-examination, PNG accepted that for the next five to ten-year time frame, the existing return on equity mechanism should continue to apply. However, PNG did acknowledge that the Commission might vary the return on equity level if it determined that the overall yields to the PNG Income Trust were inappropriate based on the income generated from the subordinate notes and common equity (T6: 581).

Subordinate Debt Interest Rates

The determination of an appropriate interest rate on the large portion of the capital structure (53 percent) made up by the subordinate notes was one of the most contentious aspects of the hearing. The issue was made more complex by the changes proposed by PNG as the hearing process developed. In the end, Exhibit B-14 identified that 70 percent of the subordinate notes would be issued at variable interest rates, while the remaining 30 percent of the subordinate notes would be at a fixed rate of 12 percent per annum. The variable-rate notes would attract an interest rate to be set annually at the beginning of each calendar year equal to the closing yield on the benchmark long Canada bond of the prior year plus 5.75 percent. Both the variable-rate notes and the fixed-rate notes would be issued in three equal tranches with maturities of ten years, 20 years and 30 years respectively. The variable rate notes could be repaid at any time conditional on PNG's directors determining that PNG had sufficient "free cash flow" to permit payment. The fixed-rate notes could be redeemed following the tenth anniversary of issuance with a "make-whole" payment, conditional on PNG's directors determining PNG had sufficient "free cash flow" to permit repayment. Although Exhibit B-14 identifies a "make-whole" provision, the testimony and Final Argument of PNG identified that "make-whole" premium was not critical and could be deleted, if so directed by the Commission (T6: 562).

PNG suggested that the variable-rate notes would be an attractive feature for investors in the IPO because they would provide a hedge against the potential rise in interest rates in future. PNG also maintained that the variable-rate notes might have some advantage from a customer and Commission perspective because they would tend to mimic the changes in allowed ROE under a conventional structure as long Canada interest rates changed.

PNG defended the significant portion of variable-rate notes as being desirable even in this historic low interest rate environment. The concern is that existing interest rates are at such a low level that they are more likely to rise over the next 30 year period than they are to decline significantly. PNG believes that the spread between the variable-rate notes and fixed-rate notes adequately compensates for the market's expectation of interest rate fluctuations.

With respect to the proposed interest rates there was considerable concern as to the comparability of the overall yield from subordinate notes and equity returns to the Income Trust compared to the yields on comparable Income Trusts. Extensive information was filed in response to Information Requests from BCOAPO on the yields of other Income Trusts. BCOAPO focused on the relatively low returns of the Clean Energy Income Trust

in support of its argument that the yield to the PNG Income Trust and, hence, the appropriate interest rate on the subordinate notes should be below 10 percent. Exhibit B-31 was filed near the end of the hearing process in response to a request of the Panel Chair. It provides updated adjusted yields for Power and Pipeline funds and indicates a cash-on-cash yield averaging 8.2 percent and an adjusted yield averaging 9.2 percent.

In its Final Argument, BCOAPO observes that the Altalink subordinate notes have an 8 percent interest rate (Exhibit B-23, p. 2) for their ten year term, while PNG proposes a rate of approximately 12 percent for the fixed rate portion of the ten year notes (BCOAPO Argument, p. 11). BCOAPO recommends that the maturity on the subordinate notes should be no later than 2009 to coincide with the Methanex contract and that an appropriate rate on the fixed-rate subordinate notes should be deemed to be 6 percent. If the Commission approved a term as long as ten years, BCOAPO estimates the appropriate interest rate to be 7.15 percent.

Commission Panel Determinations

The Commission Panel appreciates the diligent efforts by all parties to try and establish an appropriate interest rate on the subordinate notes. However, in spite of the extensive information generated, the Commission Panel concludes that the establishment of the interest rate, at least at this point in time, is a matter of considerable judgment (T6: 630, 635). The Commission Panel accepts that Messrs. Bustos and Wallace are experts in this field and has given significant weight to their evidence in these circumstances. **The Commission Panel finds that the proposed variable and fixed-rate notes of 70 percent variable and 30 percent fixed is appropriate. In addition, the expected yield range estimated by the experts of 10 to 12 percent appears appropriate. The Commission Panel accepts the midpoint of this range in the current interest rate and business environment. The Commission Panel finds that the interest rate on the fixed rate subordinate notes should be 11 percent. The interest rate on the variable rate subordinate notes should be 4.75 percent above long Canada bonds.**

Finally, the Commission Panel believes that the subordinate note pre-payment conditions identified in Exhibit B-14 are particularly appropriate since the Commission may have to rebalance the capital structure in the future if it finds that the overall yields to the Income Trust have become inappropriate. The pre-payments would allow PNG to adjust its capital structure by varying the amount of third-party debt so as to conform with future Commission determinations. The "make-whole" conditions should not be included in the subordinate note conditions since this will maximize the flexibility for PNG to adjust its

capital structure for changing business conditions, and because PNG's experts do not believe it is a necessary condition to complete the conversion.

6.0 INCOME TRUST TAX CONSIDERATIONS

The principal advantage in the conversion to an income trust structure for PNG is that the interest on the subordinate notes is deductible for tax purposes within the Utility, resulting in minimal income tax paid at the Utility level and, therefore, a higher cash flow to the PNG Income Trust. Even though the pay-outs to the PNG Income Trust unit holders are fully taxable, the tax minimization at the Utility level has been valued as a significant benefit by investors. Those businesses which are seen to have a steady cash flow are desirable for income trust conversion.

In the case of PNG, the Utility will be expected to pay a substantial portion of its cash flows by way of interest on shareholder notes and dividends on common shares to the PNG Income Trust. However, PNG provided assurances that the Utility would retain a prudent level of cash reserves to maintain financial flexibility and make capital expenditures required to maintain and enhance the quality of the asset base.

Several tax-related issues were raised during the hearing. The first was identified in the evidence of BCOAPO's expert with respect to a consultation paper from the federal government relating to possible taxation changes of income funds. PNG and its experts were unable to provide an update with respect to that consultation paper. However, the President of PNG testified that, "We are certainly on the record as saying that if, certainly from the tax deductibility point of view, that the shareholders are prepared to take the risk if there's any change in the regulations in that regard" (T6: 544).

PNG believes that if future tax changes occur, existing Income Trusts might be "grandfathered" from the tax changes. PNG argues that income trusts are now a permanent part of Canada's equity market accounting for 10 percent of publicly traded equity in Canada with a market capitalized value of approximately \$133 billion. PNG further states that the tax treatment of Income Trusts has been part of tax law for more than 30 years and there is no suggestion of the law changing in that regard (PNG Argument, p. 19).

BCOAPO disagrees with PNG's assertion that, "the Income Trust allows the tax burden to be shifted from the shoulders of PNG's customers to the shoulders of PNG's investors" (PNG Argument, para. 67). BCOAPO points out that a substantial portion of the tax benefits are not being returned to the customers. In addition, PNG investors, whether in debt or equity, have discreet tax positions. Some investors may be tax exempt like pension

funds, others like resident Canadian individuals are taxable and, depending on the character of the distributions, will face tax on business income or dividends, or on a deferred basis as a return of capital (T4: 235-236).

BCOAPO also raised a concern that the Federal Department of Finance might invoke some rule or apply the general anti-avoidance provisions to recognize some aspects of the subordinate debt as equity. If this were to occur it might limit the tax deductibility of the interest on the subordinate notes and reduce the tax advantages of the income trust structure (Exhibit C3-4, p. 29). PNG's witnesses dismissed the likelihood of this occurring, but acknowledged that an advanced tax ruling in this regard was likely not possible. In its Argument PNG states that, "There is no basis whatever for concluding that the company has any particular risk that its income trust structure will be disallowed from a tax viewpoint" (PNG Argument, para. 69).

A separate tax issue relates to the use of deferred income tax credits to stabilize rates in the income trust scenario. In the period from July 1, 1978 through November 6, 1986 PNG used the normalized method of accounting for income taxes, and collected approximately \$14.4 million of deferred income taxes from its customers to be used to pay income taxes once "crossover" was reached. The purpose of recording the deferred income tax balance under normalized taxation is to provide funds to draw down in a future period when deductions for tax purposes are less than those for book purposes. The arguments with respect to the appropriateness of utilizing the flow-through method of income tax calculations as opposed to the normalized method have been ongoing for many years but in PNG's case the Utility has been and is currently on the flow-through method, except for an identified period when the normalized tax accounting was used and the deferred income tax balance was built up.

In PNG's case, the amount of overhead that is capitalized for book purposes, but deducted immediately for tax purposes, is also taken into account in the calculation of income taxes payable and is effectively treated the same as Capital Cost Allowance ("CCA"). For the period 1993 – 1996, overhead was not allowed as a current deduction for tax purposes by the Canada Revenue Agency and resulted in equilibrium between depreciation and CCA in 1996. Beginning in 1997, overhead was again allowed as a deduction for tax purposes. Since 2000, depreciation has exceeded CCA plus deductible overhead (i.e. crossover) by an average of approximately \$1 million per year.

The PNG-West Division currently has approximately \$14.5 million of booked deferred income taxes which are deemed by the Commission to be zero cost capital financing the PNG-West Division rate base. The corresponding balances for the Fort St. John/Dawson Creek and Tumbler Ridge Divisions are \$553,000 and \$415,000 respectively. Under the income trust structure, PNG will have significantly reduced taxable income

and the deferred income taxes will not be required to pay income taxes for the foreseeable future. PNG intends to apply to the Commission in future revenue requirement applications for approval to gradually draw down the deferred income tax balances by crediting each Division's deferred income tax balance to their respective cost of service over time. The portion of the deferred income taxes to be credited to the annual revenue requirement will be determined each year based on the overall objective of stabilizing and, in appropriate cases, reducing customer rates (Exhibit B-1, p. 22).

BCOAPO's expert undertook calculations intended to show that most of the tax-saving benefits would flow through to shareholders rather than customers (Exhibit C3-4, pp. 39-41). PNG countered that virtually all the benefits go to customers if one accepts that the fair equity capitalization in a conventional utility capitalization should be 51 percent in 2005.

BCOAPO did not take issue with PNG's proposal regarding the potential return of deferred income tax credits to customers in its Final Argument.

Commission Panel Determinations

The Commission Panel finds that the proposed income trust structure is more tax efficient for the Utility and can provide benefits to both customers and shareholders. The Commission Panel accepts PNG's position that the proposed PNG Income Trust would be reasonably structured to avoid any potential determination by the Canada Revenue Agency that the interest on the subordinate notes should be treated, for tax purposes, in any way other than the proposed interest deduction by the Utility.

The Commission Panel does not accept the BCOAPO submission that the tax savings should be split 50/50 or on any basis other than a fair allocation of cost to customers ensuring that the opportunity to earn a fair return on invested capital is provided to the owners of the Utility.

7.0 REGULATION OF THE INCOME TRUST STRUCTURE BEYOND THE INITIAL PUBLIC OFFERING

This section first addresses governance, particularly governance considerations relevant to the long-term viability of the Utility which requires reinvestment in the assets of PNG. Regulatory parameters that may ensure the financial stability of the Utility will also be considered in this section. Then issues related to the determination by the regulator of fair and reasonable returns will be considered. And the section will close with consideration of mechanisms for regulating fair and reasonable returns.

7.1 Regulatory Capacity and Governance

It is common ground between PNG and BCOAPO that the Commission does not have jurisdiction to regulate the income trust (T7: 804; T7: 808). PNG submits that because the Commission does not regulate a corporate parent, it does not need to regulate the income trust (PNG Reply, p. 3; T7: 808). BCOAPO submits that it is “fundamental that the Commission determines if it is to regulate PNG at the corporate level or at the income trust level” (BCOAPO Argument, p. 1).

The PNG Income Trust will be governed by trustees and the Utility to be owned by the income trust will be governed by a board of directors. The directors will be appointed by the Income Trust and the unit holders will elect the trustees. Therefore, the trustees and directors are expected to be the same individuals. PNG stated the fiduciary duties of trustees are similar to those of directors. (Exhibit B-1, Tab 1, p. 2, para. 2). During the proceeding, concerns were raised regarding capitalization decisions, principally distribution and allocation decisions, to be made by the trustees that may not be in the best interests of the Utility.

Payments on the subordinate notes can be reasonably expected to result in a much higher distribution to unit holders, than under a conventional capital structure where earnings are frequently retained. Moreover, the policy of the trustees will be to distribute all available cash to the income trust (Exhibit B-3, BCUC IR 1, 15.0). However, PNG asserts that in the exercise of their fiduciary duties the trustees may waive the requirement of the Utility to make interest payments on the subordinate notes where the waiver is in the best interests of the Utility. PNG states in its Application that the interest payments may be waived by the trustees because if it is in the best interest of the Utility for the payments not to be made, it follows that it will also be in the best interests of the

unit holders. PNG testified that its paramount responsibility would remain with the operating Utility and that there would be no conflict of interest between the management and directors of the Utility and the PNG Income Trust (T6: 545). PNG agreed that it would put the security of the Utility operations first because it is that entity which feeds the income trust, and if the Utility were to be imperiled, the PNG Income Trust would have no ability to distribute income to the unit holders.

As well as concerns about distributions, BCOAPO also raised capital allocation issues. BCOAPO was concerned that if the Utility was not the sole asset owned by the PNG Income Trust, then capital allocation considerations may result in decisions by trustees that are not in the best interests of the Utility. PNG submits that, at least initially, the Utility will be the sole asset owned by the PNG Income Trust. In other words, there will be no conflicting interests on the part of the income trust, to prefer one asset over another. The interests of the PNG Income Trust are synonymous with the interests of PNG (PNG Argument, p. 20, para. 75).

BCOAPO links “the need for close regulation and the concerns for governance” (BCOAPO Argument, p. 25). BCOAPO submits that only regulation at the PNG Income Trust level will ensure that the unit holders act in the best interests of the Utility (BCOAPO Argument, p. 24). BCOAPO also expressed concern about governance and submits that the need for regulation of the income trust is evident in the Utility’s request for a make-whole premium on the subordinate notes (BCOAPO Argument, p. 25).

Commission Panel Determinations

The Commission does not regulate the parent corporate entities of utilities with a conventional capital structure, and the Commission Panel does not consider that the differences between a conventional capital structure and the income trust structure applied for in the Application create a need to specifically regulate the PNG Income Trust. However, the capitalization differences, particularly the financing requirements of the subordinate notes, do establish a need for conditions of approval for the income trust structure so as to ensure adequate capitalization.

The PNG Income Trust advances the subordinate notes; therefore, it cannot be assumed that the terms, including the interest rates, of the subordinate notes are comparable to market terms. Although those terms are relevant for the purposes of the IPO, the Commission Panel finds the interest rates should be neither determinative of, nor relevant to, costs of capital that are recoverable in rates beyond the 2005 test year.

The Commission Panel also accepts PNG's assurances that the Utility's management and directors will safeguard the security of Utility operations by retaining a prudent level of cash reserves to maintain financial flexibility and make capital expenditures required to maintain and enhance the asset base. The Commission has an ongoing responsibility to ensure all regulated utilities have the financial capability to maintain safe, reliable operations.

7.2 Determination of Fair and Reasonable Return

For conventional capital structures, the Commission allows returns for revenue requirement purposes based on returns achievable by comparable risk firms. The Commission determines returns by estimating expected returns, that is, by forward-looking estimates of a utility's cost of capital at a point in time. Current regulatory decisions rely on models ("standard tests") used by rate of return experts that provide the forward-looking estimates of the cost of capital.

PNG submits the actual yields can be used for determining fair and reasonable returns for the operating entity as follows:

"It is simply a matter of comparing PNG's trading yields over a reasonable period of time to the returns being paid to the trust via the subordinate note and common equity" (PNG Reply, p. 12, para. 33).

During Oral Argument, counsel for PNG stated that the units trade values relative to book values are a significant factor to assess whether or not the cost of servicing the equity and subordinate notes held by the income trust should be recovered from the customer or not (T7: 785). PNG also submits that imputing a capital structure and calculating the appropriate cost of capital based on that imputed capital structure is a second means of determining the revenue requirement (T7: 790).

The use of actual yields of a parent entity needs to be contrasted with using expected yields at the operating level. The use of actual yields of a parent entity is a departure from previous approaches utilized by the Commission when approving returns. This departure needs to be considered in the context of the other approaches proposed by PNG for approving returns, and whether or not using actual yields together with the other approaches is appropriate until the other methodologies commonly used in setting returns can be adapted for income trusts.

BCOAPO submits that with 20 years of capital markets experience with income trusts the data was available to undertake the Equity Risk Premium and Comparable Earnings tests (BCOAPO, p. 31). BCOAPO further submits that the Commission should draw a negative inference from the fact that the applicant has not presented the analysis of these standard tests (BCOAPO, p. 32). In Reply, PNG states that “it is not possible to develop equity risk premium and comparable earnings model for the PNG Income Trust until there is a trading history” (PNG Reply, p. 13; PNG Argument, p. 22). PNG further asserts that “it is too early in the life of the income trust” market for the development of the standard tests (PNG Argument, p. 22, para. 83). PNG submits that focusing on yield at the income trust level is appropriate at this time (PNG Reply, pp. 4-5).

PNG and BCOAPO hold differing views regarding the effect of approval of the income trust structure. PNG asserts that it is not asking the Commission to approve its cost of capital for decades as asserted by BCOAPO (PNG Reply, p. 12). BCOAPO submits that if the income trust is approved, the Commission will lose the opportunity to apply the future adjustments it may make to the equity risk formula (BCOAPO Argument, p. 27). Specifically, the conversion will have profound influences on the cycle of review and the extent to which the Commission can adjust the costs of equity and debt capital (BCOAPO Argument, p. 27).

BCOAPO submits that the specific tests required to be met attach to the individual securities to be issued rather than their blended effect alone (BCOAPO, p. 34). BCOAPO submits that the Commission does not have the jurisdiction to approve a utility’s debt issues, including their interest rates, as being appropriate and then subsequently limit the utility’s ability to recover these costs from ratepayers because of changed circumstances, particularly if this possibility of these changed circumstances was in the consideration of the Commission in approving the debt issue (BCOAPO, p. 44).

The evidence of PNG’s expert Ms. McShane was informative regarding the expected discretion of the Commission to adjust the approved capital structure of the Utility in the future, irrespective of having approved the amount of the subordinate notes and their interest rates at the time of conversion to the income trust structure (T4: 286-290). She agreed that regulators retain their discretion to establish efficient capital structures and she believes that the BCUC could adjust the amount of subordinate debt to achieve that end.

Commission Panel Determinations

The implication of PNG’s submission regarding the subordinate notes is that approval of the subordinate notes will not determine the cost of capital for the notes for revenue requirement purposes, and the implication of the

submissions of BCOAPO is that approval of the subordinate notes will determine the cost of capital for the Utility for the term of the subordinate notes. In this regard, the Commission Panel accepts the submission of PNG.

The Commission Panel considers that it should not approve the Application if the outcome would be the loss of authority to regulate returns for the Utility. For example, if approval of the subordinate notes resulted in the loss of authority, even in part, to make adjustments to the cost of capital, then the income trust structure should not be approved. In this regard, the Commission Panel accepts the evidence of the Utility's executives and the submissions of its counsel that approval of the Application, including the subordinate notes, will not result in the loss of authority to regulate returns for the Utility.

The Commission Panel accepts PNG's focus on yields at the trust level for the purposes of this Application and the initial IPO. Prior to the development of standard tests for income trusts, PNG should expect that the actual yields at the trust level will continue to be relevant to the determination of fair returns, and should not expect any relief from the conditions of approval, particularly Condition #1 (See Chapter 10). Prior to and after development of the standard tests, PNG should expect that the Commission will continue to compare the combined cost of the subordinate notes and equity with the rate of return on equity under a conventional capital structure as well as to comparable income trust yields. That is to say the weighted average cost of the subordinate notes and equity should not exceed a fair rate of return on equity on an imputed, conventional capital structure.

The Commission Panel concludes that it does not need to draw inferences from the lack of evidence presented by PNG regarding the standard tests because the effect of approving the income trust structure for future adjustments to returns is much more limited than BCOAPO submits.

7.3 Mechanisms for Regulating Fair and Reasonable Returns

The Commission has established an automatic adjustment mechanism, for calculating rates of return on approved capital structures that is applied to utilities that have regulated rates of return. The automatic adjustment mechanism annually adjusts rates of return.

PNG commits that when it “seeks changes in rates in revenue requirement applications, and seeks an adjustment in return on capital, it will provide evidence that the applied for weighted average return to the income trust is appropriate relative to the actual yield required by the market....Further,...PNG will provide evidence that the income trust capital structure continues to result in a competitive cost of capital relative to the cost of capital under the conventional structure” (PNG Argument, p. 21, para. 82; T7: 822).

PNG submits the primary mechanism for regulating the rates to the approved revenue requirement should be to deem an appropriate portion of third party debt in the capital structure (PNG Argument, p. 21, para. 80). It follows that deeming a portion of the third party debt in the capital structure would be necessary each time the revenue requirement is approved.

Commission Panel Determinations

The Commission Panel accepts that deeming the portion of the third party debt will, as appropriate, be the principal mechanism for regulating the cost of capital included in rates. Adjusting the rate of return on equity may also be used as a mechanism for regulating the cost of capital included in rates.

The Commission Panel anticipates that following approval of the income trust structure conversion, the 2005 revenue requirements for PNG-West may be the subject of an NSP. For the purposes of a capital structure to be used in the automatic adjustment mechanism, the Commission Panel expects that the capital structure stated in a negotiated settlement will be used. In the alternative, the Commission Panel will determine the appropriate capital structure for 2005 from the evidence filed in this proceeding as part of the PNG-West application.

8.0 SHAREHOLDER/UNIT HOLDER RISKS AND COSTS

PNG has taken on most all of the risks and costs related to conversion to an income trust structure, thereby shielding customers from virtually all risks.

- The Application states that PNG estimates that it will incur total costs in the range of \$9 million to convert PNG to an income trust structure. This includes an underwriting commission of approximately 6 percent with respect to the IPO, early redemption and restructuring costs related to the third-party secured debt, and legal and other transaction costs. PNG shareholders will bear all of these costs and none of these costs will be recovered through PNG's customer rates (Exhibit B-1, Application, p. 14). PNG testified that the only cost that it could think of which would be borne by ratepayers was the cost of this proceeding, and other than that, the shareholders of the Company will cover all of the costs (T6: 557-558). However, in paragraph 81(iii) of the Application PNG accepts that no costs associated with this Application will be recovered through customer rates.
- At some point it may become desirable for PNG to convert to another capital structure from the income trust structure. In response to questioning on what could be done to unwind the income trust structure, PNG was equivocal in its responses since it could not speculate on the potential reason for such an unwinding. It was noted that PNG accepted the possibility for the Commission to deem a capital structure as it currently does for PNG (T6: 559). The Company also agreed that the Commission would have the same powers to ask the Utility to convert to another capital structure as it has under the Act today (T6: 561). PNG accepts that if the reason for such an unwinding is a result of changes in income taxes, that this is a risk that the Company has accepted (T6: 561). PNG has accepted the cost risk if shareholders do not convert their shares to income trust units and if the IPO is unsuccessful or is not issued.
- While PNG hopes that it would be grandfathered from any new tax requirements affecting income trusts, it accepts that if the laws do change that it would be a shareholder risk (T5: 517-518, T6: 544).
- BCOAPO's expert speculated that the Federal Department of Finance might not consider the subordinate debt as debt and might deem it to be equity for tax purposes. PNG responded that it could not get advance tax rulings on such questions of fact but that it would be getting an opinion

from its underwriters that the subordinate debt would in fact be tax deductible (T6: 555-556).

- PNG intends to establish the Income Trust under the laws of British Columbia. Although British Columbia has not yet enacted shareholder protection legislation similar to that in Ontario, Quebec and Alberta, PNG identified that a discussion paper was currently being circulated with respect to the potential for such legislation and the Company anticipates that such legislation will be brought into effect in British Columbia (T5: 500-501).
- Since the subordinate debt would rank below the priority of the third-party secured debt, there is an ongoing risk that PNG may need to withhold cash from the shareholder note payments for such things as unanticipated events like line breaks and the impact if Methanex were to close its plant. In Exhibit B-6 a scenario analysis identifies that there would be virtually no cash available for servicing of subordinate debt if Methanex closed after 2009. However the same scenario identifies that PNG would be in an even worse position under its existing capitalization if Methanex closed.
- A final risk to the Company was raised in oral argument when PNG agreed that it would be difficult, if not impossible, for the Commission to establish the fair trade in yields of the PNG Income Trust if the Trust owned assets other than PNG. PNG is prepared to accept a condition requiring approval of the Commission before the PNG Income Trust can acquire any other asset (T7: 800). This is further addressed in Chapter 10 of this Decision.

Commission Panel Determinations

The Commission Panel notes that PNG's shareholders and future Income Trust unit holders have accepted virtually all risks and costs related to the proposed conversion to an income trust structure. **The Commission Panel is satisfied that the ratepayers will be well protected from unanticipated costs if the income trust structure is approved.**

9.0 APPROVAL OF INCOME TRUST

The PNG Application details the approvals being sought under Sections 50, 53, 54, 58 and 89 of the Act. Due to the many changes to the Application since it was filed, the Commission wrote to PNG on April 29, 2005 requesting that the Utility revise Exhibit B-1, pages 30-32 inclusive, as may be determined to be necessary by PNG. Exhibit B-14 provides the revisions to paragraphs 80 to 83 of the Application with respect to the approvals being sought from the Commission. The revised filing with respect to Commission approvals is as follows:

“APPROVALS SOUGHT

80. PNG hereby applies to the Commission:

- (i) for approval of the acquisition by PNGT of all of the issued and outstanding common shares of PNG in exchange for common shares and subordinate notes of PNGT, pursuant to section 54 of the Act (See Step 2 on page 12 of the Application and Tab 2, page 2 which describe the initial step where PNGT acquires a “reviewable interest”, as defined in section 54(4)(b) of the Act, in PNG. Under section 54(5)(c) of the Act PNG must not, without the approval of the Commission register a transfer of shares to a person if it causes the person to have a reviewable interest. Section 54(4)(b) of the Act states that a person has a reviewable interest in a public utility if the person owns or controls in the aggregate more than 20 percent of the voting shares outstanding of any class of shares of the utility. Upon completion of Step 2, PNGT will own 100 percent of the outstanding common shares of PNG);
- (ii) for approval of the acquisition by the PNG Income Trust of indirect control of PNG upon the acquisition by the PNG Income Trust of all the issued and outstanding common shares and subordinate notes of PNGT in exchange for units of the PNG Income Trust, pursuant to section 54 of the Act (See Step 3 on page 12 of the Application and Tab 2, page 3 for a description of this step where the PNG Income Trust indirectly acquires a reviewable interest in PNG through its acquisition of PNGT, the direct owner of PNG);
- (iii) for consent of the Lieutenant Governor in Council to the amalgamation of PNG, PNG(N.E.) and PNGT under the name “Pacific Northern Gas Ltd.”, pursuant to section 53 of the Act (After the completion of Steps 2 and 3 as described in paragraphs (i) and (ii) above, the PNG Income Trust will own PNGT which in turn will own PNG which in turn owns PNG(N.E.). To complete the reorganization of the ownership of PNG by the PNG Income Trust requires that PNG, PNG(N.E.)

and PNGT amalgamate to form PNG, the utility to be regulated by the Commission. See Step 4 on page 13 of the Application and Tab 2, page 4. Section 53(1) of the Act provides that a public utility (i.e. PNG) must not amalgamate with another person (i.e. PNGT and PNG(N.E.)) unless the Lieutenant Governor in Council has first received from the Commission a report stating that the amalgamation would be beneficial in the public interest and then by order consenting to the amalgamation);

- (iv) for approval of the acquisition by the PNG Income Trust of all the issued and outstanding common shares of amalgamated PNG, pursuant to section 54 of the Act (PNG Income Trust will become the holder of all of the common shares of amalgamated PNG following the amalgamation of PNG, PNG(N.E.) and PNGT as described in paragraph (iii) above);
- (v) for approval of the issuance of additional common shares and subordinate notes by amalgamated PNG to the PNG Income Trust, pursuant to section 50 of the Act, the proceeds of which are to be used by amalgamated PNG to redeem all of its issued and outstanding preferred shares and approximately \$31 million of its existing third party secured debt (See Step 5 on page 13 of the Application and Tab 2, page 5. Section 50(1) of the Act provides that a public utility must not issue a security without first obtaining approval of the Commission. Section 50(7) provides that the Commission may give its approval subject to the conditions and requirements considered necessary or desirable in the public interest);
- (vi) for approval that the subordinate notes specified under paragraphs (i) and (v) above be issued in two blocks with one block equal to 70 percent of the total issue amount with a variable rate of interest ("Variable Rate Notes") and the other block equal to 30 percent of the total issue amount with a fixed rate of interest ("Fixed Rate Notes") with the following terms and conditions in respect of each issue:

Variable Rate Notes

Principal Amount:	70% of the principal amount of the subordinate notes issued by PNG to the PNG Income Trust in accordance with the foregoing transactions.
Interest Rate:	The interest rate to be set annually at the beginning of each calendar year equal to the closing yield of the benchmark long Canada bond of the prior year plus 5.75 percent.
Term:	Three equal tranches with bullet maturities of 10 years, 20 years and 30 years, respectively.
Prepayment:	Right to prepay in whole at any time and in part from time to time, with no make-whole payment, and conditional on PNG's Directors determining that PNG has sufficient "free cash flow" to permit repayment.

Principal Payments: No mandatory principal payment obligations before maturity.

Fixed Rate Notes

Principal Amount: 30% of the principal amount of the subordinate notes issued by PNG to the PNG Income Trust in accordance with the foregoing transactions.

Interest Rate: 12% per annum.

Term: Three equal tranches with bullet maturities of 10 years, 20 years and 30 years, respectively.

Prepayment: The 20 year and 30 year tranches to be prepayable in whole at any time and in part from time to time, with the applicable make-whole payment, following the 10th anniversary of the issuance and conditional on PNG's Directors determining that PNG has sufficient "free cash flow" to permit repayment. The make-whole provisions to be determined in accordance with market practice at the time of issuance of the notes and subject to final Commission approval at that time.

Principal Payments: No mandatory principal payment obligations before maturity.

- (vii) for approval of the redemption by amalgamated PNG of all of its issued and outstanding preferred shares and approximately \$31 million of its existing third party secured debt, subject to the Commission's approval of the final amount to be redeemed, pursuant to section 50 of the Act (See Step 6 on page 13 of the Application and Tab 2, page 6);
- (viii) for approval for rate making purposes that amalgamated PNG's actual capital structure, after giving affect to the foregoing transactions, will apply to the three operating Divisions of PNG (i.e. PNG-West, Fort St. John/Dawson Creek and Tumbler Ridge) (See page 16 and page 20, paragraph 62(c) of the Application for the expected actual capital structure); and
- (ix) for approval for rate making purposes that the return on PNG's actual common equity will continue to be fixed using the Commission's automatic return on equity adjustment formula as may be modified by the Commission from time to time and that the risk premiums relative to the low risk benchmark utility be 65 basis points for the PNG-West and Tumbler Ridge Divisions and 40 basis points for the Fort St. John/Dawson Creek Division.

81. The approvals sought by PNG are subject to the following conditions:
- (i) that PNG files with the Commission, before any of the foregoing transactions are carried out, final details of the terms and conditions on which the foregoing transactions will be carried out, including in the case of the issuance of securities, the principal amounts of such securities to be issued and, in the case of the redemption of securities, the amount of such securities to be redeemed. This information will be made available to the Commission by PNG filing all of the documents required to carry out the foregoing transactions, including the final draft of the Plan of Arrangement described in paragraph 47 on page 12 of the Application prior to seeking approval of this document by PNG's shareholders and the Supreme Court of British Columbia and the final draft of the preliminary prospectus for the IPO described under Step 6 on page 13 of the Application;
 - (ii) that the Commission confirms with PNG, before any of the foregoing transactions are carried out, that it is satisfied with the terms and conditions on which the foregoing transactions are to be carried out; and
 - (iii) that no costs associated with this Application and no transaction costs, including amalgamation and securities issuance and redemption costs, related to the foregoing transactions shall be recovered through customer rates.
82. PNG also hereby applies to the Commission for an order pursuant to sections 58 and 89 of the Act making amalgamated PNG's existing rates (other than the rates charged to Methanex Corporation and West Fraser Mills Ltd.) interim effective as of the income trust conversion completion date, together with a direction that amalgamated PNG file a revenue requirement application with the Commission for final rates for all three operating Divisions, effective from the date the interim rates go into effect, reflecting the new actual capitalization, weighted average cost of capital and income tax expense of amalgamated PNG as a result of conversion to the income trust structure.
83. For all the reasons set out in this Application, PNG submits that PNG and the users of the services of PNG will not be detrimentally affected by the acquisition of a reviewable interest in PNG by the PNG Income Trust (section 54(9) of the Act) and the amalgamation of PNG, PNG(N.E.) and PNGT will be beneficial in the public interest (section 53(1)(a)(i) of the Act)."

Relevant Statutory Provisions and Tests

Briefly, PNG's Application and the associated requested approvals relate to the proposed acquisition of reviewable interests, the amalgamation of PNG, PNG(NE) and PNGT, and the issuance of securities under sections 54, 53 and 50, respectively, of the Act.

BCOAPO submits that to approve the Application, the Commission must find that: (1) the terms of the issued securities are reasonable and prudent and in the public interest; (2) the proposed capital structure is reasonable and prudent and in the public interest; and (3) the equity return at the trust level is fair and reasonable, meaning that it is neither "more than a fair and reasonable charge for service of the nature and quality provided," nor less (BCOAPO Argument, p. 31).

PNG submits that the law is not in dispute that the two relevant tests are absence of detriment for the customers and the public interest. The Company notes that the law is well-established that matters of public interest assessment in utility regulation are substantially within the purview of the Commission and are to be determined on the particular facts of the individual application (PNG Reply, para. 15, p. 5).

The amalgamation of PNG, PNG(NE) and PNGT is required to complete the reorganization of the ownership of PNG by the PNG Income Trust. Section 53(1) of the Act provides that a public utility must not amalgamate with another person unless the Lieutenant Governor in Council has first received from the Commission a report stating that the amalgamation would be beneficial in the public interest.

PNG submits for all the reasons set out in the Application, the amalgamation of PNG, PNG(NE) and PNGT will be beneficial in the public interest. BCOAPO sees no objection to the amalgamation of the PNG companies proceeding without regard to the decision on this Application (BCOAPO Argument, p. 46).

Commission Panel Determinations

The Commission Panel has reviewed the Application and evidence related thereto and has assessed the benefits identified by PNG and the proposed allocation of related risk and concludes that the proposed conversion to the income trust structure will not result in the users of the Utility service being detrimentally affected and the Commission Panel finds that the conversion is beneficial in the public interest. This being the case, **the**

Commission Panel is prepared to issue the approvals requested by PNG with the modifications and conditions which are further elaborated in this Decision. The Commission Panel will submit this Decision to the Lieutenant Governor in Council pursuant to Section 53(5) of the Act and will request that the LGIC issue an Order pursuant to Section 53(1) of the Act, including the conditions and requirements in this Decision to ensure that the proposed amalgamation will be beneficial in the public interest.

The Commission Panel has found that the proposed capital structure of the new PNG is both tax efficient and appropriate as a starting point for the income trust structure. The Commission Panel finds that the redemption of all of PNG's preferred shares and the reduction in third-party secured debt of approximately \$31 million as proposed by PNG will add significant financial stability to the Utility in the event that Methanex closes. The Commission Panel also finds that the proposal to have 7 percent common equity in the new capital structure is tax efficient and that an equity risk premium relative to the low-risk benchmark Utility of 65 basis points for the PNG-West and Tumbler Ridge Divisions and 40 basis points for the Fort St. John/Dawson Creek Division is reasonable at this time.

With respect to the subordinate notes which will make up 53 percent of the capital structure, the Commission Panel has accepted that the issuance of 70 percent of the principal amount of these notes as variable-rate notes and 30 percent of the principal amount as fixed-rate notes is appropriate. Even though the interest payments on the variable-rate notes could rise with changes in the long Canada bond rate, PNG provided evidence that the spread between the variable-rate notes and the fixed-rate notes was appropriate.

As for the repayment conditions on the fixed-rate notes, PNG testified that the proposed "make-whole" payment was not necessary and that the Utility was prepared to delete that requirement. **The Commission Panel finds that the "make-whole" payment conditions should be deleted from the subordinate note conditions.**

The Commission Panel has discussed the appropriate returns to PNG on its common equity and subordinate notes and has concluded that the interest rate on the fixed-rate subordinate notes should be 11 percent per annum and the premium above the benchmark long Canada bond should be 4.75 percent for the floating rate subordinate debt.

The Commission Panel approves the conditions identified by PNG in paragraph 81 of the revised Application. In addition to those conditions, PNG has accepted that the owners of PNG will take on the risk with respect to costs resulting from tax changes as they may impact income trusts and the tax

deductibility by PNG of the subordinate notes in the future. This additional condition is required by the Commission Panel to ensure that ratepayers will continue to be held harmless from the proposed conversion to an income trust structure.

A number of additional conditions were identified by the Commission Panel during Oral Argument and were accepted by PNG. These additional conditions are discussed in Chapter 10 of this Decision and are to be part of the approval of the proposed conversion.

The next steps will be for PNG to file with the Commission, before any of the conversion transactions are carried out, final details of the terms and conditions on which the transactions will be carried out, including in the case of the issuance of securities, the principal amounts of such securities to be issued and, in the case of the redemption of securities, the amount of such securities to be redeemed. PNG will file with the Commission all of the documents required to carry out the transactions, including the final draft of the Plan of Arrangement and the preliminary prospectus for the IPO.

Once satisfied with the foregoing details, the Commission will issue an Order making PNG's rates interim (except for the fixed retention rates of Methanex and West Fraser Mills Ltd.) effective the date of the income trust conversion, and requiring PNG to make a revenue requirement filing based on the new cost structure.

10.0 CONDITIONS OF APPROVAL

BCOAPO submits that regulation of the PNG Income Trust is necessary to ensure adequate regulatory capacity. The Commission has concluded that regulation of the income trust is not necessary, and has also concluded that approval of the conversion of the Utility to an income trust structure should be subject to certain conditions (T7: 794). The conditions and their purpose are identified in this section.

Counsel for PNG submits that PNG's control over the conditions does not in any way limit the Commission's jurisdiction to impose conditions on PNG and that the Commission can, at any time, direct conversion back to a conventional capital structure (T7: 804).

During Oral Argument, counsel on behalf of PNG agreed to, and accepted, the potential conditions proposed by the Chair as revised with the benefit of submissions at that time. The conditions are to be incorporated by reference into the prospectus and the trust indenture. For greater certainty, the conditions do not need to be repeated in the prospectus and trust indenture but should be referred to in the prospectus and trust indenture.

Condition #1 - Prior Approval of Acquisition of Other Assets

Without first obtaining the Commission's approval, the PNG Income Trust shall not hold an interest in any entity or property other than PNG. If the PNG Income Trust does hold an interest in any entity or property other than PNG, then the Commission can require PNG to appear before it and demonstrate that the PNG Income Trust structure continues to be in the public interest and otherwise complies with the Act. If the Commission determines that the PNG Income Trust structure is no longer in the public interest or otherwise does not comply with the Act, on notice to PNG and after a hearing, the Commission may make an order imposing on PNG conditions or requirements respecting the ownership of PNG and any other conditions or requirements the Commission determines to be appropriate.

Purpose – The purpose of Condition #1 is to ensure that the Commission can determine fair and reasonable returns, particularly prior to the development of standard tests, and to ensure that capital allocation decisions by the PNG Income Trust are not detrimental to the management and operation of the Utility. Once standard tests to determine fair and reasonable returns to be paid by PNG to the PNG Income Trust are established with sufficient trading history to make them workable, PNG may apply to have Condition #1 removed.

Condition #2 - Third Party Debt Issued as Directed by Commission

If the Commission, after inquiry, considers that it is necessary and reasonable that PNG issue to any party other than the PNG Income Trust any bond, debenture, note or other debt instrument, then the Commission may require the Utility to issue such securities and PNG shall issue such securities and seek such approvals as are required by the Act.

Purpose – The purpose of Condition #2 is to ensure that the capital structure of PNG is in the public interest and otherwise complies with the Act.

Condition #3 – Issue and Call of Subordinate Notes

If the Commission, after inquiry, considers that it is necessary and reasonable that PNG either issue or call subordinate notes, then the Commission may require PNG to issue or call such securities and PNG shall issue or call such securities and seek such approval as are required by the Act.

Purpose – The purpose of Condition #3 is to ensure that the capital structure of PNG is in the public interest and otherwise complies with the Act. With Conditions #2 and #3 acting together, the Commission will have the authority to direct PNG to replace the subordinate notes with third party debt.

Condition #4 - Regulatory Capacity and Change in Law

PNG acknowledges that the Commission has the authority to either: 1) deem the portion of third party debt in the capital structure so that the weighted average cost of the subordinate notes and equity for setting rates provides an opportunity to earn the fair rate of return on equity, assuming an imputed conventional capital structure; or 2) deem the portion of third party debt in the capital structure for setting rates to provide an opportunity to earn the fair rate of return on the subordinate notes and equity, assuming the subordinate notes are equity-like. If a court decision restricts the powers of the Commission to deem the portion of third party debt for the purposes of calculating rates, then the Commission can require PNG to appear before it and demonstrate that the income trust structure is still in the public interest and otherwise complies with the requirements of the Act.

Purpose - The purpose of Condition #4 is to ensure that the Commission can deem third party debt as a means to ensure that rates are in compliance with the Act. A further purpose of Condition #4 is to ensure that the interest

payments due to the PNG Income Trust pursuant to the terms of the subordinate notes, as may be approved by the Commission, are neither determinative of nor relevant to the cost of capital recoverable in rates.

Condition #5 – PNG Acceptance of Condition

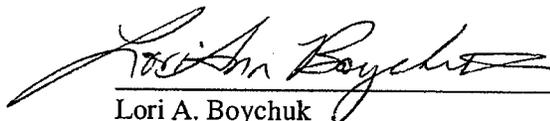
By converting to the income trust structure, PNG accepts that the conversion to an income trust structure is subject to the above conditions and undertakes to do whatever may be within its powers to ensure the conditions are satisfied. If at any time the conditions are not satisfied, PNG accepts that the Commission may, on notice to PNG and after an inquiry, direct PNG to call the subordinate notes and recapitalize under a conventional capital structure.

Purpose – Condition #5 is necessary because the PNG Income Trust is not regulated. In this regard, the Commission Panel acknowledges that PNG may not be able to ensure that the conditions are satisfied. However, if the conditions are not satisfied at any time in the future, then the Commission may order the recapitalization of the Utility with a conventional capital structure.

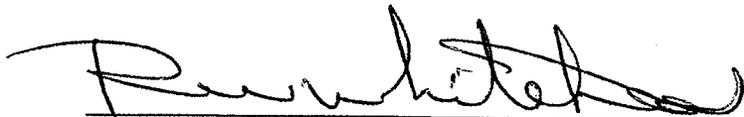
Dated at the City of Vancouver, in the Province of British Columbia, this 9 day of September 2005.



Robert H. Hobbs
Chair



Lori A. Boychuk
Commissioner



Robert W. Whitehead
Commissioner

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-84-05**



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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by Pacific Northern Gas Ltd.
For Approval to Convert to an Income Trust

BEFORE: R.H. Hobbs, Chair
L.A. Boychuk, Commissioner September 9, 2005
R.W. Whitehead, Commissioner

O R D E R

WHEREAS:

- A. On December 17, 2004, Pacific Northern Gas Ltd. ("PNG") filed for approval of its 2005 Revenue Requirements Application to amend its rates on an interim and final basis, effective January 1, 2005, pursuant to Sections 89 and 58 of the Utilities Commission Act ("the Act"); and
- B. On December 17, 2004, PNG also filed an "Application for approval to Convert to an Income Trust" ("Income Trust Application") (collectively "the Applications"); and
- C. The PNG 2005 Revenue Requirements Application proposes to increase delivery rates to all customers, except West Fraser Mills and Methanex Corporation, as a result of increases in cost of service and lower gas deliveries to most customers classes; and
- D. By Order No. G-114-04 the Commission approved an interim rate increase in the delivery rates for all classes of customers, except West Fraser Mills and Methanex Corporation, effective January 1, 2005 subject to refund with interest; and
- E. By Order No. G-114-04 the Commission also established a Pre-hearing Conference ("PHC") in Vancouver which was held January 20, 2005 to address procedural matters related to the Applications, including the identification of principal issues and the process options for review of the Applications; and

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-84-05**

2

- F. At the PHC, some Intervenor raised concerns regarding PNG's request to review its Income Trust Application prior to the fall 2005 General Review of Return on Equity ("ROE") and Capital Structure that has been scheduled by Commission Order No. G-88-04 ("the General ROE Review"); and
- G. The Commission, by letter dated January 26, 2005 to PNG and the Registered Intervenor (Exhibit A-3), addressed the issues raised at the PHC. The Commission determined that the review of the PNG Income Trust Application will precede the General ROE Review and that the expert evidence and testimony at the hearing into PNG's Income Trust Application is to address the cost of capital under the 2005 Revenue Requirements Application and the Income Trust Application; and
- H. An oral public hearing was held in Vancouver from May 10, 2005 to May 13, 2005, to review the Income Trust Application, along with the capital component of the 2005 Revenue Requirement Application; and
- I. The Commission has considered the Income Trust Application and the capital component of the 2005 Revenue Requirements Application along with evidence and arguments, all as set forth in the Decision issued with this Order.

NOW THEREFORE the Commission orders as follows:

1. The Income Trust Application is approved subject to the modifications, conditions and directions identified in the Decision dated September 9, 2005 issued concurrently with this Order.

DATED at the City of Vancouver, in the Province of British Columbia, this 9 day of September 2005.

BY ORDER


Robert H. Hobbs
Chair

GLOSSARY AND ABBREVIATIONS

Acronym	Term
Amalgamated PNG	Amalgamation of PNG, PNG(NE) and PNGT as one company under the name Pacific Northern Gas Ltd.
Application	Pacific Northern Gas Ltd.'s Application for approval to recapitalize under an income trust ownership structure dated December 17, 2004
BCOAPO	The BC Old Age Pensioners' Organization et al.
BCUC or Commission	British Columbia Utilities Commission
CAPM	Capital Asset Pricing Model
CCA	Capital Cost Allowance
CRA	Canadian Revenue Agency
DBRS	Dominion Bond Rating Service
EBITDA	Earnings before Income Tax, Depreciation and Amortization
ERP	Equity Risk Premium
IPO	Initial Public Offering
LGIC	Lieutenant Governor in Council
MEM or Ministry	Ministry of Energy and Mines
Methanex	Methanex Corporation
NSP	Negotiated Settlement Process
PNG 2005 RR	PNG 2005 Revenue Requirements Application
PNG, Utility or Company	Pacific Northern Gas Ltd.
PNG(NE)	Pacific Northern Gas (N.E.) Ltd.
PNGT	Pacific Northern Gas Transition Ltd.
PNG-West	Pacific Northern Gas Ltd. (West)
ROE	Return on Common Equity
RoyNat	RoyNat Inc.
UCA or Act	Utilities Commission Act

LIST OF APPEARANCES

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P. MILLER

Commission Counsel

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C.P. DONOHUE
K. TEITGE

Pacific Northern Gas Ltd.

D. HUMBER

West Fraser Mills Limited

G. BIERLMEIER

Ministry of Energy and Mines, Gas & Oil Division

R.J. GATHERCOLE

B.C. Old Age Pensioners' Organization
Council of Senior Citizens' Organization of BC
Senior Citizens Association of British Columbia
West End Seniors Network
Federated Anti-Poverty Groups of BC
End Legislated Poverty Society
Tenants Rights Action Coalition

EXHIBIT LIST

Exhibit No.	Description
<i>Commission Documents</i>	
A-1	Letter dated December 22, 2004 and Order No. G-114-04
A-2	Letter dated January 18, 2005 enclosing a Draft Pre-hearing Conference Issues List and two alternative draft regulatory timetables
A-3	Letter dated January 26, 2005 addressing issues raised at the Pre-hearing Conference
A-4	Order No. G-15-05 and Letter dated February 1, 2005 establishing an oral public hearing for the Income Trust Application and a Pre-hearing Conference for the 2005 Revenue Requirements
A-5	Letter and Commission Information Request No. 1 dated February 4, 2005
A-6	Letter and Commission Information Request No. 2 dated March 4, 2005
A-7	Letter and Commission Information Request No. 3 dated March 24, 2005
A-8	Letter and Commission Information Request No. 1 dated April 12, 2005 on the Expert Evidence of John McCormick filed on behalf of The BC Old Age Pensioners Organization <i>et al.</i>
A-9	Letter dated April 29, 2005 regarding the public hearing process for the Pacific Northern Gas Ltd. Application to Convert PNG to an Income Trust
A-10	Letter dated June 29, 2005 setting the Oral Phase of Closing Argument

Applicant Documents

B-1	Pacific Northern Gas Limited - Application dated December 17, 2004 for Approval to Convert to an Income Trust
B-2	Letter and proposed regulatory timetable dated January 28, 2005
B-3	Response dated February 18, 2005 to Commission Information Request No. 1
B-4	Written Evidence of David Bustos and Alan Wallace dated February 25, 2005
B-5	March 18, 2005 Responses to Information Requests for the following: BCUC IR-2 BCOAPO IR-1 BCMEM IR-1

Exhibit No.	Description
B-6	March 24, 2005 Response to BCUC Information Request No. 2, Question 47
B-7	March 30, 2005 Amended Response to BCOAPO Information Request No. 1, Question 184
B-8	Response dated April 1, 2005 to Commission Information Request No. 3, and The BC Old Age Pensioners Organization et al. and Ministry of Energy and Mines Information Requests No. 2
B-9	Revised response to The BC Old Age Pensioners Organization et al. Information Request No. 2, (Exhibit No. B-8) Pages 24 and 25
B-10	Information Request No. 1 dated April 12, 2005
B-11	Rebuttal Supplemental Evidence of Pacific Northern Gas Ltd. dated April 21, 2005
B-12	Rebuttal Supplemental Evidence of Kathleen McShane dated April 21, 2005
B-13	Rebuttal Supplemental Evidence of David Bustos and Alan Wallace dated April 21, 2005
B-14	Letter dated May 3, 2005 and revisions to the Application pages 30 to 32 in response to the Commission letter of April 29, 2005 (Exhibit A-9)
B-15	Letter dated May 3, 2005 identifying witness panels for Pacific Northern Gas Ltd.
B-16	Letter dated May 5, 2005 providing the Curriculum Vitae for R.G. Dyce, E.A. Fletcher, K.R. Teitge and C.P. Donohue
B-17	PNG Undertaking – Transcript Reference: Page 130 – 131
B-18	PNG Undertaking – Transcript Reference: Page 138 – 139
B-19	PNG Undertaking – Transcript Reference: Page 167
B-20	PNG Undertaking – Transcript Reference: Page 137 - 138
B-21	Schedule of Activities to complete PNG Income Trust Conversion
B-22	PNG Undertaking – Transcript Reference: Page 252
B-23	Credit Rating Report – AltaLink, L.P. dated November 24, 2004
B-24	Alberta Energy and Utilities Board - Decision 2003-061 ~ AltaLink Management Ltd. and TransAlta Utilities Corp, Transmission Tariff for May 1, 2002 – April 30, 2004 and TransAlta Utilities Corp, Transmission Tariff for January 1, 2002 – April 30, 2002 dated August 3, 2003
B-25	Pacific Northern Gas Ltd. – Income Trust Conversion Application Hearing ~ D. Bustos/A. Wallace Undertakings from Day 3, May 12, 2005

Exhibit No.	Description
B-26	PNG Undertaking – Transcript Reference: Page 522
B-27	Witness Aid – John McCormick – Calculation of the Account Based ROE – Clean Power 2004
B-28	2004 Financial and Operating Highlights
B-29	Illustrative Impact of Levelized Revenue on Earned Returns
B-30	PNG Undertaking – Transcript Reference: Page 426
B-31	PNG Undertaking – Transcript Reference: Page 624 - 626

Intervenor Documents

C1-1	TERASEN GAS INC. – Notice of Intervention dated January 5, 2005 from Scott Thomson
C2-1	MINISTRY OF ENERGY AND MINES – Notice of Intervention dated January 11, 2004 from Stirling Bates
C2-2	Letter and Information Request No. 1 dated March 9, 2005
C2-3	Letter and Information Request No. 2 dated March 24, 2005
C2-4	Witness Aid spreadsheets prepared by Grant Bierimeier, Ministry of Energy and Mines
C3-1	THE BC OLD AGE PENSIONERS ORGANIZATION ET AL. – Notice of Intervention dated January 13, 2005 from Richard J. Gathercole
C3-2	Letter and Information Request No. 1 dated March 9, 2005
C3-3	Letter and Information Request No. 2 dated March 24, 2005
C3-4	Letter and written evidence of John McCormick dated April 6, 2005
C3-5	Response dated April 19, 2005 to Commission IR-1 on the Expert Evidence of John McCormick filed on behalf of The BC Old Age Pensioners Organization et al.
C3-6	Response dated April 19, 2005 to PNG Information Request on the Expert Evidence of John McCormick filed on behalf of The BC Old Age Pensioners Organization et al.
C3-7	Letter dated April 26, 2005 advising that BCOAPO will not be filing further information requests or evidence
C3-8	The Canadian Institute of Chartered Business Valuators Export Reports - Standards No. 310 entitled “Report Disclosure Standards and Recommendations”

Exhibit No.	Description
C3-9	The Canadian Institute of Chartered Business Valuators Export Reports - Standards No. 320 entitled "Scope of Work Standards and Recommendations"
C3-10	Fair Market Curve Analysis Sector 351 dated May 6, 2005, Copyright 2005 Bloomberg L.P.
C3-11	Fair Market Curve Analysis Sector 297 dated May 6, 2005, Copyright 2005 Bloomberg L.P.
C3-12	The BC Old Age Pensioners Organization <i>et al.</i> Undertaking – Transcript Reference: Page 680 - 681 and 713 - 714
C4-1	AVISTA ENERGY INC. – Notice of Intervention dated January 27, 2005 from Nick Caumanns
C5-1	METHANEX CORPORATION – Notice of Intervention dated February 1, 2005 from Vincent Tong

Letters of Comment

E-1	Letter of Comment dated May 5, 2005 from Steve Thorlakson
E-2	Letter of Comment dated May 5, 2005 from Mayor Richard Wozney, District of Kitimat
E-3	Letter of Comment dated May 9, 2005 from Victor Kumar, City Manager, City of Prince Rupert
E-4	Letter of Comment dated May 9, 2005 from Mayor Jack Talstra, City of Terrace

TAB 31



IN THE MATTER OF

CENTRAL COAST POWER CORPORATION

**SALE AND DISPOSITION OF UTILITY ASSETS OF
CENTRAL COAST POWER CORPORATION TO
BORALEX OCEAN FALLS LIMITED PARTNERSHIP**

DECISION

December 5, 2008

BEFORE:

Peter E. Vivian, Panel Chair and Commissioner

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COMMISSION ORDER G-180-08

APPENDICES

APPENDIX A LIST OF EXHIBITS

1.0 INTRODUCTION

1.1 Background

By letter dated April 18, 2008, Central Coast Power Corporation ("CCPC") advised the British Columbia Utilities Commission (the "Commission" or "BCUC") that it was negotiating the sale of its utility assets relating to the generation and sale of electrical power at Ocean Falls, BC. CCPC wished to apply for approval of the sale in accordance with Commission Order G-40-86, paragraph 2.(e) dated July 4, 1986. That paragraph provides:

- (e) Except for the disposition of its property in the normal course of its business CCPC shall not, without first obtaining the Commission's approval, dispose of the whole or part of its property.

According to the letter, the Purchaser was a fully owned Canadian Company with its registered office in Montreal, Quebec and a subsidiary was to be incorporated in British Columbia. CCPC expected that if the sale proceeded, it would be completed by June 1, 2008. CCPC's letter requested a description of the necessary next information or process steps that are required to obtain the Commission's approval.

By letter dated April 28, 2008, the Commission informed CCPC that it is generally the responsibility of the Seller and the Purchaser to file the application for acquisition with the Commission. As a guide for the type of information that is required in an application for acquisition, the Commission provided CCPC with a copy of the application filed by Kanelk Transmission Company Limited ("Kanelk") on June 8, 1999 to dispose of its utility assets. That application was approved by Commission Order G-127-99 dated December 2, 1999 and was the most recent utility asset sale application approved by the Commission.

In addition, the Commission also included a copy of the recent joint application from Fortis Inc. ("Fortis"), Fortis West Inc. and Fortis Pacific Holdings Inc. and Princeton Light & Power Company, Limited ("PLP"), although that application related to a disposition of the shares of the PLP and their acquisition by Fortis.

By email to the Commission dated April 29, 2008, CCPC inquired as to the level of detail required in the application, since the purchase and sale involved the sale of hydro-electric assets rather than shares and the operations and rate structure would remain unchanged. CCPC's letter also requested confidentiality for certain aspects of the agreement with the Purchaser, including confidentiality for the purchase price.

By letter dated May 1, 2008 the Commission replied that in its view the Kanelk application, which also involved an asset sale and purchase, was a more relevant precedent for the CCPC application. The Commission also stated that it would not provide an advance ruling on the confidentiality of the agreement or certain aspects of the sale, including purchase price or any part of the Application. CCPC was further informed that if it considered that the exemption provided by Commission Order G-40-86 was relevant to CCPC's request for confidentiality, then CCPC should address that issue in its application for the sale of the utility assets. The Commission also informed CCPC that it should, at a minimum, address the matters covered in Items 2 and 7 of the Commission's "Confidential Filings" Practice Directive in making any submissions on confidentiality. In addition, CCPC was informed that the level of information required of the purchaser of the utility assets could vary depending on whether the purchaser was an existing utility known to the Commission or a new utility that is being established to operate the utility. CCPC was further informed that the Commission may have further requests for information once it had reviewed CCPC's filed application in detail.

1.2 Application

On August 1, 2008 CCPC and Boralex Ocean Falls Limited Partnership ("Boralex LP"), (the "Applicants") applied for an Order pursuant to Section 52(1) of the Utilities Commission Act (the "Act") approving the sale and disposition of the utility assets of CCPC to Boralex LP as set out in an asset purchase agreement dated June 3, 2008 (the "Purchase Agreement"); or alternatively pursuant to [paragraph]2.(e) of the BCUC Order G-40-86 approving the said sale and disposition (the "Application"). Central Coast Hydro Ltd. ("CCH"), a non regulated business, which owns certain rights respecting potential hydroelectric projects located at or near the Atnarko River and Bella Coola Valley in BC (the "CCH Rights") is also a party to the Purchase Agreement. The Purchase Agreement contemplates that CCH will sell the CCH Rights to Boralex LP.

The assets to be sold by CCPC pursuant to the Purchase Agreement comprise CCPC's property, licences, permits, privileges and rights used to generate, transmit and distribute electricity (the "Utility Assets") (Exhibit B-1, pp. 1, 3).

The Applicants also applied for the continuation of the exemption from certain sections of the Act set out in Order G-40-86 and for confidentiality of the sensitive business terms of the Purchase Agreement. Two copies of the Purchase Agreement were filed with the Commission - a redacted copy Schedule "A" that was publicly filed and an unredacted copy Schedule "A-1" labelled as Confidential.

1.3 Purchase Agreement

The Purchase Agreement contemplates that the Utility Assets and the CCH Rights will be sold by CCPC and CCH respectively to Boralex LP.

Paragraph 5 of the Application, as amended by Exhibit B-1-2, summarizes what the Applicants consider to be the salient terms of the Purchase Agreement. That summary is as follows:

- (a) it is a condition of the closing of the transaction that the Commission approve the Purchase Agreement and permit disposition by CCPC and the acquisition by Boralex LP of the Utility Assets;
- (b) CCPC sells, transfers, conveys, assigns or delivers to Boralex LP:
 - i. the Utility Assets
 - ii. a transmission line between Ocean Falls and the community of Shearwater;
 - iii. substation equipment in CCPC's Shearwater substation;
 - iv. a conditional water licence and the associated Crown land permit;
 - v. the water licence applications and the associated Crown land applications related to the potential hydroelectric projects on Noosgulch River and Bella Coola Valley and on the Atnarko River;
- (c) CCH sells, transfers, conveys, assigns or delivers to Boralex LP the studies and reports associated with the water licence and Crown Land applications related to the potential hydroelectric projects on the Noosgulch River at Bella Coola Valley and on the Atnarko River;
- (d) CCPC and CCH respectively sell, transfer, convey, assign or deliver to Boralex LP, the rights, title and interest under contracts, permits, equipment, personal property and intangible property leases, rental agreements and similar agreements relating to the electric transmission of CCPC and CCH;
- (e) CCPC and CCH sell their goodwill to Boralex LP;
- (f) Boralex LP will assume and be responsible for all obligations and liabilities of CCPC and CCH which are to be observed, performed or paid from and after the closing date in respect of:
 - i. Utility Assets and CCH Assets;
 - ii. contracts (including all contracts, commitments or engagements which are entered into by CCPC and CCH between the date of the Purchase Agreement and closing and which are not prohibited by the Purchase or are consented to in writing by Boralex LP);
 - iii. permits; and
 - iv. any other contract, agreement or obligation specifically agreed to be consumed by Boralex LP;

- (g) Boralex LP will indemnify and hold harmless CCPC and CCH from and against any claims or losses suffered or incurred by them as a result of, or arising out of, the failure of Boralex LP to perform or pay any of the obligations referred to in paragraph (f) above; (Exhibit B-1-2, Errata)
- (h) the conditional closing date is August 3, 2008;
- (i) Boralex LP will, as an obligation arising at closing of the Purchase Agreement, enter into an Operation and Maintenance Agreement with CCPC for the continued operation and maintenance of the Utility Assets until December 31, 2010;
- (j) Boralex LP will, as an obligation arising at closing of the Purchase Agreement, enter into an Advisory Services Agreement with Tony Knott to provide a wide range of consulting, development and operational services with the goal to develop the hydro electric projects on the Noosgulch River and Atnarko River (Exhibit B-1, pp. 3-4).

2.0 CORPORATE BACKGROUND

2.1 Boralex Group of Companies

The Boralex Group of Companies are described in Part B of the Application.

Boralex LP is a limited partnership under the British Columbia Partnership Act. The Partners of Boralex LP are Boralex Inc. (Limited Partner, holding 99.9% of the Partnership's Capital Units) and newly created Boralex B.C. Development Inc. (General Partner holding 0.1% of Capital Units).

Boralex B.C. Development Inc. is a wholly owned subsidiary of Boralex Inc.

Boralex Inc. is one of Canada's largest private corporations in the development and production of renewable energy. Boralex Inc. currently operates 21 power generation sites with a total installed capacity of 351 megawatts ("MW"). Boralex Inc. was a pioneer in the production of renewable energy, which is the core business of almost all of its operations. It has facilities in Quebec, the northeastern United States and France, in three different types of electrical generation: wind power (7 sites, 108MW), hydro electric power (7 power stations, 25MW) and thermal power (7

power stations, 218 MW). Its operations include several hundred kilometres of transmission and distribution power lines. Boralex has considerable experience in all aspects of hydroelectric generation and electrical delivery.

Boralex Inc. has assets of approximately \$514.7 million with annual revenues from energy sales of approximately \$162.8 million. Boralex Inc.'s growth strategy is based on diversification by segment and by geography, and on its state of the art expertise in the development, acquisition, operation and maintenance of power stations. It employs some 300 highly qualified employees (Exhibit B-1, pp. 5-6).

2.2 CCPC and CCH

CCPC is a British Columbia corporation which generates electricity and supplies electricity to 95 accounts. These accounts are held by 27 holders who reside in Ocean Falls (approximately one-quarter of whom hold multiple accounts) and 32 account holders whose primary residence is outside of Ocean Falls. In addition to these 95 accounts, CCPC has one industrial customer (Marine Harvest Canada Ltd.) in Ocean Falls and an Electricity Purchase Agreement with BC Hydro in Bella Bella, BC (the "Electricity Purchase Agreement", "EPA") (Exhibit B-1, p. 3).

CCH is also a British Columbia corporation. Tony Knott, a principal of CCPC, is the sole shareholder of CCH. CCH owns the CCH Rights which relate to potential hydroelectric projects located at or near the Atnarko River and the Bella Coola Valley in British Columbia (Exhibit B-1, p.3).

On February 19, 1986, CCPC and BC Hydro and Power Authority ("BC Hydro") signed the 20 year Electricity Purchase Agreement for the sale and supply of electricity by CCPC to BC Hydro. The electricity was to be generated at the hydroelectric facilities of CCPC and transmitted over transmission facilities to be constructed and owned by CCPC to a point of delivery which was the point where CCPC's transmission connection met BC Hydro's substation at Bella Bella, BC.

On March 27, 1986, CCPC purchased certain lands and chattels that included the dam, powerhouse, transmission and distribution systems in the Ocean Falls, BC town site and mill site from Ocean Falls Corporation ("OFC").

On June 4, 1986 CCPC applied to the Commission for an exemption from the Utilities Commission Act (the "Act") for the sale of electric power to residential, commercial and industrial customers located at Ocean Falls and to BC Hydro at Bella Bella, BC.

By Order G-40-86, the Commission granted the exemption and allowed CCPC to negotiate rates with industrial customers subject to certain limitations set out in Schedule F of the agreement between CCPC and OFC that was attached to the order. In the event of a complaint by an interested party, the Commission could review whether the exemption for CCPC continued to be in the public interest (Order G-40-86).

The Electricity Purchase Agreement between CCPC and BC Hydro was subsequently extended for another 10 years to December 31, 2016 (BC Hydro 2007 Rate Design Phase II Hearing Exhibit B-79).

By Order G-30-02 dated April 17, 2002, the Commission amended Order G-40-86 with respect to Schedule F, by striking out Section 2 (c) of Schedule F and replacing it with the following wording: "For present firm installed capacity in CCPC's Ocean Falls generating facility, industrial customers are to be charged rates as negotiated by the parties, but not to exceed the rate authorized by BC Hydro's Rate Schedules 1821, 1200, 1201, 1210, or 1211 as amended from time to time, for similar service. In the event that additional generation, above the firm installed capacity of the plant is required, the parties may negotiate rates with consideration of the cost of installing additional generation".

3.0 PUBLIC CONSULTATION, REGULATORY REVIEW PROCESS AND INTERVENOR SUBMISSIONS

3.1 Public Consultation

The Applicants summarized their stakeholder consultation efforts in Part D of the Application and provided a report on the consultation process and its results as Schedule "B" to the Application.

Following the announcement of the Purchase Agreement, representatives of CCPC and Boralex LP contacted all relevant stakeholders regarding the proposed transfer of Utility Assets to Boralex LP. Consultation efforts included meeting with every permanent residential customer of CCPC in Ocean Falls and letters were sent to each non-resident account holder informing them of the sale. A letter which included an enclosure drafted by CCPC was sent to all permanent residents on the proposed transfer. The residents were asked to sign and send the letter to the Commission with an opportunity to comment. A copy of the letter was also posted in the Ocean Falls Post Office on July 3, 2008. Copies of the signed customer letters were included in Schedule B(ii) of the Application (Exhibit B-1, pp. 7-8, Schedules B, B(i) and B(ii)).

The one Industrial customer of CCPC, Marine Harvest Canada Ltd, agreed to transfer its contract with CCPC to Boralex LP.

The approval for the transfer of the Electricity Purchase Agreement with BC Hydro was pending, subject to confirmation and advice from BC Hydro respecting particular forms to be completed by the Applicants. BCUC IR 1.4.1 states that a signed copy of the EPA had been obtained from BC Hydro (Exhibit B-1, Schedule B).

3.2 Regulatory Process

By Order G-121-08 dated April 22, 2008, the Commission established a Regulatory Timetable, which set the following deadlines: (i) publication of a notice of the written public hearing process for the Application - August 30, 2008; (ii) Commission Information Requests to the Applicants - September 12, 2008; (iii) registration of Intervenors and Interested parties - September 22, 2008; (iv) Applicants' responses to the Commission Information Requests - September 24, 2008; (v) Intervenor Information Requests to Applicants - October 1, 2008; (vi) Applicants responses to Intervenors Information requests - October 8, 2008; (vii) Intervenor written Submissions - October 20, 2008; and (viii) Applicants Written Reply - October 28, 2008 (Exhibit A-1).

Only two parties registered as Intervenors: Heiltsuk Tribal Council (the "Heiltsuk") and Shearwater Marine Ltd. ("Shearwater"). Neither Intervenor filed evidence. The Heiltsuk delivered Information Requests and made two sets of Final Submissions. Shearwater was not actively involved and did not deliver Information requests or make Final Submissions.

On September 24, 2008 the Commission received the Applicants' Responses to the Commission's Information Requests ("IR No. 1"). Upon review of the responses, the Commission determined that it needed to make further Information Requests ("IR No 2").

On October 1, 2008 the Heiltsuk issued an Information Request to the Commission (Exhibit C1-4).

By letter dated October 3, 2008, the Commission informed the Heiltsuk that as the decision-maker of matters within its jurisdiction under the Act, the Commission does not respond to Information Requests. The Commission's letter advised the Heiltsuk to direct their questions to the Applicants and informed the Heiltsuk that the deadline for Intervenor Information Requests would be extended to October 14, 2008.

The Commission's letter also explained that the purpose of Information Requests is to allow parties appearing before the Commission to ask questions of each other. The Responses may then, for example, be used by the party receiving the Response:

- i. As the basis for additional questions during a further round of Information Requests, if the Commission Panel allows for a further round of Information Requests;
- ii. As the basis of questions during cross-examination, if an oral hearing takes place; and
- iii. In support of Final Argument.

The letter, in addition, informed the Heiltsuk of an opinion the Commission Panel in the Vancouver Island Transmission Reinforcement Project ("VITR") proceeding had received from Commission counsel which dealt in part with the principles regarding the duty to consult and accommodate. Parts of Exhibit A-31 and all of Exhibit A-37 in the VITR proceeding were attached to the Commission's letter.

In addition, the letter informed the Heiltsuk that the Commission Panel was prepared to receive submissions on the duty of the Crown and of the Commission to consult and accommodate and any duty the Commission may have to ensure that consultation has been adequate in the context of the proposed sale of the assets contemplated by the Application as part of the Written argument process provided by Order G-121-08. The Heiltsuk were informed that if they decided to make submissions on these issues they needed to do so by October 20, 2008. The letter also stated that the Commission Panel was prepared to further amend the Regulatory Timetable to allow the Heiltsuk to file a Reply, if any, to the Written Argument of the Applicants on these issues by Tuesday, November 3. It cautioned that the Regulatory Timetable would only be further amended in this respect if the Heiltsuk advised the Commission Secretary by Friday, October 10, 2008 of their intention to file Written Argument on these issues (Exhibit A-4).

The Heiltsuk did not notify the Commission Secretary of their intention to file written Argument on the issues within the time provided for in Exhibit A-4.

The Commission issued a second letter on October 3, 2008 (Exhibit A-5), which arose as a response to the Commission's review of the Applicants' Responses to Commission IR No. 1 and the Commission's request that the Heiltsuk deliver their Information Requests to the Applicants and not the Commission (Exhibit A-5). The letter amended the Regulatory Timetable established by Order G-121-08 by extending the date of the filing deadline for Intervenor Request No. 1 to October 7, 2008 and providing for the delivery of IR No. 2 from the Commission by the same date. The original Regulatory Timetable was further amended to allow for the delivery of the Applicants' Responses by October 14, 2008. The original dates for the filing of Intervenor Written Submissions and Reply remained the same.

The Heiltsuk filed a Written Submission on October 20, 2008 and the Applicants filed a Written Reply on October 27, 2008.

On November 10, 2008, the Heiltsuk, without seeking leave, attempted to file a further submission which responded to the Applicant's Written Reply. The Commission decided to treat the second Heiltsuk submission as including an application for a leave to file and sought submissions from the Applicants. The Applicants did not oppose the filing of the further Heiltsuk submission and accordingly that submission became one of the submissions that the Commission Panel has considered in arriving at its determination of the Application.

4.0 ISSUES

1. Should the Commission Panel approve the disposition of CCPC's assets as contemplated by the Purchase Agreement, with or without conditions?
2. Should the rate setting mechanism employed by CCPC in accordance with Commission Order G-40-86 as amended by Commission Order G-30-02 be allowed for Boralex LP?

3. What is the normal accounting treatment of recording utility assets on the books of a purchaser of public utility assets such as Boralex LP?
4. Should the Commission Panel accept the Applicant's request for confidentiality for certain parts of the Application?
5. Does the Commission Panel have the jurisdiction to approve the continuation of the exemption provided in Commission Order G-40-86 to Boralex LP.? If so, should it do so?
6. Does the Commission have a duty to consult and accommodate the Heiltsuk Tribal Council (the "Heiltsuk") in the circumstances of this Application? If not, should the Commission Panel delay its determination on the Application until consultation and, accommodation, if required, has taken place between the Heiltsuk and the Crown through the agency of the Integrated Land Management Bureau?

4.1 Relevant Sections of the Utilities Commission Act

CCPC is a public utility as defined in the Act and is subject to the regulatory jurisdiction of the Commission to the extent not otherwise exempted by Order G-40-86. Section 52 of the Act requires Commission approval for, among other things, the disposition the property, franchises, licences, permits, concessions, privileges or rights of a public utility, other than in the ordinary course of its business.

Section 52 of the Act states:

- (1) Except for a disposition of its property in the ordinary course of business, a public utility must not, without first obtaining the commission's approval,
 - (a) dispose of or encumber the whole or part of its property, franchises, licences, permits, concessions, privileges or rights, or
 - (b) by any means, direct or indirect, merge, amalgamate or consolidate in whole or in part its property, franchises, licences, permits concessions, privileges or rights with those of another person.
- (2) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in the public interest.
[Emphasis added.]

Order G-40-86, paragraph 2.(e) referred to in Section 1.1 of this Decision contains wording which make it clear that a disposition of the nature contemplated by the Purchase Agreement requires Commission approval.

Section 54 of the Act relates to share transactions involving a public utility that result in reviewable interests or impacts on reviewable interests as defined by the Act. This is the section of the Act that the Commission considers when determining whether or not to approve the sale of shares of a public utility.

Subsection 54(9) of the Act provides:

(9) The commission may give its approval under this section subject to conditions and requirements it considers necessary or desirable in the public interest, but the commission must not give approval under this section unless it considers that the public utility and users of the service of the public utility will not be detrimentally affected. [Emphasis added.]

In utility share purchase Decisions, the Commission has applied certain criteria to assist in determining whether there is potential for detrimental effects to the utility and its customers and in broader sense, to the public interest. The criteria are that:

1. The utility's current and future ability to raise equity and debt financing not be reduced or impaired;
2. There will be no violation of existing covenants, the effect being detrimental to the customers;
3. The conduct of the utility's business, including the level of service, either now or in future, will be maintained or enhanced;
4. The application be in compliance with appropriate enactments and/or regulations;
5. The structural integrity of the assets be maintained in such a manner as to not impair utility service; and
6. The public interest is being preserved. (Exhibit B-1, p. 8, Commission Order G-49-07 Fortis Inc. acquisition of Terasen Inc. Decision)

Subsection 88(3) of the Act requires the Commission to obtain the advance approval of the Lieutenant Governor in Council before exempting a person, equipment or facilities from all or any of the provisions of the Act. The subsection provides as follows

(3)The commission may, on conditions it considers advisable, with the advance approval of the Lieutenant Governor in Council, exempt a person, equipment or facilities from the application of all or any of the provisions of this Act or may limit or vary the application of this Act. [Emphasis added.]

4.2 Confidential Filings Directive

The Commission has issued a Confidential Filings Directive (the "Directive") to address requests for confidentiality of information made by parties appearing before it.

As previously stated in Section 1.1 of this Decision, in its letter to CCPC dated May 1, 2008, the Commission informed CCPC, in part, that on the issue of any claim for confidentiality CCPC should at a minimum, address matters covered in items 2 and 7 of the Directive. Those sections state:

2. The request for confidentiality should:
 - (a) briefly describe the nature of the information in the document and the reasons for request for confidentiality, including specific harm that could reasonably be expected to result if the document were placed on the public record; and
 - (b) indicate whether all or only part of the document is the subject of the request.

7. In determining whether the nature of the information or documents require a confidentiality direction, the Commission will have regard to matters that it considers relevant, including,
 - (a) whether the disclosure of the information could reasonably be expected to result in
 - i. undue material financial loss or gain to a person, or
 - ii. significant harm or prejudice to that person's competitive or negotiating position and

- (b) whether the information is financial, commercial, scientific or technical information that is confidential and consistently treated as confidential by the person,
- (c) whether the person's interest in confidentiality outweighs the public interest in the disclosure of the information or documents in the hearing, and
- (d) whether it is practical to hold the hearing in a manner that is open to the public.

The Applicants address their claims for confidentiality in Part H of the Application.

The Commission received two filings from the Heiltsuk which were confidential in nature. The first had embedded within it confidential information and the second was marked "Confidential". The Commission removed the first letter from its website when it became apparent that the Heiltsuk were claiming confidentiality over part of the letter. Neither complied with the Directive.

The Commission informed the Heiltsuk that before it would post either letter as confidential exhibits, it required the Heiltsuk to comply with the Directive. The Commission informed the Heiltsuk that the Directive could be located on the Commission's website and pointed out where the Applicants had addressed their claims of confidentiality in the context of the Directive in the Application (Exhibit A-3).

The Heiltsuk made no request for filing in compliance with the provisions of the Directive.

The Commission Panel accordingly determined that neither document would form part of the evidentiary record (Exhibit A-7).

4.3 Intervenor Submissions

The only active Intervenor in this proceeding was the Heiltsuk. Their first Submissions were received on October 20, 2008. The Heiltsuk do not support the proposed sale and disposition of CCPC's Utility Assets to Boralex LP and seek a delay of the Commission's decision on the Application pending adequate consultation.

In their first submissions the Heiltsuk submitted that "The Crown owes a duty to consult and accommodate Heiltsuk with respect to the Crown's decision to consent to a change in control over CCPC's utility assets where such interests cover lands over which Heiltsuk assert aboriginal title and rights. Such duty is based in case law, provincial consultation guidelines and the New Relationship between British Columbia and First Nations."

On the subject of any duty the Commission may have to consult, the Heiltsuk submitted that the Commission "takes position that it does not have a duty to consult and accommodate Heiltsuk's aboriginal rights, title or interests. While we respectfully disagree, given BCUC's position, it would be unproductive for Heiltsuk to provide submissions to the Commission on this matter."

The Heiltsuk then went on to submit: "The Commission, then, having absolved itself of any responsibility to Heiltsuk in this regard, must rely on other Crown agencies to fulfill the duty of consultation and accommodation. Heiltsuk is presently engaged with the Ministry of Agriculture and Lands, Integrated Land Management Bureau, regarding the Crown's duty to consult and accommodate its aboriginal interests. Such consultation is still in its preliminary stages whereby the parties are sharing information and Heiltsuk is identifying its interests. Until such time as these steps have been concluded, no meaningful consultation has commenced to address Heiltsuk's interests or the potential measures for accommodation. Given that the Commission is now aware that the Crown's duty has been triggered, any decision it makes prior to the conclusion of the consultation process could not only prejudice this other regulatory process but be moot and a waste of everyone's time if it is ultimately determined that Heiltsuk has not been adequately consulted and/or Heiltsuk must be accommodated...".

The Heiltsuk acknowledge " that the Commission must consider all parties, including the public interest" but add that "the failure of the Crown to properly consult with Heiltsuk, compromises that interest as well as the integrity of both the Commission's process and the Crown's consultation process."

The Heiltsuk conclude their first Submissions as follows: "Based on the foregoing, the Commission must be satisfied that Heiltsuk's concerns have been adequately addressed before proceeding any further. To date, they have not. Therefore, in order to ensure that consultation has been adequate in the context of the proposed sale of assets contemplated by the Application, it is in everyone's best interest that the Commission delay any decision regarding the proposed sale. To do otherwise would seriously jeopardize all parties, including CCPC and Boralex."

In their submissions filed on November 10, 2008, the Heiltsuk addressed:

- i. the Commission's jurisdiction to consult and accommodate the Heiltsuk;
- ii. the Heiltsuk's view that the duty to consult and accommodate rests with the Integrated Land Management Bureau ("ILMB") of the Ministry of Agriculture and Lands;
- iii. the Heiltsuk's view that the Applicants opinion regarding the impact of Heiltsuk's Aboriginal rights and title interests was irrelevant;
- iv. the Heiltsuk's view that the Applicants opinion regarding the appropriate level of consultation was irrelevant; and
- v. the Heiltsuk's conclusions.

On the issue of the Commission's jurisdiction to consult and accommodate, the Heiltsuk declined to engage in any debate over the issue, saying it did not want to take up the Commission's "valuable time" and argue whether the matter may or may not be within the Commission's jurisdiction.

On the issue of the duty resting with the ILMB, the Heiltsuk asserted that it had been contacted by the ILMB for the purposes of commencing the consultation process. The Heiltsuk referred to the five step test for consultation described in the *2008 Gitanyow* decision on the subject of transfers of interest. The Heiltsuk further asserted "We are currently fully engaged with ILMB on this matter" and requested a delay in the Commission's decision.

On the issues of the opinions of the Applicants, the Heiltsuk submitted that their opinions are irrelevant and that they "are not part of our consultation process with ILMB...The duty to consult rests with the Crown." The Heiltsuk go on to state the "The appropriate level of consultation will be determined by both ILMB and Heiltsuk."

In their conclusions, the Heiltsuk requests a temporary delay until the ILMB has reached its conclusions on the impact the transfer may have to their aboriginal rights and interests and whether accommodation is possible. The Heiltsuk offer to keep the Commission updated, state that in the near future they will be providing the ILMB with further information on the strength of their claim and the impacts of the transfer and additionally will be organizing a meeting with the ILMB.

They assert there is no pressing reason for a decision by the Commission and there is a risk that the results of the ILMB consultation process may significantly alter the Application. The Heiltsuk conclude with the comment that a Commission decision that does not consider the ILMB's conclusions "could perpetuate any existing or past infringements and impacts to our aboriginal rights, title and interests."

The Heiltsuk submissions contain no comments on the Applicants' claims for confidentiality.

5.0 REVIEW OF CRITERIA AND RELEVANT ISSUES

As previously identified in this Decision, the Application requests approval of the sale and disposition of CCPC's Utility Assets to Boralex LP pursuant to section 52(1) of the Act or alternatively, pursuant to paragraph 2.(e) of Order G-40-06. The Application notes that neither section 52 of the Act nor Order G-40-86 sets out the criteria by which the Commission will determine whether to approve the transfer of assets.

The Applicants addressed each of the criteria that the Commission has used in examining applications for the approval of the transfer of utility operations through the sale of shares. The Applicants submitted that the Purchase Agreement satisfies each of the criteria that have been applied by the Commission in a sale of shares application. In particular, the Applicants submitted that the acquisition by Boralex LP of the Utility Assets will not detrimentally affect any of the Utility Customers and that the public interest will be preserved by the completion of the transaction (Exhibit B-1, pp. 1, 8-9).

The Commission Panel finds the information provided in accordance with the criteria applied in the review of a sale of utility shares to be of some value, but does not consider that its determination under section 52 of the Act should be limited to a finding of whether any detrimental effects may result from the acquisition. The Commission Panel notes that the wording in subsection 52(2) does not contain the words "detrimentally affected" and therefore the Commission Panel considers that its discretion under subsection 52(2) is much broader in scope.

The Application and Responses to the Information Requests provided the following information relating to the factors that the Commission Panel has taken into account in arriving at its determination of this Application under section 52 of the Act:

5.1 Financing

- (a) Financing Capability Not Adversely Affected – CCPC’s current owners wish to cause CCPC to sell the Utility Assets. In response to BCUC IR 1.1.2, the Applicants note that guarantees are not necessary because of the close relationship between Boralex Inc. and Boralex LP. In particular, Boralex Inc. is financially responsible for its wholly owned subsidiary, Boralex Canadian Energy Inc. which is a partner of Boralex LP. In their response to BCUC IR 1.12.2, the Applicants state that Boralex Inc. will stand behind future investments if necessary. Accordingly, Boralex LP submits that the acquisition of the Utility Assets by Boralex LP will enhance the financial integrity of the operation of the CCPC System.
- (b) The acquisition will not reduce or impair the current or future ability of the operator of Utility Assets to raise equity and debt financing. In fact, Boralex LP’s ability, through its limited partner, Boralex Inc. will be substantially greater than CCPC.
- (c) In their response to BCUC IR 1.1.1, the Applicants state that “The closing of the transaction is not conditional upon a third party financing but it is intended to contract a term loan at a later date. The exact amount of the loan is still uncertain; however, it is anticipated to be approximately in the range of \$8 million to \$10 million. The balance of the purchase price will be provided by Boralex as equity.”
- (d) In their response to BCUC IR 1.12.1, the Applicants state “Boralex has a very strong balance sheet, with \$78 million of cash available as of the end of the second quarter 2008. It is Boralex’s intent to initially finance 100% of this transaction using cash already available on its balance sheet. Debt will later be contracted under typical project financing conditions. Boralex Inc. has a vast experience in financing large renewable energy projects and sees no significant problems in obtaining such financing.”
- (e) There are no covenants, agreements or legislative restrictions on Boralex Inc. or Boralex LP that would adversely affect or limit the ability to access capital in relation to the business using the Utility Assets.

5.2 Utility Business Conduct will be Maintained or Enhanced

The Application states that acquisition will not alter the regulatory oversight of the Commission over the Utility Assets. To the extent the Commission currently regulates the operations of the Utility Assets and CCPC, it will continue to have the ability to regulate the operation of the Utility Assets and Boralex LP, including rates and other terms and conditions of the services provided by it and the construction of the new facilities. More particularly, the Commission will continue to have jurisdiction to regulate the following business transactions:

- (a) The disposition of any property other than in the ordinary course of the business of Boralex LP (Act, section 52);
- (b) Orders for service provided by Boralex LP (Act, section 25);
- (c) Orders respecting extensions of service by Boralex LP (Act, section 30);
- (d) No discontinuance of service (Act, section 41);
- (e) Any consolidation, merger or amalgamation of Boralex LP with any other person (Act, section 53);
- (f) The subsequent acquisition by any person of a reviewable interest in Boralex LP (Act, section 54); and
- (g) Hearing costs (Act, section 117).

5.3 Compliance with Enactments

The Purchase Agreement is subject to various conditions, including obtaining necessary approvals and consents from the Commission and other regulatory authorities having jurisdiction. Accordingly, at the time of its completion, the acquisition will be in compliance with applicable federal and BC legislation, including the Act.

5.4 Structural Integrity of the Assets Maintained

The Purchase Agreement does not alter the regulatory obligations of the owner operator of the Utility Assets to ensure that it is capable of providing safe, reliable and secure service to its customers. Legislated regulatory oversight is in place, will be observed, and will not change as a result of this transaction.

The Applicants in their Final Submission under the heading "Maintenance of Service" state, in part, the following:

- i. Boralex Inc. operates its various utilities at a higher level of sophistication and quality control than CCPC. For example, it uses more electronically automated systems, a central control room to provide 24-hour monitoring, and an enhanced emergency response system. The system will be applied immediately to the CCPC System;
- ii. Boralex LP will establish a dedicated communication link to provide real-time operations information to its control centre to allow monitoring of the CCPC System 24 hours / day, 7 days / week and improve response time to any unplanned event;
- iii. Under the control of Boralex LP, the CCPC System will have access to all Boralex Inc. technical services such as mechanical, electrical, civil programs to ensure the CCPC System will be maintained consistent with good utility practices;
- iv. All capital projects contemplated by CCPC will be maintained and completed;
- v. Boralex LP, with the assistance of CCPC will invest \$3 million to maintain the existing dam. Currently, only one penstock is available to supply water to any of the four units located with the power house. Boralex LP has committed to adding a second penstock in order to obtain redundancy in water supply to the units.

5.5 Public interest is being preserved

The Application states that Boralex Inc. is a well-capitalized company with expertise, commitment and resources to expand and develop the business to be carried on by Boralex LP in BC. In all of the circumstances of the Application, following completion of the Purchase Agreement:

- i. There will be continuity in the business and operations of the Utility Assets;
- ii. Structural integrity of the Utility Assets will be maintained;
- iii. There will be continuity in the utility services provided by Boralex LP to CCPC's customers;
- iv. There will be continuity in the regulation of the Utility Assets and the services provided under the Act;
- v. There will be no adverse impact on the ability to access capital markets;
- vi. There will be compliance with applicable BC statutes and regulations; and
- vii. No other public interest in the Utility Assets as defined in the stakeholder consultation process will be adversely affected.

In the Applicants' view, completion of the acquisition contemplated by the Purchase Agreement will not detrimentally affect the Utility Assets or the service provided using those assets.

In regard to whether the Purchase Agreement may be approved, the Applicants submit that it is appropriate for the Commission to have regard for the following considerations:

- (a) Boralex LP is knowledgeable in management of both regulated integrated electrical utilities and hydroelectric generating facilities;

- (b) Boralex LP will assess opportunities for improved efficiency and security in the management of power supply to the utility customers;
- (c) Boralex LP has substantial and valuable experience with respect to the operation of regulated electrical distribution utilities;
- (d) Completion of the acquisition will bring the Utility Assets under the control of a diversified, Canadian electric utility holding company having regulated operations in Canada, the United States, and France;
- (e) There will be no adverse change in the current capital expenditure program related to Utility Assets;
- (f) Boralex LP expects to retain continuity in CCPC's employees and management;
- (g) The proposed acquisition of the Utility Assets by Boralex has been favourably received by key stakeholders.

Having considered the Applicants' evidence and submissions on these matters, the Commission Panel determines that the acquisition of the Utility Assets by Boralex LP will not adversely affect the financial integrity of the operation of the CCPC System, will maintain or enhance the conduct of the utility business, will maintain the structural integrity of the assets, will result in the continued compliance with all relevant enactments and preserve the public interest.

5.6 Confidentiality

The Applicants' reasons for requesting confidentiality for certain parts of the Application are as follows:

- (a) CCPC and Boralex LP have agreed between themselves to keep the sensitive business terms of the Purchase Agreement confidential;
- (b) As a public company, Boralex Inc. is subject to numerous disclosure requirements, and will continue to comply with them.;

- (c) Subject to securities disclosure rules, Boralex LP has adopted a general business policy of not disclosing financial details provided in acquisition agreements such as the Purchase Agreement for several reasons including:
- i. Boralex Inc.'s competitors, many of whom are private companies and do not face public company disclosure rules, would obtain a competitive advantage;
 - ii. Boralex Inc.'s bargaining position in acquiring other projects may be undermined by disclosure of the Purchase Agreement;
 - iii. Many of Boralex Inc.'s investors are attracted in part by Boralex Inc.'s policy of non-disclosure.
 - iv. As a result of the above Boralex LP is of the opinion that the publication of the Purchase Agreement, particularly financial details would cause harm to Boralex LP.
- (d) As a result of the above, publication of the Purchase Agreement, particularly financial details would cause specific harm to Boralex LP;
- (e) CCPC is also concerned that the Purchase Agreement, including financial details be kept confidential for the following reasons:
- i. CCPC is closely held private corporation and the disclosure of the sensitive business terms of the Purchase Agreement will serve no public interest;
 - ii. As a non-rate based Utility, there is no public interest to be served by the disclosure of the financial and economic aspects of the Purchase Agreement;
 - iii. In the event that the financial details of either CCPC and/or CCH are made public, their potential competitors, many of whom are private companies or individuals and do not face public disclosure requirements, would obtain a complete advantage; and
- (f) CCPC and Boralex LP are also concerned that disclosure of the sales price, along with other information contained in the Purchase Agreement, might introduce a source of unwarranted speculation and concern by CCPC's current workforce as they will not be aware of all the parameters involved in the Purchase.

No Intervenor has challenged the request for confidentiality or the other assertions made by the Applicants.

The Commission Panel accepts that the reasons the Applicants have provided for their request for confidentiality are reasonable in the circumstances of this Application.

The Commission determines that the financial details of the Purchase Agreement will be kept confidential.

The Commission considers that the following further issues are relevant in its review of the Application pursuant to section 52 of the Act:

5.7 Accounting Issues

5.7.1 Acquisition Premium and Transaction Costs

In their Responses to BCUC IR 1.8.1 and 1.8.2, the Applicants have confirmed that no acquisition premium, transaction fees, litigation expenses, retention bonuses, termination costs or any other related cost of the sale will be recovered from the utility customers of CCPC or Boralex LP.

5.7.2 Accounting Treatment of Utility Assets

BCUC IR 1.8.5 sought confirmation that Boralex LP will be reporting its acquired utility assets at the historical cost for regulatory and financial statement purposes. The Response to BCUC IR 1.8.5 states "Since this transaction is an asset purchase, the acquired utility assets will be reported as at the date of acquisition at the fair market value as per Canadian GAAP. Subsequent to the acquisition date, the assets will be reported at cost (less depreciation) for regulatory and reporting purposes."

BCUC IR 2.15.1 referred to the Response to BCUC IR 1.8.5 and requested that the Applicants identify the Section(s) of the Canadian Institute of Chartered Accountants Handbook that support the fair market value treatment of the CCPC Utility Assets that are acquired by Boralex LP for regulatory purposes.

In their Response to BCUC IR 2.15.1, the Applicants state that "The Applicants believe that the provisions of the Handbook requires Boralex LP to record the purchase at fair market value and that it is not necessary, feasible or appropriate to apply other treatment for regulatory purposes given the manner in which CCPC has been regulated and the manner in which it is proposed that the utility assets will be regulated....Historically, many of the assets utilized to provide service to CCPC's customers in Ocean Falls were valued and priced at \$1 because of the unique circumstances. The allocation between improvements and maintenance is indistinct and exact costing has not occurred with respect to individual assets...It should be noted that, from a practical perspective, the generation, distribution and sale of power to the residents of Ocean Falls does not generate sufficient revenue even to cover maintenance of the system and does not generate normal return on regulated rate base or return on equity."

BCUC IR 2.15.3 asked the Applicants if they are aware of any restriction or circumstance that would prevent the Commission from approving the fair market value of the acquired utility assets at the time of purchase but in accordance with Section 3475.26(b) of the Handbook also requiring the excess proceeds on disposal of utility assets by CCPC to be deferred for the future benefit of Boralex LP customers. The Applicants replied that Section 3475.26(b) of the Handbook applies to entities selling rate-regulated operations. It does not apply to Boralex LP since (i) it is purchaser of the assets, and (ii) it is currently not rate-regulated. It does not apply to CCPC as neither CCPC nor its utility operations are rate-regulated in a typical manner. Its rates are set "by proxy" with reference to BC Hydro rates.

Present fair market value is the only applicable benchmark evaluation that can be used to assign value to the assets either in total, or individually, at this time. This is true whether the rates for the utility as operated by Boralex LP continue to be set with reference to BC Hydro rates or whether, under ownership of Boralex LP, the utility's rates are to be determined on the basis of cost of service methodology."

BCUC IR 2.15.4 asked the Applicants if it would be appropriate to record utility assets at their historic, depreciated value for regulatory purposes and a fair value for financial statement purposes. In their Response to BCUC IR 2.15.4, the Applicants stated that "...Boralex LP does not consider that it would be appropriate to attempt now to record the utility assets at their historic, depreciated value for regulatory purposes."

BCUC IR 2.15.5 referred to Commission Order G-127-99 and the attached Reasons for Decision, in the Kanelk Transmission Company Limited "(Kanelk)" application to dispose of its utility assets to BC Hydro. In the Kanelk Decision, the Commission did not accept BC Hydro's request to capitalize Kanelk's utility assets at the full purchase price. The Commission considered that it would be more appropriate to record the Kanelk utility assets at net book value (Order G-127-99, Appendix A, p. 5). BCUC IR 2.15.5 also referred to the June 26, 2001 Plateau Pipeline Ltd. ("Plateau") Decision, page 36, where the Commission expressed the view that "purchase of assets which remain in regulated service should continue to reflect the historic, depreciated value of the assets."

The Commission denies Boralex LP's request to capitalize the Utility Assets of CCPC at fair market value. The Commission is of the view that it is more appropriate for Boralex LP to record the CCPC Utility Assets at the historical depreciated value. This is more in keeping with normal regulatory accounting treatment which protects customers from the increased rate effects of having the value of utility assets previously paid for by customers being increased by a new utility owner.

The Commission approves the Application subject to the Applicants confirming within 60 calendar days of this Decision that Boralex LP will record the CCPC Utility Assets at their historical, depreciated value and providing a detailed listing of the CCPC Utility Assets with their historical, depreciated value.

The Panel surmises that the Applicant's reluctance to record the purchased Utility Assets at their depreciated historical costs, may in part be due to the state of accounts in CCPC. If, in fact, there are deficiencies in the recording by CCPC of initial costs and depreciation over the years, for the

purpose of satisfying this condition of the approval of the Application, the Commission will accept reasonable estimates of the depreciated costs of the Utility Assets. Any such estimates should be submitted for approval by the Commission, with a brief supporting rationale consistent with general accounting and depreciation principles appropriate to a rate-based regulated utility.

5.7.3 Asset Purchase versus Share Purchase

In their Responses to BCUC IR 1.8.3 and 1.8.4, the Applicants confirmed that Boralex Inc. was purchasing only the Utility assets of CCPC. The benefit to an asset agreement, unlike a share agreement allows Boralex LP to acquire only those assets necessary to operate the "CCPC System" under the existing BCUC Orders. Some CCPC assets were not of interest to Boralex Inc. Because of this, an asset transaction was determined to be more appropriate and effective than a share transaction.

5.8 Rate Setting Mechanism Employed by CCPC

The rate setting mechanism that has been employed by CCPC in accordance with Commission Order G-40-86 as amended by Order G-30-02 is described in detail in the Corporate Background section of this Decision. BCUC IR 1.9.1 stated that CCPC had been following the BC Hydro tariff binder for rates and terms and conditions of service for customers in Ocean Falls and asked if Boralex LP will be following the BC Hydro binder for rates and terms and conditions of service. In response to BCUC IR 1.9.1 Boralex LP confirmed that it will be following the BC Hydro binders and in the response to BCUC IR 9.2 confirmed that retail customers will continue to be charged the same rates [as BC Hydro rates] and new industrial customers will be charged negotiated rates.

The Applicants requested a continuation of the 1986 exemption provided to CCPC, also apply to Boralex LP. In BCUC IR 1.14.1 the Applicants were asked if they were aware that a request for exemption from regulation for Boralex LP from the Act except for Sections 25, 38, 41 and 117 requires the approval of the Lieutenant Governor in Council ("LGIC") and such approval can take a

few months to receive. In BCUC IR 1.14.2, Boralex LP was asked if it is prepared to provide utility service to its customers under complaint-based regulation while awaiting LGIC exemption approval. The Applicants replied, yes, if it is legally necessary.

The Commission approves the continuation of the rate setting mechanism employed by CCPC pursuant to Order G-40-86 as amended by Order G-30-02 and complaint-based regulation while awaiting LGIC exemption approval for Boralex LP, subject to the Applicants accepting the condition of approval relating to the accounting treatment for the recording of Utility Assets and confirmation from Boralex LP that the transfer is proceeding. Customer rates will only be set based on the historical, depreciated cost of Utility Assets in the event that a customer complaint cannot be resolved by Boralex LP and if the Commission decides to set cost-based rates.

5.9 Continuation of the 1986 Exemption

Commission Order G-40-86 exempted CCPC from application of the Act, except for Part 2 and sections 30, 44, 47 and 133. The exemption was to be in effect until total demand exceeded 6,000 KW, at which time continuation of the exemption would be subject to review by the Commission. Part 2 was repealed in 2003. Sections 30, 44, 47 and 133 of the 1986 Act are now sections 25, 38, 41 and 117 of the Act. The Applicants' reasons for continuing the exemption were stated in the Application as follows:

- (a) without the exemption, the CCPC System would become a rate-based utility, with the inevitable result that tolls for customers of the CCPC System would increase substantially above the current tolls that are linked to BC Hydro's tolls for residential retail customers. Rates currently charged to the residents and other customers located in Ocean Falls are determined by the 1986 Order. The amending Order G-30-02 relates to the rates charged to the industrial customers on the industrial site in Ocean Falls;
- (b) public interest is maintained. For example, the Commission retains the jurisdiction to regulate service standards. Sales to BC Hydro (via the Electric Purchase Agreement with BC Hydro) have been deemed by the Commission to be in public interest;

- (c) BC Hydro submitted to the Commission in *British Columbia Hydro and Power Authority – 2007 Rate Design Application Phases – I and III* that the current Bella Bella arrangement, including the CCPC-BC Hydro electricity purchase agreement was “fair and appropriate”;
- (d) the transition provisions of the Purchase Agreement will ensure that the CCPC System can and will operate in substantially the same way by Boralex LP;
- (e) the limit to the 1986 Order is 6.5 MW (sic), meaning that Boralex LP will be subject to full BCUC regulation with any significant increase (from the current production);
- (f) Boralex LP, together with its partner, Boralex Inc. are sophisticated operators and a large part of the business elsewhere consists of providing power compliant with service standards. Boralex Inc. has acquired substantial expertise and capacity for dealing with a wide array of service standard issues in various jurisdictions, including FERC standards in the U.S;

In their Response to BCUC IR 1.9.1, the Applicants state that “Boralex LP will be following the BC Hydro binders [for rates and terms and conditions of service for customers in Ocean Falls]”. In their Response to BCUC IR 1.9.2 regarding new customers, the Applicants state “Retail customers will continue to be charged the same rates. New Industrial customers will be charged negotiated rates.”

BCUC IR 1.14.4 asked Boralex LP to confirm if it takes issue with the inclusion of the following provision in a new exemption Order: “This exemption, granted pursuant to this Order, shall remain in effect until the Commission orders otherwise, for reasons that may include the determination of any complaint it receives from a person whose interests are affected.” This provision is now generally included in exemption Orders, and would have the effect of not exempting the utility from Section 99 of the Act. Boralex LP responded that “Boralex LP does not take issue with the inclusion of Section 99” (Exhibit B-4, BCUC IR 1.14.4).

The Applicants' Final Submission states that the continuation of the exemption is in the interest of the CCPC system and utility customers and observes that no utility customers have expressed any concern or objection to the continuation.

The Applicants do not address the impact of subsection 88(3) of the Act in their submissions or explain a basis under the Act that would enable the Commission to transfer the exemption under Order G-40-86 to Boralex LP, or to continue the exemption in the name of Boralex LP. Commission Order G-40-86 does not provide for the assignment of the exemption to a subsequent purchaser of the assets of CCPC. Boralex LP as the purchaser of the Utility Assets is seeking exemption from certain sections of the Act, and Section 88(3) can be applied in that situation.

The Commission Panel therefore determines that since the transaction is the purchase of Utility Assets by Boralex LP the Commission is unable to continue the CCPC exemption for Boralex LP and denies the request to continue the exemption.

In order to grant an exemption for Boralex LP the Commission must obtain the approval of the LGIC before it can grant the exemptions sought. The Commission has considered the reasons that Boralex LP submits in support of its request for an exemption, and has determined that the exemption should be granted providing the transfer of Utility Assets proceeds.

Therefore, if Boralex LP advises the Commission within 60 calendar days of the date of the Order which accompanies this Decision that it accepts the condition for approval relating to the accounting treatment of the recording of the Utility Assets and that the transfer is proceeding, the Commission will send a request to the LGIC for approval to grant Boralex LP an exemption from regulation from the Act except for sections 25, 38, 41, 99 and 117 and with the inclusion of the afore-mentioned provision related to the Commission's ability to revisit the exemption.

5.10 Duty to Consult and Accommodate First Nations

As noted above, the Heiltsuk were the only active intervenor in this proceeding. They did not file evidence. Their submissions raised issues of First Nations consultation and accommodation, if appropriate, in the context of the Commission's hearing process for this Application. Without making any substantive submissions on the point, although given the opportunity to do so, they took issue with the Commission's position in previous proceedings that as a quasi-judicial decision maker exercising adjudicative functions, the Commission does not have a duty to consult with First Nations.

In their two submissions, the Heiltsuk referenced their present involvement with the ILMB on behalf of the Crown and asked the Commission Panel to defer its decision on the Application until the outcome of the ILMB process is known.

There has been a substantial amount of recent case law in the area of First Nations rights and more particularly, the duty of the Crown to consult with First Nations. There can be no longer any doubt that the Crown has a duty to consult with, and accommodate, if appropriate, First Nations.

The leading case in this area is *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, 245 D.L.R. (4th) 33 ("Haida"). That case did not involve a decision by a quasi judicial tribunal such as the Commission and the Panel has not had any legal decision or precedent brought to its attention that discusses the Crown's duty to consult where the context is that of a quasi judicial regulatory body exercising adjudicative functions, such as the Commission. However, the *Haida* decision did decide that there was a firm duty on the Crown to consult, and if appropriate, accommodate the concerns of a First Nation where there has been (or will be) an alleged infringement of an Aboriginal right or title.

The Supreme Court of Canada in *Haida* recognized that they were breaking new ground in 2004 and stated:

This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts in the age-old tradition of the common law will be called on to fill in the details of the duty to consult and accommodate. (Paragraph 11)

While the *Haida* decision did not involve a tribunal similar to the Commission, it did involve **the transfer of existing rights** (in that case a Tree Farm Licence) between two third parties, in an area where a First Nation was claiming Aboriginal rights. To that extent only, the facts parallel the claims being asserted by the Heiltsuk that arise in this proceeding.

In fleshing out the "framework" for dealing with the claims of First Nations and the Crown's duty to consult, the Supreme Court of Canada gave guidance on the manner by which decision-making bodies should proceed. Without going into a detailed analysis of the decision, it is important to note some of the guidelines put forward by Canada's highest court:

It [the Crown] must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. **It may continue to manage the resource in question pending claims resolution.** (Paragraph 27)

But, when, precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggests that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and **contemplates conduct that might adversely affect it.** (Paragraph 35)

To facilitate this determination, **claimants should outline their claims with clarity**, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. (Paragraph 36)

A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. **The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.** Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty. (Paragraph 37)

The content of the duty to consult and accommodate varies with the circumstances. **Precisely what duties arise in different situations will be defined as the case law in this emerging area develops.** In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and **to the seriousness of the potentially adverse effect upon the right or title claimed.** (Paragraph 39)

In discharging this duty [to consult], **regard may be had to the procedural safeguards of natural justice mandated by administrative law.** (Paragraph 41)

While precise requirements will vary with the circumstances, the consultation required at this stage [where the risk of non-compensable damage is high] may entail **the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that the Aboriginal concerns were considered and to reveal the impact they had on the decision.** (, Paragraph 44)

The process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. ...Rather, what is required is a process of balancing interests, of give and take. (Paragraph 48)

The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; **the question is whether the regulatory scheme or government action “viewed as a whole”, accommodates the collective aboriginal right in question.** ...What is required is not perfection but **reasonableness.** (Paragraph 62)

[In all the extracts above, emphasis has been added.]

The issue of the Crown's duty to consult has arisen in several recent Commission proceedings:

- (a) An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project (“VITR”) (Decision July 7, 2006);
- (b) In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5 (Decision July, 12, 2007);

- (c) In the Matter of British Columbia Hydro and Power Authority, A Filing of Electricity Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71 (Decision January 29, 2008) ("Alcan"); and
- (d) In the Matter of British Columbia Transmission Corporation and An Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project ("ILM") (Decision August 5, 2008);

All of these decisions are available on the Commissions website at www.bcuc.com . Alcan and ILM are presently under appeal to the British Columbia Court of Appeal on First Nations issues.

None of the fact situations in these proceedings are congruent with the facts in the Application, although many of the considerations that played into the decisions of the various Commission panels have some relevancy to the facts before the Panel in this proceeding. Pursuant to section 75 of the Act, the Commission is not bound to follow its previous decisions and must make its decision on the merits and justice of the case.

Given that the Commission must base its decision on the merits and justice of the case, there is still an obvious benefit in the Commission establishing a consistent approach to the issues involving the Crown's duty to consult. How quasi-judicial tribunals exercising adjudicative functions **must** deal with the complex nature of the Aboriginal claims asserted by First Nations, will await further development of case law by the courts. In the interim, the Commission will continue to apply the law as set out in the *Haida* decision and the cases that build upon it.

As part of the VITR proceeding, Commission Counsel produced a memorandum of law dealing with a number of issues that had been raised in that proceeding by the Hul'qumi'num Treaty Group. The opinion was filed as Exhibit A-31 (November 15, 2005) in that proceeding. In brief, the opinion concluded that the Commission does not, itself, have a duty to consult with or accommodate First Nations. (The opinion, as an Exhibit in that proceeding is available on the Commission's website) An extract from this opinion was circulated by staff of the Commission to the Heiltsuk under cover of a letter dated October 3, 2008 (Exhibit A-4) is part of the record.

In the memorandum of law, Commission counsel reviewed the case law that builds upon the *Haida* decision and as well, canvasses several decisions that involved quasi-judicial decision makers. (See Memorandum at p. 13 and following.) The leading case cited for quasi judicial decision bodies was *Attorney-General of Quebec v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 ("NEB"). This case was decided before *Haida*, but lends support to the argument that the normal procedural safeguards dictated by administrative law and the Rules of Natural Justice will go some way to meet and satisfy any duty owed by a quasi judicial tribunal to an intervener asserting Aboriginal rights. The most recent case law is consistent with this ruling and none disapproves of the NEB finding.

Also of relevance to the manner in which the Commission should approach the Crown's duty to consult is the "Provincial Policy for Consultation with First Nations", issued in October 2002. This was attached as Appendix A to the Commission Counsel's opinion that was filed in the Vancouver Island Transmission Reinforcement Project mentioned above. There is no guidance given in the Policy as to how quasi-judicial tribunals should approach the issue of the Crown's duty to consult nor any discussion as to how tribunals should interact with the prime agencies of the Provincial Crown established to carry out consultations with First Nations.

5.10.1 Position of the Parties

The Heiltsuk Tribal Council

On the record of this proceeding, the Heiltsuk did not provide any evidence as to the nature and extent of the claims that they were advancing nor did they attempt to show any particular adverse affect on their people, should the proposed transfer of the CCPC Utility Assets and the CCH Rights to Boralex LP be approved by the Commission.

In their November 10, 2008 Submission, the Heiltsuk reported that they are engaged in a consultation process with the ILMB. They asserted that this consultation was triggered by the proposed sale of assets and the ILMB took the initiative of contacting the Heiltsuk to initiate the

process. The Heiltsuk provided a brief description of the nature of the consultation that will take place and make reference to the *2008 Gitanyow* decision (*Wii'litswx v. British Columbia (Minister of Forests) 2008 BCSC 1139*) and the five step test set out in that decision. The Heiltsuk do not address the expected schedule of proceedings with the ILMB nor do they estimate when those consultations might be brought to a conclusion.

They point out that the Applicants in this proceeding are not part of the consultations with the ILMB, and "...do not possess the expertise or relevant information to make any decision or reach any conclusions regarding the nature and extent of our aboriginal rights, particularly the impact this transfer may have to such rights. The duty to consult rests with the Crown. All we seek is to permit the Crown to fulfill its duty to us." (Heiltsuk November 10, 2008 Submission, Paragraph 3.) And later at Paragraph 4 they note that "...the [Applicants] are not part of our consultations with ILMB nor do they have the expertise to make any decision or reach any conclusion regarding the nature and extent of consultations. Part of the consultation process will include gathering evidence to determine the level of consultation, evidence which is not before the Commission or within the knowledge of the [Applicants]."

The same informational deficiencies might also be attributed to the Commission.

In sum, the Heiltsuk did not advance any particular claim or suggest any remedy by way of accommodation in these proceedings. Their solitary request was to have the Commission delay its decision in this application until such time as they have brought their consultations with the ILMB to a conclusion. No estimate is given although the Heiltsuk do undertake to keep the Commission informed. In their view, the Heiltsuk states that there is no pressing need for the Commission to proceed in the absence of the results of the consultation process with the ILMB.

The ILMB was not an intervenor in this proceeding nor was any other provincial government department or agency.

Central Coast Power Corporation and Boralex Ocean Falls Limited Partnership

On the issue of the duty to consult, the Applicants summarize their position at Item 4, Paragraph 5 in their Final Argument:

“The Applicants submit that the Heiltsuk Submission [in respect of the duty to consult] is without merit because:

- (i) the jurisdiction of the Commission is limited strictly to matters under the Act;
 - (ii) there is no obligation of the Commission to consult with the Heiltsuk in these circumstances, since there is no “impact” resulting from the decision of the Commission;
 - (iii) as a quasi-judicial body, the Commission has no obligation to consult and consultation with the Heiltsuk would itself offend the Commission’s obligation to conduct its proceedings fairly and in accordance with the rules of natural justice; and
 - (iv) if there was an obligation on the Commission to consult, in these circumstances it would be at the low end of the “Haida Nation spectrum”, and such obligation, if any, has already been met by the established process of the Commission.
- (a) Jurisdiction of the Commission is limited to the Act.”

In support of their position, the Applicants cite *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69 which built upon *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 and pointed out that there is an onus on those asserting a First Nations right, to present evidence of some adverse impact. In this proceeding, the Applicants state that there “...is no evidence (or assertion) that the proposed transfer might have any impact on any asserted right, [and hence] it follows that there is no duty to consult.” Even if there was a duty to consult [directly on the Commission], the duty would be at the very low end of the “spectrum” of consultation as described in *Haida Nation* and this has been satisfied by the hearing process of the Commission.

The Applicants also rely upon *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources) 2008 YKCA 13*, a decision of the BC Court of Appeal sitting as the Yukon Court of Appeal. There, the court held that “... notice to the aboriginal group, an opportunity to submit a position by the aboriginal group, and a fair consideration of the submission of the aboriginal group by the decision making body, all within the normal rules of the decision making body, was determined to be adequate consultation.” (Final Argument, Item 4(d), Paragraph 6)

The Applicants also point out that the proposed transfer of the Utility Assets is a time-sensitive transaction and they seek a “speedy and unconditional approval of the Application. (Final Argument, Item 5, Summary and Conclusion)

Commission Determination

The Panel notes that the only question remaining before it is whether or not the decision in this matter ought to be delayed until such time as the consultations now underway with the ILMB are brought to some sort of conclusion. However, the broader issues of the Commission’ duty to consult were raised during the course of the proceeding.

The Panel notes that there was no specificity presented by the Heiltsuk in respect of their asserted First Nations rights nor was there any information presented as to any adverse impact that a positive decision by the Commission might precipitate.

Further, the Heiltsuk had every opportunity to participate in the proceeding. They did ask IRs and were permitted make two sets of final submissions. They could have filed evidence pursuant to the Commission’s Confidential Filings Directive, but chose not to do so. They were afforded the opportunity to make submissions on the duty of the Crown and of the Commission to consult and accommodate and on any duty the Commission may have to ensure that consultation has been adequate in the context of the proposed sale of assets contemplated by the Application as part of the written process provided for by Order G-121-08 and to file a reply to the Written Argument of

the Applicants on these issues by November 3, 2008. They chose not to make full submissions on these matters, nor did they advise the Commission in a timely way that they intended to file a Reply by November 3.

When they did file a Reply, they did so on November 10, 2008 some 13 days beyond the end of the Regulatory Timetable contemplated by Order G-121-08. In an effort to afford every accommodation to the Heiltsuk, the Commission extended filing deadlines and accepted submissions for the record that were outside of the Commission's Regulatory Timetable for this proceeding.

On the basis of the evidence on the record, the relevant cases cited by the parties and the arguments submitted by the Applicants and the Heiltsuk, and on the facts of this case and in the particular circumstances of this Proceeding under the Act for the disposition of assets of a public utility, the Panel determines as follows:

- (a) The Commission has no mandate or statutory right to evaluate the asserted claims of First Nations in respect of Aboriginal rights or title (and any appropriate accommodation) and such matters are beyond the jurisdiction of the Commission, at least insofar as they extend to matters that are beyond the direct impact of the decision before the Commission;
- (b) While no details of the consultations that are on-going before the ILMB are in evidence for the purposes of the record, the Panel is of the view from the assertions made by the Heiltsuk in their submissions that, *prima facie*, the Crown's duty to consult is being addressed in that venue;
- (c) The Heiltsuk has been afforded every opportunity to participate in this proceeding and to present any concerns or to outline any adverse impact that a positive decision by the Commission might have on their Aboriginal rights or on the people that they represent;
- (d) Given that the operations of the public utility in this case will not change in any significant way and that the proposed transfer of the Utility Assets will not impact the service to the public, there seems to be no reason to delay the decision of the Commission pending the resolution of the consultations with the ILMB at some undetermined date in the future.

In result, the request by the Heiltsuk for a delay in proceedings is denied.

DATED at the City of Vancouver, in the Province of British Columbia, this 5th day of December 2008.

Original signed by:

P.E. VIVIAN

PANEL CHAIR AND COMMISSIONER



BRITISH COLUMBIA
UTILITIES COMMISSION

ORDER
NUMBER G-180-08

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TELEPHONE: (604) 660-4700
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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by Central Coast Power Corporation
and Boralex Ocean Falls Limited Partnership
for Approval of the Sale and Disposition of Utility Assets of
Central Coast Power Corporation to Boralex Ocean Falls Limited Partnership

BEFORE: P.E. Vivian, Commissioner December 5, 2008

O R D E R

WHEREAS:

- A. On August 1, 2008, Central Coast Power Corporation ("CCPC") and Boralex Ocean Falls Limited Partnership ("Boralex LP") applied, pursuant to Section 52(1) of the Utilities Commission Act ("the Act") or alternatively pursuant to section 2.(e) of British Columbia Utilities Commission ("the Commission") Order G-40-86 dated July 4, 1986, for an Order approving the sale and disposition of Utility Assets of CCPC to Boralex LP as set out in an agreement dated June 3, 2008 (the "Purchase Agreement") (the "Application"); and
- B. Central Coast Hydro Ltd. ("CCH"), a non-regulated business, owns certain rights respecting potential hydroelectric projects located at or near the Atnarko River and Bella Bella Valley in BC ("CCH Rights") that CCH will sell to Boralex LP as part of the Purchase Agreement; and
- C. On February 19, 1986, a 20 year agreement was signed by CCPC and British Columbia Hydro and Power Authority ("BC Hydro"). CCPC would supply electricity to BC Hydro at the point of delivery, which was the point where CCPC's transmission connection met BC Hydro's substation in Bella Bella (the "Power Purchase Agreement"); and
- D. On March 27, 1986, CCPC purchased certain lands and chattels that included the dam, powerhouse, transmission and distribution systems in the Ocean Falls, BC town site and mill site from the Ocean Falls Corporation ("OFC"). On June 4, 1986 CCPC applied to the Commission for an exemption from the Act pertaining to the sale of electric power to residential, commercial and industrial consumers located at Ocean Falls and to Bella Bella, BC; and

**BRITISH COLUMBIA
UTILITIES COMMISSION**

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- E. Commission Order G-40-86 approved the Transfer of Lands and Chattels from OFC to CCPC and exempted CCPC from the Act (S.B.C 1980 Chapter 60) except for Part 2 and Sections 30, 44, 47 and 133. Part 2 has since been repealed and the sections have been renumbered as Sections 25, 38, 41 and 117, respectively; and
- F. Order G-40-86 allowed CCPC to negotiate rates with industrial customers subject to certain limitations set out in Schedule F of the Agreement between CCPC and OFC that was attached to the Order. In the event of a complaint by an interested party, the Commission may review whether the exemption for CCPC continues to be in the public interest; and
- G. The 20 year Power Purchase Agreement between CCPC and BC Hydro was extended for another 10 years to December 31, 2016 (BC Hydro 2007 Rate Design Phase II Hearing, Exhibit B-79); and
- H. Commission Order G-30-02 amended Order G-40-86 with respect to Schedule F, by striking out Section 2 (c) of Schedule F and replacing it with the following wording: "For present firm installed capacity in CCPC's Ocean Falls generating facility, industrial customers are to be charged rates as negotiated by the parties, but not to exceed the rate authorized by BC Hydro's Rate Schedules 1821, 1200, 1201, 1210, or 1211 as amended from time to time, for similar service. In the event that additional generation, above the firm installed capacity of the plant is required, the parties may negotiate rates with consideration of the cost of installing additional generation"; and
- I. Order G-30-02 was also amended by striking out paragraph 2(a) of the Order and replacing it with the following wording: "CCPC shall fully comply with the terms of its agreements with B.C. Hydro and Ocean Falls Corporation (except for Schedule F) attached as Appendices I and II respectively"; and
- J. Boralex LP is a limited partnership under British Columbia's Partnership Act. The Partners of Boralex LP are Boralex Inc. (limited partner) and Boralex B.C. Development Inc. (general partner). Boralex Inc. is one of Canada's largest and most experienced private corporations in the development and production of renewable energy and is based in Quebec; and
- K. Boralex LP is also applying for the continuation of the exemption for rates currently charged to residents and other customers as set out in Order G-40-86 and for industrial customers as amended in Order G-30-02; and
- L. CCPC has informed its customers by personally meeting with every permanent customer in Ocean Falls. A copy of the letter was posted in the Ocean Falls Post Office. A letter was sent to all non-resident account holders informing them of the sale. The industrial customer agreed to the transfer of its contract with CCPC to Boralex LP; and

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-180-08**

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- M. By Order G-121-08 the Commission established Regulatory Timetable for a written public hearing process to review the Application; and
- N. CCPC and Boralex LP, as part of the stakeholder consultation process, were directed to inform the public of the Application and respond to questions from the public concerning the Application and process to consider the Application; and
- O. On September 19, 2008, Heiltsuk Tribal Council (the "Heiltsuk") filed for Registered Intervenor status; and
- P. On October 3, 2008 by Letter L-48-08, the Commission amended the Regulatory Timetable to provide additional time for issuance of Information Request No.2 and for the Heiltsuk to direct their questions to CCPC and Boralex LP; and
- Q. On October 20, 2008, the Heiltsuk filed its comments on the Application; and
- R. On October 27, 2008, CCPC and Boralex LP submitted their Final Argument; and
- S. By letter dated November 10, 2008 (the "Heiltsuk Filing"), the Heiltsuk filed its closing comments in response to the Final Argument of CCPC and Boralex LP dated October 27, 2008; and
- T. On November 14, 2008 by Letter L-54-08, the Commission informed CCPC and Boralex LP and all other participants that the amended Regulatory Timetable did not provide for a right of reply by Intervenors after October 20, 2008, consistent with the Commission's practice and that the Commission Panel had established a process to address the Heiltsuk Filing; and
- U. By letter dated November 17, 2008, CCPC and Boralex LP advised that that they did not oppose the Commission accepting for filing the Heiltsuk Filing; and
- V. Section 52 of the Act states:
 - (1) "Except for a disposition of its property in the ordinary course of business, a public utility must not, without first obtaining the commission's approval,
 - a) dispose of or encumber the whole or a part of its property, franchises, licenses, permits, concessions, privileges or rights, or
 - b) by any means, direct or indirect, ,merge, amalgamate or consolidate in whole or in part its property, franchises, licenses, permits, concessions, privileges or rights with those of another person.

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-180-08**

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(2) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in the public interest"; and

W. The Commission has reviewed the Application, the evidence and the submissions and considers the sale and disposition of the Utility Assets, subject to one condition, desirable in the public interest.

NOW THEREFORE the Commission orders as follows:

1. Subject to compliance within 60 calendar days of the date of this Order with the condition set out in Section 5.7.2 of the Decision issued concurrently with this Order by Boralex LP, the Commission approves, pursuant to Section 52 of the Act, the **sale and disposition** of the Utility Assets of CCPC to Boralex LP as set forth in the Purchase Agreement.
2. In the event of the failure of Boralex LP to comply with the said condition within 60 calendar days of the date of this Order, the Application is dismissed.

DATED at the City of Vancouver, in the Province of British Columbia, this 5th day of December 2008.

BY ORDER

Original signed by:

P.E. Vivian
Panel Chair and Commissioner

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-180-08**

4

(2) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in the public interest"; and

W. The Commission has reviewed the Application, the evidence and the submissions and considers the sale and disposition of the Utility Assets, subject to one condition, desirable in the public interest.

NOW THEREFORE the Commission orders as follows:

1. Subject to compliance within 60 calendar days of the date of this Order with the condition set out in Section 5.7.2 of the Decision issued concurrently with this Order by Boralex LP, the Commission approves, pursuant to Section 52 of the Act, the **sale and disposition** of the Utility Assets of CCPC to Boralex LP as set forth in the Purchase Agreement.
2. In the event of the failure of Boralex LP to comply with the said condition within 60 calendar days of the date of this Order, the Application is dismissed.

DATED at the City of Vancouver, in the Province of British Columbia, this 5th day of December 2008.

BY ORDER

Original signed by:

P.E. Vivian
Panel Chair and Commissioner

IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

Application for Approval of the Sale and Disposition of Utility Assets
of Central Coast Power Corporation
to Boralex Ocean Falls Limited Partnership

EXHIBIT LIST

Exhibit No.	Description
<i>COMMISSION DOCUMENTS</i>	
A-1	Letter dated August 22, 2008 and Order No. G-121-08 establishing a Written Public Hearing and Regulatory Timetable
A-2	Letter dated September 11, 2008 issuing Information Request No. 1 to Central Coast Power Corporation
A-3	Letter dated September 26, 2008 issuing an response to Heiltsuk Tribal Council
A-4	Letter dated October 3, 2008 issuing an response to Information Request No. 1 from the Heiltsuk Tribal Council
A-5	Letter dated October 3, 2008 issuing an amendment to the Regulatory Timetable
A-6	Letter dated October 7, 2008 issuing Information Request No. 2 to Central Coast Power Corporation
A-7	Letter dated October 10, 2008 withdrawing exhibits from the proceeding
A-8	Letter dated November 14, 2008 issuing response regarding Heiltsuk Tribal Council filing of closing comments to Central Coast Power Corporation and Boralex Ocean Falls Limited Partnership Final Argument
<i>APPLICANT DOCUMENTS</i>	
B-1	Letter dated August 1, 2008 filing Application for Approval of the sale and disposition of utility assets of Central Coast Power Corporation to Boralex Ocean Falls Limited Partnership
B-1-1	CONFIDENTIAL - Application for Approval of the sale and disposition of utility assets of Central Coast Power Corporation to Boralex Ocean Falls Limited Partnership

Exhibit No.	Description
B-1-2	Received November 20, 2008, an Errata for page 4, paragraph 5, line 3 of the Application for Approval of the Sale and Disposition of Utility Assets
B-2	Email dated August 27, 2008 filing Notice of Publication of the written public hearing for the sale and disposition of utility assets
B-3	Email dated September 8, 2008 filing Notice of Publication of the written public hearing in the Coast Mountain News
B-4	Letter dated September 24, 2008 filing response to Commission's Information Request No. 1
B-4-1	CONFIDENTIAL - Filing Financial Statements for 2006 and 2007 as part of the response to Commission's Information Request No. 1
B-4-2	Letter dated September 25, 2008 filing investment analyst reports in response to Commission's Information Request No. 1.12.3
B-5	Letter dated September 26, 2008 from Waldemar Braul, of Fraser Milner Casgrain, legal counsel, filing confirmation of compliance
B-6	Letter dated October 10, 2008 filing responses to the Heiltsuk First Nation Information Request No. 1
B-7	Letter dated October 14, 2008 filing responses to Commission Information Request No. 2

INTERVENOR DOCUMENTS

C1-1	HEILTSUK TRIBAL COUNCIL - Online web registration received September 19, 2008 from Marilyn Slett, filing request for Registered Intervenor status
C1-2	CONFIDENTIAL - Letter dated September 19, 2008 from Marilyn Slett, filing comments
	** EXHIBIT WITHDRAWN **
C1-3	CONFIDENTIAL - Letter dated September 24, 2008 from Vi Bowack, Executive Director, filing request to remove Exhibit C1-2
	** EXHIBIT WITHDRAWN **
C1-4	Letter dated October 1, 2008 issuing Information Request No. 1

Exhibit No.	Description
C2-1	SHEARWATER MARINE LIMITED – Letter dated September 22, 2008 from Fred J. Weisberg, Weisberg Law Corporation, legal counsel, filing request for Intervenor status
<i>LETTERS OF COMMENT</i>	
E-1	MOSS, JOANN – Letter of Comment dated July 3, 2008, from Joann Moss, Ocean Falls, BC
E-2	OLSON, DWIGHT - Letter of Comment dated July 3, 2008, from Dwight Olson, Ocean Falls, BC
E-3	BAUMAN, MARTIN – Letter of Comment dated July 3, 2008, filed after the Application from Martin Bauman, Ocean Falls, BC

TAB 32

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BRITISH COLUMBIA
UTILITIES COMMISSION

ORDER
NUMBER G-112-01

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by West Kootenay Power Ltd.
[now UtiliCorp Networks Canada (British Columbia) Ltd.]
to Sell its Hydroelectric Generation Assets

BEFORE: P. Ostergaard, Chair)
P.G. Bradley, Commissioner) October 26, 2001
B.L. Clemenhagen, Commissioner)

O R D E R

WHEREAS:

- A. On March 22, 2001, West Kootenay Power Ltd. ("WKP") filed an Application for the sale of its generation assets ("the Application"), pursuant to Sections 50, 52, 54, 60, and 71 of the Utilities Commission Act ("the Act"). In the Application WKP proposes to sell its four hydroelectric plants and related facilities ("the Plants") situated on the Kootenay River to a joint venture subsidiary of the Columbia Basin Trust and the Columbia Power Corporation ("Columbia Joint Venture") for a purchase price of \$120 million; and
- B. In order to accomplish the sale, WKP first proposes to transfer the Plants to a newly incorporated subsidiary of WKP, Kootenay River Power Corporation ("KRP"), and then sell the shares in KRP to the Columbia Joint Venture; and
- C. On completion of the sale, KRP and WKP would enter into a Power Purchase Agreement ("PPA") to sell the output of the plants to WKP at prices specified in the PPA; and
- D. The Commission convened an oral public hearing in Rossland, B.C. on May 29, 2001, to hear WKP's Application; and
- E. At the request of WKP, with the support of the Columbia Joint Venture, the hearing was adjourned, and later reconvened in Rossland on July 16, 2001 after a Technical Information Session in Kelowna; and
- F. On June 8, 2001, WKP filed updates to its Application, being an Amended and Restated Brilliant Power Purchase Agreement, an Operations Agreement, a Transitional Services Agreement, and a Transmission Maintenance Agreement, with the Commission and intervenors; and
- G. By separate letter, WKP requested Commission approval of a letter agreement dated June 1, 2001 regarding the Brilliant tailrace issue; and
- H. The hearing was completed on July 25, 2001 and the filing of written argument was completed on September 7, 2001; and
- I. The Commission has considered the Application and the evidence adduced thereon, all as set forth in the Reasons for Decision issued concurrently with this Order.

BRITISH COLUMBIA
UTILITIES COMMISSION

ORDER
NUMBER G-112-01

2

NOW THEREFORE the Commission orders as follows:

1. The Commission denies the WKP Application.
2. The Commission will not approve the transfer of assets to Kootenay River Power Corporation unless the terms of the sale are restructured to provide for sharing of the proceeds on sale as determined in Chapter 2 of the Reasons for Decision.
3. The Commission directs West Kootenay Power Ltd. to advise it of the Utility's intentions within one month of the date of this Order.

DATED at the City of Vancouver, in the Province of British Columbia, this 26th day of October 2001.

BY ORDER

Original signed by:

Peter Ostergaard
Chair

TAB 33

ROBERT J. PELLATT
COMMISSION SECRETARY
Commission.Secretary@bcuc.com
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a

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PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 631, Approved and Ordered MAY 27 1999

Executive Council Chambers, Victoria

In the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, order that

- (a) Approval is given to Pacific Northern Gas Ltd., for the corporate amalgamation of "Pacific Northern Gas (N.E.) Ltd.", "Centra Gas Fort St. John Inc." and "Peace River Transmission Company Ltd."; and
- (b) The amalgamated entity shall be called "Pacific Northern Gas (N.E.) Ltd."

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.

Deputy Order-in-Council Custodian

Minister of Employment and Investment

Presiding Member of the Executive Council

Authority under which Order is made:

Act and section:- Utilities Commission Act, R.S.B.C. 1996, c. 473, section 53(1)(a)(ii)

April 26, 1999

ROBERT J. PELLATT
COMMISSION SECRETARY
Commission.Secretary@bcuc.com
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BRITISH COLUMBIA UTILITIES COMMISSION
VIA FACSIMILE
(250) 356-5587

April 9, 1999

The Honourable Michael Farnworth
Minister
Ministry of Employment and Investment
P.O. Box 9046
Room 124 Parliament Buildings
Victoria, B.C. V8W 9E2

Dear Minister Farnworth:

Re: Corporate Amalgamation of
Pacific Northern Gas (N.E.) Ltd. ["PNG(N.E.)"],
Centra Gas Fort St. John Inc. ("Centra FSJ") and
Peace River Transmission Company Ltd. ("PRT") into PNG (N.E.)

On November 26, 1998, Pacific Northern Gas Ltd. ("PNG") submitted a request that the Commission report to the Lieutenant Governor in Council ("LGIC") in support of the amalgamation of PNG (N.E.), Centra FSJ and PRT, into PNG (N.E.), (collectively referred to herein as the "Companies") pursuant to Sections 53(1) and 53(3) of the Utilities Commission Act (the "Act"). The Commission supports the amalgamation, for the reasons discussed below, and recommends that the LGIC, by Order, consent to the requested amalgamation by PNG, pursuant to Section 53(1)(a)(ii) of the Act.

PNG (N.E.) currently serves, through two separate divisions, the communities of Tumbler Ridge and Dawson Creek. Centra FSJ currently serves the communities of Fort St. John and Taylor. Centra FSJ was purchased by PNG (effective January 1, 1997) from Centra Gas British Columbia Inc. and the purchase was approved by Commission Order No. G-127-96. PRT, which was acquired by PNG (N.E.) in 1997, operates gas transmission facilities that transport gas to the distribution system serving Dawson Creek. All of the Companies are owned and operated by PNG and are all public utilities as defined under Section 1 of the Act.

The employees of Centra FSJ, who are currently represented by the Teamsters Union, and of PNG (N.E.), who are currently represented by the IBEW, have been advised by PNG of its intention to amalgamate Centra

FSJ and PNG (N.E.). PNG has stated that it had advised both unions some time ago of PNG's intention to seek approval of the Labour Relations Board to have one union represent the employees of the amalgamated entity, and has recently indicated to Commission staff that it expects to make an application to the Labour Relations Board in late April.

Page 2

Under Section 53(4) of the Act, the Commission has inquired into PNG's application to amalgamate through a process of Staff Information Requests and an Alternative Dispute Resolution ("ADR") process. The ADR process was established under Commission Orders No. G-8-99 and G-17-99 and examined the amalgamation request and a Cost of Service Allocation/Rate Design Study for Centra FSJ and the Dawson Creek division of PNG (N.E.).

The effect of the amalgamation will be to consolidate PNG's gas transmission and distribution systems serving the communities of Fort St. John, Taylor, Tumbler Ridge and Dawson Creek. Based on PNG's responses to Commission staff information requests, the Commission anticipates that the proposed amalgamation will result in some operational and administrative efficiencies. For instance, PNG anticipates that there will be a reduction in the administrative workload in the Vancouver head office in the areas of corporate reporting and document handling. More efficient operation and administration of the merged Fort St. John and Dawson Creek distribution systems is also anticipated to result in more cost-efficient operations. Both of these aspects are expected by the Commission to benefit customers by keeping rates slightly lower than they would be under the current corporate structure.

The Commission also anticipates a slight increase in administrative efficiency in dealing with one amalgamated entity rather than two. There may also be a similar slight administrative benefit to the local governments of Fort St. John, Taylor, Dawson Creek and the Peace River Regional District. However, PNG advises that the day-to-day interactions of gas company employees with their municipal counterparts will not change, nor will the natural gas Franchise Agreements. PNG also anticipates benefits in the area of public safety and emergency response in the merged Fort St. John and Dawson Creek areas as a result of a more flexible allocation of service crews.

The ADR process took place in Dawson Creek on March 8 and 9, 1999 to negotiate a settlement regarding the Centra FSJ/Dawson Creek Cost of Service Allocation/Rate Design Study and to review the proposed corporate amalgamation of the Companies.

A final settlement document has not been prepared by PNG regarding the rates. However, parties involved in the ADR were asked by PNG to acknowledge their agreement to the amalgamation in advance of a final determination on rates. Parties to the ADR – the Peace River Regional District, the City of Dawson Creek and the Consumers Association of Canada et al. – have all agreed with the corporate amalgamation of the Companies into PNG (N.E.). A final determination on rates will be made subsequently by the Commission based on the facts before it, including whether or not parties to the ADR process have reached a final settlement.

Consequently, the Commission sees several reasons why the amalgamation of the Companies proposed by PNG is beneficial and in the public interest.

- All of the Companies are currently owned by PNG and this will not change as a result of the amalgamation.
- The amalgamation is anticipated to result in increased administrative and operational efficiencies over time, leading to rates that are slightly lower than they would be under the current corporate structure.
- The amalgamation may result in some slight administrative benefits to the Commission and to the affected local governments.
- The Franchise Agreements between the Companies and the communities they serve will not change.
- The amalgamation should result in a more flexible allocation of service crews in Fort St. John and Dawson Creek leading to enhanced emergency response capability.
- The parties involved in the ADR processes to consider the Fort St. John/Dawson Creek Cost of Service Allocation/Rate Design Study and the proposed amalgamation agree with the amalgamation.

For the above reasons the Commission has concluded that the proposed amalgamation of the Companies into a single corporate entity, PNG (N.E.) is beneficial and in the public interest.

Enclosed for your information and review are the following documents:

- PNG's November 26, 1998 request that the Commission seek the approval of the LGIC for the proposed amalgamation.
- BCUC Staff Information Request dated November 27, 1998 and PNG's February 1, 1999 response.
- Draft Minute No. 32-3 from the BCUC Meeting of March 31, 1999 approving PNG's request.
- Letters from the Peace River Regional District, the British Columbia Public Interest Advocacy Centre and the City of Dawson Creek agreeing to the PNG amalgamation.

Yours truly,

Robert J. Pellatt

JF/cms
Attachments

cc: Mr. C.P. Donohue
Director, Regulatory Affairs & Gas Supply
Pacific Northern Gas Ltd.

Mr. Jack Ebbels
Deputy Minister
Ministry of Energy and Mines

Mr. Charles Kang
Deputy Minister

Mr. Dan Green
Senior Policy Advisor

Ministry of Employment and Investment

Mineral Oils & Gas Branch
Ministry of Energy & Mines

WILLIAM J. GRANT
EXECUTIVE DIRECTOR,
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a

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PACIFIC NORTHERN GAS LTD.

FAX COVERSHEET

Suite 1400
1185 West Georgia Street
Vancouver, British Columbia

TO: Rob Pellatt FAX NO.: (604) 660-1102

FROM: Craig P. Donohue TEL NO.: (604) 691-5882 FAX NO.: (604) 691-5863

DATE: November 26, 1998 NUMBER OF PAGES: 3

MESSAGE:

Attached is PNG's letter to the Commission respecting the amalgamation of Pacific Northern Gas (N.E.) Ltd. ("PNG (N.E.)"); Centra Gas Fort St. John Inc. ("Centra FST"); and Peace River Transmission Company Limited ("PRT"). It would be greatly appreciated if this letter could be reviewed or discussed at the Commission's meeting this morning. This is a straight forward proposal. The management and ownership of the utilities in Fort St. John, Dawson Creek and Tumbler Ridge will be the same after the amalgamation is completed. This is just a corporate reorganization to have the Fort St. John, Dawson Creek and Tumbler Ridge divisions under one corporate entity instead of three.

This amalgamation will not affect the rates payable by the customers as it will not preclude the Commission from maintaining the Fort St. John system as a separate division for rate making purposes. This is currently the case with the Dawson Creek and Tumbler Ridge Divisions operated through PNG (N.E.). The Fort St. John system could be operated as a third division of PNG (N.E.) with its current rate structure kept in place. The merits of rate integration will be dealt with through the review of the 1998 Fort St. John/Dawson Creek Cost of Service Allocation/Rate Design Study that was filed earlier this month.

Please call me if you have any questions respecting the foregoing or the attached

WILLIAM J. GRANT
EXECUTIVE DIRECTOR,
REGULATORY AFFAIRS & PLANNING
bill.grant@bcuc.com
web site: http://www.bcuc.com

a

SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. CANADA V6Z 2N3
TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385 -
FACSIMILE: (604) 660-1102

PACIFIC NORTHERN GAS LTD.

Suite 1400
1185 West Georgia Street
Vancouver, British Columbia

Craig P. Donohue
Director, Regulatory Affairs & Gas Supply

November 26, 1998
B.C. Utilities Commission
6th Floor - 900 Howe Street
Vancouver, B.C.
V6Z 2N3

Attention: R.J. Pellatt
Commission Secretary

Dear Sir:

Re: Amalgamation of:

1. **Pacific Northern Gas (N.E.) Ltd. ("PNG (N.E.)");**
2. **Centra Gas Fort St. John Inc. ("Centra FSJ"); and**
3. **Peace River Transmission Company Limited ("PRT")**

PNG (N.E.), Centra FSJ and PRT (the "Companies") hereby request the B.C. Utilities Commission ("BCUC"), pursuant to section 53(3) of the Utilities Commission Act (the "Act"), to submit a report to the Lieutenant Governor in Council pursuant to subsection 53(1)(a)(i) of the Act confirming the BCUC's opinion that the above referenced amalgamation would be beneficial and in the public interest. In support of this request the Companies submit the following:

1. The Companies are public utilities as defined under section 1 of the Act.
2. A public utility may not amalgamate with another person unless the Lieutenant Governor in Council has first consented to the amalgamation pursuant to subsection 53(1)(a)(ii) of the Act.
3. Pacific Northern Gas Ltd. owns 100 percent of the shares of the Companies.

4. The amalgamation will be beneficial and in the public interest because:

- One amalgamated company (i.e. PNG(N.E.)) will serve natural gas customers in the Fort St. John, Dawson Creek and Tumbler Ridge areas, thereby consolidating the operation of gas transmission and distribution systems that are physically located close to one another under one corporate entity. This will result in operational and administrative synergies;

Page 2

- PNG (N.E.) will be able to more efficiently comply with administrative requirements under the Act; and
- The BCUC should experience some operating efficiencies by reducing the number of companies it regulates.

The Companies kindly request the Commission to expedite its consideration of this application to facilitate the completion of the amalgamation by December 31, 1998.

Please direct any questions regarding this letter to my attention.

Yours truly,

C.P. Donohue

WILLIAM J. GRANT
EXECUTIVE DIRECTOR,
REGULATORY AFFAIRS & PLANNING
bill.grant@bcuc.com
web site: http://www.bcuc.com

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BRITISH COLUMBIA UTILITIES COMMISSION

VIA FACSIMILE

November 27, 1998

Mr. C.P. Donohue
Director, Regulatory Affairs & Gas Supply
Pacific Northern Gas Ltd.
1400 - 1185 West Georgia Street
Vancouver, B.C.
V6E 4E6

Dear Mr. Donohue:

Re: Amalgamation of —

1. Pacific Northern Gas (N.E.) Ltd. ["PNG(N.E.)"];
2. Centra Gas For St. John Inc. ("Centra FSJ"); and
3. Peace River Transmission Company Limited ("PRT")

Further to your letter dated November 26, 1998 in which you request that the Commission submit a report to the Lieutenant Governor in Council pursuant to subsection 53(1)(a)(i) of the *Utilities Commission Act* ("the Act"), confirming that in the BCUC's opinion the above-referenced amalgamation would be beneficial and in the public interest, please note that this request was discussed at the Commission meeting which was held Thursday, November 26, 1998. During that discussion, the Commission indicated that it had several concerns regarding this request. Accordingly, Commission staff are making the following Information Requests.

1. Section 53(1) states, in part, that before the Lieutenant Governor in Council will consent to an amalgamation, it must receive a report from the Commission indicating that the Commission holds the opinion that the amalgamation would be beneficial and in the public interest. In your letter, you make reference to the benefits which are expected to arise as a result of the amalgamation. These include operational and administrative synergies, more efficient compliance with the administrative requirements of the Act and a reduced regulatory burden for the Commission.

Please describe and quantify the specific operational and administrative synergies which are expected. Please describe and quantify how these synergies will benefit the utility and how these

synergies will benefit the customers of each of the current utilities.

Page 2

Please describe how the amalgamation will allow for more efficient compliance with the administrative requirements of the Act. Please quantify these benefits and explain how these benefits will affect customers.

Please explain how the amalgamation will result in a reduced regulatory burden for the Commission, particularly if the current companies continue to be operated as separate operating divisions of the larger company.

2. Please describe the process which PNG has undertaken to make affected parties aware of its desire to amalgamate these companies.

In particular, please describe the actions PNG has undertaken to inform the municipalities in which the various companies have service areas. Has PNG undertaken any actions to identify the impacts amalgamation may have on each of the local service areas? If so, please provide the results.

In addition, please describe the actions PNG has undertaken to inform the unions of each the companies of its plans to amalgamate. What has been the response to the proposal?

3. Section 53(4) of the Act states that the Commission must inquire into the application and may for that purpose hold a hearing.

Please provide PNG's views as to the form the inquiry should take.

Commission staff recognize that you wish to proceed with this matter as quickly as possible. Therefore, your timely response to these questions would be appreciated.

Yours truly,

D.W. Emes
for: W.J. Grant

WJG/ssc

Pacific Northern Gas Ltd.
Suite 1400
1185 West George Street
Vancouver, British Columbia
V6E 4E6

Craig P. Donohue
Director, Regulatory Affairs & Gas Supply

February 1, 1999

B.C. Utilities Commission
6th Floor - 900 Howe Street
Vancouver, B.C.
V6Z 2N3

Attention: R.J. Pellatt Commission Secretary

Dear Sir:

Re: Amalgamation of PNG (N.E.), Centra FSJ and PRT

Enclosed are 15 copies of PNG's response to Commission Staff's information request dated November 27, 1998. In PNG's original letter to the Commission dated November 26, 1998 requesting the Commission to submit a report to the Lieutenant Governor in Council confirming the amalgamation would be in the public interest we advised that we were attempting to complete the amalgamation by December 31, 1998. This date has now been changed to June 30, 1999. In order to complete the merger application before the Courts, we will need to have the LGIC consent by no later than May 31, 1999. In this regard, we would appreciate the Commission reviewing the enclosed in conjunction with our November 26, 1999 letter having regard to these time lines.

Please contact me if any further information is required.

Yours truly,

C.P. Donohue

CPD/ekv
encl:

BCUC IR No. 1
Dated Nov. 27/98
re: PNG(N.E.) /FSJ/PRT Amalgamation
Page 1
January 31/99

Pacific Northern Gas Ltd.
Amalgamation of:

- 1. Pacific Northern Gas (N.E.) Ltd. ("PNG(N.E.)");**
- 2. Centra Gas Fort St. John Inc. ("Centra FSJ"); and**
- 3. Peace River Transmission Company Limited ("PRT") Response to**

BCUC Staff Information Request #1
Dated November 27, 1998

- 1.0 Section 53(1) states, in part, that before the Lieutenant Governor in Council will consent to an amalgamation, it must receive a report from the Commission indicating that the Commission holds the opinion that the amalgamation would be beneficial and in the public interest. In your letter, you make reference to the benefits which are expected to arise as a result of the amalgamation. These include operational and administrative synergies, more efficient compliance with the administrative requirements of the Act and a reduced regulatory burden for the Commission.

Please describe and quantify the specific operational and administrative synergies which are expected. Please describe and quantify how these synergies will benefit the utility and how these synergies will benefit the customers of each of the current utilities.

Response:

The Fort St. John and Dawson Creek gas distribution systems are currently operated by staff located in Fort St. John and Dawson Creek with administrative support from the Vancouver head office. The two systems will continue to be operated with current staff complement. However, the corporate reorganization is expected to result in some operational and administrative synergies.

Administrative workload in Vancouver is expected to be lessened in the areas of corporate reporting and document handling as there will be consistency of documentation and record keeping. Similarly it is expected there will be increased consistency of service to

customers. Specifically operating practices both in the field and in the office will become

BCUC IR No. 1
Dated Nov. 27/98
re: PNG(N.E.) /FSJ/PRT Amalgamation
Page 2
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common where appropriate. Also an increased level of comfort around emergency response will be created for customers as potential responders will be more widely distributed (i.e. throughout the Fort St. John/Dawson Creek ("FSJ/DC") service area) rather than restricted to current boundaries.

The anticipated synergies will benefit mainly the customers through more efficient operation and administration of the merged FSJ/DC service area. The resulting decreases in cost of service will help to maintain natural gas rates at competitive levels. Keeping natural gas rates competitive compared to alternative energy sources will benefit PNG (N.E.) by helping to retain and grow its merged customer base.

Please describe how the amalgamation will allow for more efficient compliance with the administrative requirements of the Act Please quantify these benefits and explain how these benefits will affect customers.

Response:

Merging FSJ, DC and PRT into one entity for regulatory purposes will eliminate duplication of effort in the following areas:

1. Revenue requirement and rate design applications. Only one application will need to be reviewed by the Commission.
2. Gas tariffs. PNG (N.E.) and Centra FSJ have two separate gas tariffs which are very similar to one another. The merged utility would develop one gas tariff for application to the FSJ/DC service area. Only one gas tariff would need to be maintained by the Commission and PNG (N.E.).
3. Annual Reports to the Commission. Only one report will need to be filed with the Commission. This would reduce Commission staff review time accordingly.

Customers will benefit from the fact only one tariff will apply in the FSJ/DC merged service area. This will enable customers to know their rates will be the same whether they live in Fort St. John or Dawson Creek. A marginal benefit results from enabling a customer to move from Fort St. John to Dawson Creek knowing that natural gas rates will not change as a result of the move.

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Dated Nov. 27/98
re: PNG(N.E.) /FSJ/PRT Amalgamation
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The cost of regulation will be reduced as two proceedings will be replaced with one proceeding for rate making purposes. Groups of customers may be able to obtain synergies with respect to intervening into only one proceeding instead of two. Customers of similar interests in each community may be able to band together to share costs more effectively.

Please explain how the amalgamation will result in a reduced regulatory burden for the Commission, particularly if the current companies continue to be operated as separate operating divisions of the larger company.

Response:

The previous response addressed how the Commission staff time will be reduced as a result of having to deal with only one of a variety of applications and submissions where there is presently two submissions. If the Commission did not approve of common rates being applied in each of the Fort St. John and Dawson Creek areas, it would still be necessary to administer two separate operating areas for regulatory accounting purposes. This is currently how PNG (N.E.) administers its Dawson Creek and Tumbler Ridge operating divisions. There is only company (i.e. PNG (N.E.)), that operates the two separate divisions. If the Fort St. John and Dawson Creek service areas were to continue to be separate operating divisions, then the regulatory efficiencies described above would not occur.

It would still be better to have only one company operating three divisions (i.e. the Fort St. John, Dawson Creek and Tumbler Ridge divisions). There would be cost savings associated with having standard company stationary. Corporate filings could be made under one company. Therefore, even if the operating areas were separate for regulatory accounting purposes, it would still be beneficial for the all the areas to be owned and operated under the superintendence of one corporate entity.

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Dated Nov. 27/98
re: PNG(N.E.) /FSJ/PRT Amalgamation
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January 31/99

- 2.0 Please describe the process which PNG has undertaken to make affected parties aware of its desire to amalgamate these companies.

In particular, please describe the actions PNG has undertaken to inform the municipalities in which the various companies have service areas. Has PNG undertaken any actions to identify the impacts amalgamation may have on each of the local service areas? If so, please provide the results.

In addition, please describe the actions PNG has undertaken to inform the unions of each of the companies of its plans to amalgamate. What has been the response to the proposal?

Response:

The only parties that will be directly affected by the amalgamation of the companies are the employees of Centra FSJ and PNG (N.E.). PNG advised the employees of its intention to amalgamate Centra FSJ and PNG (N.E.) after Centra FSJ was acquired in 1997. At present the Teamsters represent the employees of Centra FSJ and the IBEW represents the employees of PNG (N.E.). The IBEW was advised several months ago of PNG's intention to seek approval of the Labour Relations Board, after the completion of the amalgamation, to have one union represent the employees of the merged company. The Teamsters were advised of this intention late last year. The unions have not indicated their position to PNG concerning this issue. Similarly, PNG has not indicated what union it will be recommending should be the bargaining agent for the employees. The respective positions will be made before the Labour Relations Board when the common employer/union application is filed by PNG subsequent to the completion of the amalgamation in June, 1999.

PNG will be arranging meetings with the Mayors of Fort St. John and Dawson Creek to advise that the amalgamation will not affect the current relationship between the gas company and the municipalities. In particular, the Franchise Agreements will not change and the day to day interaction of the gas company employees with their municipal counterparts will not change. They will be advised that the legal corporate structure will not in itself bring about significant changes to how the pipeline systems are operated. PNG as the sole owner of the systems was striving for operational efficiencies and improved service regardless of the corporate ownership structure.

BCUC IR No. 1
Dated Nov. 27/98
re: PNG(N.E.) /FSJ/PRT Amalgamation
Page 5
January 31/99

3. Section 53(4) of the Act states that the Commission must inquire into the application and may for that purpose hold a hearing.

Please provide PNG's views as to the form the inquiry should take.

Response:

There is no need for a hearing, oral or written, into PNG's application to amalgamate three corporate entities into one corporate entity. The amalgamation is simply a change in the corporate structure of PNG. The application is not seeking any changes to how the rates are determined in each of the operating areas. Therefore, the amalgamation can take place without affecting any customers. Hence, it is not necessary for the Commission to conduct a hearing process into the corporate amalgamation of Centra FSJ, PNG (N.E.) and PRT.

The issue of the integration of the FSJ and DC rates is the subject of another current separate application. The Commission is dealing with this application in the ordinary course. PNG does not consider the amalgamation will affect rates in other than a positive way by reducing costs because only one legal corporate entity will need to be maintained. These corporate cost reductions will be minor and it is not necessary to review this type of synergy through a formal proceeding. PNG submits the Commission can make a decision concerning the merits of the amalgamation of the corporate entities on the basis of the information already provided by PNG. As noted above the more contentious issues concerning rate integration can be dealt with separately from the amalgamation application.

32-3 PACIFIC NORTHERN GAS (N.E.) LTD.

DRAFT

Corporate Amalgamation of Pacific Northern Gas (N.E.) Ltd.
Centra Gas Fort St. John Inc. and Peace River Transmission Company Ltd.

PNG's application for the corporate amalgamation of the above noted companies was reviewed through an Alternative Dispute Resolution ("ADR") process established by Orders No. G-8-99 and G-17-99. Although a final settlement document has not yet been prepared by PNG, participants to the ADR process have agreed that the consolidation could take place in advance of a final determination in rates. Mr. Fraser distributed a draft letter addressed to the Lieutenant Governor in Council ("LGIC") requesting approval for the proposed amalgamation for review. General discussion took place and minor amendments were made to the letter.

It was moved by Ms. Barr and seconded by Mr. Ostergaard that the letter to the LGIC requesting approval for the proposed PNG amalgamation be issued.

Carried unanimously.

Subject to formal adoption at the next Commission Meeting

Pacific Northern Gas Ltd.
Suite 1400
1185 West George Street
Vancouver, British Columbia
V6E 4E6

Craig P. Donohue
Director, Regulatory Affairs & Gas Supply

March 25, 1999

Peace River Regional District
1981 Alaska Avenue
Dawson Creek, B.C.
V1G 4H8

Attention: Mr. Phil Cove

Dear Sir

Re: Consent to Corporate Amalgamation of;
• Pacific Northern Gas (N.E.) Ltd.
• Centra Gas Port St John Inc.
• Peace River Transmission Company Limited

At the meetings in Dawson Creek on March 8 and 9, 1999 respecting the negotiation of a settlement of the FSJ/DC Cost of Service Allocation/Rate Design Application a draft settlement document was distributed for comment by the parties attending the meeting. One section of the settlement document related to the above referenced corporate amalgamation. It stated the following:

Corporate Amalgamation

Commission Staff will recommend that the Commission seek the consent of the Lieutenant Governor in Council of the corporate amalgamation of Centra Gas Fort St John Inc, Pacific Northern Gas (N.E.) Ltd. and Peace River Transmission Company Limited into one corporate entity.

At the end of the meeting I undertook to distribute a final version of the settlement document to the parties for approval together with the financial documents showing the impact on rates of the settlement terms. Disc to other work commitments and a one week vacation the financial schedules have yet to be prepared. It will probably be another week or two before the financial schedules will be finalised.

- 2 -

The corporate amalgamation will not have any impact on the determination of the rates that will apply in Fort St. John and Dawson Creek. We are committed to completing the amalgamation by mid year. To achieve this result will require us to obtain the consent of the Lieutenant Governor in Council as soon as reasonably possible. It is our understanding that it could take two to three months for the consent to be issued after the request for the consent is made by the B.C. Utilities Commission.

In this regard, we hereby request you to acknowledge your agreement with the corporate amalgamation part of the PSI/DC Cost of Service Allocation/Rate Design Application settlement as set forth above by signing a copy of this letter where indicated and returning it by fax to my attention. A copy of your acknowledgement will be provided to the Commission in support of our request to them to seek the LGIC consent to the amalgamation.

Please direct any questions regarding the foregoing to my attention.

Yours truly,

C.P. Donohue

The Peace River Regional District hereby agrees with the corporate amalgamation of Pacific Northern Gas (N.E.) Ltd, Centra Gas Fort St. John Inc. and Peace River Transmission Company Limited into one corporate entity

Signature

Phil Cove, Deputy Administrator

Pacific Northern Gas Ltd.
Suite 1400
1185 West George Street
Vancouver, British Columbia
V6E 4E6

Craig P. Donohue
Director, Regulatory Affairs & Gas Supply

March 25, 1999

B.C. Public Interest Advocacy Centre
#815 — 815 W. Hastings Street
Vancouver, B.C.
V6C 1B4

Attention: Mr. Richard Gathercole

Dear Sir

Re: Consent to Corporate Amalgamation of;

- **Pacific Northern Gas (N.E.) Ltd.**
- **Centra Gas Port St John Inc.**
- **Peace River Transmission Company Limited**

At the meetings in Dawson Creek on March 8 and 9, 1999 respecting the negotiation of a settlement of the FSJ/DC Cost of Service Allocation/Rate Design Application a draft settlement document was distributed for comment by the parties attending the meeting. One section of the settlement document related to the above referenced corporate amalgamation. It stated the following:

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-2-

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In this regard, we hereby request you to acknowledge your agreement with the corporate amalgamation part of the FSJ/DC Cost of Service Allocation/Rate Design Application settlement as set forth above by signing a copy of this letter where indicated and returning it by fax to my attention. A copy of your acknowledgement will be provide4 to the Commission in support of our request to them to seek the LGIC consent to the amalgamation.

Please direct any questions regarding the foregoing to my attention,

Yours truly,

CR Donohue

The B.C. Public Interest Advocacy Centre, on behalf of CAC(B.C.) et al. hereby agrees with the corporate amalgamation of Pacific Northern Gas (N.E.) Ltd., Centra Gas Fort St John Inc. and Peace River Transmission Company Limited into one corporate entity.

Signature

Dated: March 26, 1999

Pacific Northern Gas Ltd.
Suite 1400
1185 West George Street
Vancouver, British Columbia
V6E 4E6

Craig P. Donohue
Director, Regulatory Affairs & Gas Supply

March 25, 1999

The City of Dawson Creek
P.O. Box 150
Dawson Creek, B.C.
V1G4G4
File No. 4.9.1

Attention: Mayor Blair Lekstrom

Dear Mayor Lekstrom:

Re: Consent to Corporate Amalgamation of;

- **Pacific Northern Gas (N.E.) Ltd.**
- **Centra Gas Port St John Inc.**
- **Peace River Transmission Company Limited**

At the meetings in Dawson Creek on March 8 and 9, 1999 respecting the negotiation of a settlement of the FSJ/DC Cost of Service Allocation/Rate Design Application a draft settlement document was distributed for comment by the parties attending the meeting. One section of the settlement document related to the above referenced corporate amalgamation. It stated the following:

Corporate Amalgamation

Commission Staff will recommend that the Commission seek the consent of the Lieutenant Governor in Council of the corporate amalgamation of Centra Gas Fort St John Inc., Pacific Northern Gas (N.E.) Ltd. and Peace River Transmission Company Limited into one corporate entity.

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-2-

The corporate amalgamation will not have any impact on the determination of the rates that will apply in Fort St. John and Dawson Creek. We are committed to completing the amalgamation by mid year. To achieve this result will require us to obtain the consent of the Lieutenant Governor in Council as soon as reasonably possible. It is our understanding that it could take two to three months for the consent to be issued after the request for the consent is made by the B.C. Utilities Commission,

In this regard, we hereby request you to acknowledge your agreement with the corporate amalgamation part of the FSJ/DC Cost of Service Allocation/Rate Design Application settlement as set forth above by signing a copy of this letter where indicated and returning it by fax to my attention. A copy of your acknowledgement will be provide4 to the Commission in support of our request to them to seek the LGIC consent to the amalgamation.

Please direct any questions regarding the foregoing to my attention,

Yours truly,

CR Donohue

The City of Dawson Creek hereby agrees with the corporate amalgamation of Pacific Northern Gas (N.E.) Ltd., Centra Gas Fort St. John Inc. and Peace River Transmission Company Limited into one corporate entity.

Signature

Blair Lekstrom

Dated: March 30, 1999

RECEIVED
4.35.08

SCHUMAN DALTROP BASRAN & ROBIN

FAMILY LAW LAWYERS

James A.W. Schuman, Q.C.*

Kathryn L. Basran*

Todd R. Bell*

Jesse L. Desilets

Lindsey A. Cruickshank (Articled Student)

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Direct line: (604) 669-4912 Ext 214

January 22, 2013

File No: 8660-1

VIA FAX

VIA FACSIMILE 604-661-9349

- AND -

VIA FAX 604-605-3592

Farris, Vaughan, Wills & Murphy LLP

Barristers and Solicitors

25th Floor, 700 W. Georgia Street

Vancouver, B.C. V7Y 1B3

Davis LLP Legal Advisors

2800 Park Place

666 Burrard Street

Vancouver, B.C. V6C 2Z7

Attention: Karen Shirley-Paterson

Attention: Paul R. Albi, Q.C.

Dear Sirs and Mesdames:

Re: Tamana v Tamana SCBC No. E111404, Vancouver Registry

We have been provided the following documents by our client:

1. May 7 2012 – October 8, 2012: Vancity Enviro Classic Visa statement for acct no. 4789**** 9402 in the name of the Claimant (18 pages);
2. June 12, 2012, July 12, 2012, August 12, 2012, September 12, 2012, October 12, 2012: Vancity MyMoney Statement for acct no. 281667 in the name of the Claimant (8 pages);
3. June 8, 2012: Surrey Parks Receipt No. 8782439 for Summer extracurricular activities for Alyssa;
4. April 7, 2012, June 7, 2012, July 7, 2012, August 7, 2012, September 7, 2012, October 7, 2012: Shaw Invoices for acct no. 014-1403-4184 in the name of the Claimant (12 pages);

- 2 -

5. May 29, 2012: Ironwood Dental Centre Receipt No. C30755191 for Alyssa Tamana;
6. June 22, 2012, August 22, 2012, September 22, 2012: Bell Mobility Account Summaries for acct no. 513658661 in the name of the Claimant (10 pages);
7. July 24, 2012, September 24, 2012: BC Hydro Invoice for acct no. 7719 495 in the name of the Margaret C. Hof (4 pages); and
8. September 20, 2012, October 4, 2012: Receipts from Dr. Lisa Ferrari, Registered Psychologist (2 pages).

Kindly advise whether you would like copies of the foregoing.

A further supplemental List of Documents will follow shortly, and will very likely include updates to bank account statements.

However, it appears that our predecessors had two independent sequences of numbers flowing from two different lists. One of the lists does not group by class or subject matter for ease of reference. We mean no disrespect to our colleagues but the state of the lists is not proper. We are correcting the deficiency and will in due course provide counsel with a single aggregated list encompassing new additions and a table of concordance for reference to number changes.

On review of the correspondence, there have been multiple requests for documents made in both directions. Aside from the follow-up questions to Ms. Shirley-Paterson's letter of December 14, 2012, which we have taken under advisement and will respond to shortly, please advise if there are specific documents your respective clients say are outstanding.

Yours truly,



TODD R. BELL
TRB/jw*

TAB 34



**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-47-05**

SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. V6Z 2N3 CANADA
web site: <http://www.bcuc.com>

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by Princeton Light & Power Company, Limited

and

An Application by Fortis Inc.,
FortisWest Inc. and Fortis Pacific Holdings Inc.

BEFORE: L.F. Kelsey, Commissioner May 19, 2005

O R D E R

WHEREAS:

- A. On April 18, 2005, Princeton Light & Power Company, Limited ("PLP") filed an application for approval of the disposition of PLP shares to Fortis Inc. ("Fortis") creating a reviewable interest ("the PLP Application"), pursuant to Section 54 of the Utilities Commission Act ("the Act"); and
- B. On April 20, 2005, Fortis, FortisWest Inc. ("FortisWest") and Fortis Pacific Holdings Inc. ("Fortis Pacific") also applied for approval of the acquisition by Fortis of a reviewable interest in PLP through the purchase of all the issued and outstanding shares ("the PLP Shares") in the capital of PLP, ("the Fortis Application"), pursuant to Section 54 of the Act, (the PLP Application and the Fortis Application collectively as "the Applications"); and
- C. The Applications seek approval for Fortis to acquire the PLP Shares; the registration on the books of PLP of the transfer of the PLP Shares from the current PLP shareholders to Fortis; the subsequent transfer by Fortis to, and acquisition by, FortisWest of a reviewable interest in PLP; the registration on the books of PLP of the transfer of the PLP Shares from Fortis to FortisWest; the subsequent transfer by FortisWest to, and acquisition by, Fortis Pacific of a reviewable interest in PLP; and the registration on the books of PLP of the transfer of the PLP Shares from FortisWest to Fortis Pacific; and
- D. FortisWest is a wholly owned subsidiary of Fortis and Fortis Pacific is a wholly owned subsidiary of FortisWest. Fortis Pacific is also sole shareholder of FortisBC Inc. ("FortisBC"), an integrated electrical generation, transmission and distribution utility in British Columbia. Upon completion of the transaction, PLP and FortisBC will be affiliate companies, each a wholly owned subsidiary of Fortis Pacific and, indirectly, a wholly owned subsidiary of Fortis; and
- E. PLP and FortisBC are both utilities regulated by the Commission; and
- F. Fortis is a diversified Canadian electric utility holding company with interests in seven regulated utilities located in British Columbia, Alberta, Newfoundland and Labrador, Prince Edward Island, Ontario, Grand

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
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Cayman and Belize. Fortis has assets of approximately \$4 billion and annual revenues of approximately \$1.2 billion; and

- G. Any premium that Fortis will pay to the vendors of PLP over the book value for the PLP Shares will not be recoverable in regulated electricity rates set from time to time by the Commission. Similarly, any premium paid by Fortis Pacific or FortisWest related to the internal transfers will not be recoverable in regulated electricity rates; and
- H. PLP and Fortis have undertaken a comprehensive stakeholder communication and consultation program in PLP's service area; and
- I. Signed letters were received from PLP's major customers and stakeholders stating that they are not opposed to the sale of the PLP Shares to Fortis; and
- J. One customer expressed some concerns about the sale of the PLP Shares. Subsequently, Fortis Pacific responded to the concerns. The customer accepted the response and confirmed that it is not opposed to the sale of the PLP Shares to Fortis; and
- K. The Commission has considered the Applications and supporting material and has determined that the public utility and the users of the service of PLP will not be detrimentally affected.

NOW THEREFORE the Commission orders as follows:

The Commission approves, pursuant to Section 54 of the Act, the sale of the PLP Shares to Fortis, the registration on the books of PLP of the transfer of the PLP Shares to Fortis and the subsequent successive sales of the PLP Shares to each of FortisWest and Fortis Pacific and the registration on the books of PLP of those transfers of the PLP Shares to each of FortisWest and Fortis Pacific, and the acquisition by each of Fortis, FortisWest and Fortis Pacific of a reviewable interest in PLP or such other internal transfer as will result in Fortis Pacific being registered on the books of PLP as the holder of the PLP Shares and having a reviewable interest in PLP.

DATED at the City of Vancouver, in the Province of British Columbia, this 19th day of May 2005.

BY ORDER

Original signed by:

L.F. Kelsey
Commissioner

TAB 35

NEW YORK SUPREME COURT

NE(2d) 167; Id. (1942) 264 App Div 496, 46 PUR(NS) 393, 36 NY Supp(2d) 194; New York Edison Co. v. Maltbie (1936) 271 NY 103, 15 PUR(NS) 143, 2 NE(2d) 277; Id. (1935) 244 App Div 685, 9 PUR(NS) 155, 281 NYSupp 223; People ex rel. Iroquois Gas Corp. v. Public Service Commission (1934) 264 NY 17; 2 PUR(NS) 448, 189 NE 764; Id. 238 App Div 184, PUR1933D 282, 264 NYSupp 550. It was arbitrary and capricious to limit the capital entry to the estimated value of the real estate owned by the Manhasset

Company when the corporation had been in existence for six years, and it appears that some items of expense had been incurred in its formation, and for other purposes, if indeed the Public Service Commission in this proceeding concerning the uniform system of accounts, has any jurisdiction to eliminate an item thirty-seven years of age, and reflecting a transaction of a quarter of a century before the Commission had any power in the premises. The order should be annulled and the matter remitted to the Commission.

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BRITISH COLUMBIA PUBLIC UTILITIES COMMISSION

Re British Columbia Electric Railway Company Limited et al.

July, 1943

INVESTIGATION into rates of associated companies furnishing electric, gas, transportation, and water service; rate schedules prescribed. For second report of Commission, see post, p. 469.

Retur
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Return, § 66 — Related companies — Uniformity of return.

1. The return for related public utility companies supplying electric, gas, transportation, and water service and divided into geographical and service units for regulatory purposes should be uniform for all units and calculated on the cost of money to the organization as a whole, where the financing of the various units has been done jointly, where it is impossible to segregate the securities used to obtain funds for the various units and the cost of money used in acquiring the separate units cannot be determined, and where the companies have had a common depreciation reserve applicable to all units, p. 446.

Valua

Valuation, § 122 — Indirect costs charged to operation.

2. Indirect costs, such as the cost of financing, interest during construction, engineering, and superintendence should be treated as capital expenditures for rate-making purposes, notwithstanding that these items were entered as operating costs on the companies' books, p. 446.

Valua

RE BRITISH COLUMBIA ELECTRIC RY. CO. LIMITED

Return, § 9 — Basis — Present value of property.

3. Public utility companies are entitled to a fair return on the appraised value of their property as of the present time, p. 446.

Valuation, § 154 — Overheads — Ratio of indirect to direct costs.

4. An allowance of 8.8 per cent for general overhead expenses of related companies furnishing electric, gas, transportation, and water service was adopted in determining the value of the utility properties for rate-making purposes, p. 446.

Rates, § 153 — Intercorporate relations — Cost of service.

5. Intercorporate relationships have no part in determining the cost of providing public utility service to the consumer where the operating accounts of the companies have been kept on a company basis and where these accounts have been analyzed and segregated on the basis of units, p. 447.

Valuation, § 35 — Measures of value — Exchange value.

6. Exchange value cannot be used as a measure of value for rate-making purposes, p. 448.

Valuation, § 32 — Measures of value — Historical cost.

7. Historical cost representing the cost to the present utility less depreciation, when prudently invested, is the fairest measure of value for rate-making purposes, p. 449.

Return, § 16 — Right to earn — Protection of investment.

8. Those who supply the funds to finance a public utility company, under either public or private ownership, are entitled to a return on the monies they have advanced, to a reasonable assurance that their investment will be preserved intact so long as proper service is provided, and to a reasonable assurance that service will continue, p. 450.

Valuation, § 41 — Measures of value — Outstanding securities.

9. The outstanding securities of a public utility company do not constitute a proper measure of value of the utility properties for rate-making purposes, p. 450.

Valuation, § 39 — Measures of value — Reproduction cost.

10. Reproduction cost new should not be considered in estimating the value of public utility properties for rate-making purposes, p. 451.

Valuation, § 340 — Going concern value — Development costs — Lag in plant use.

11. Going concern value represented by development cost consisting largely of loss due to the lag in use of new plant facilities should not be included in the appraised value of public utility property for rate-making purposes, p. 452.

Valuation, § 69 — Ascertainment of cost — Prudent expenditures.

12. The purchase price of public utility property must be accepted as prudent, unless there is evidence showing that the price was determined by some consideration not consistent with public interest, and the cost of such property means the cost to the present company, p. 453.

Valuation, § 68 — Rate base determination — Utility plant acquisition adjustments.

13. Utility plant acquisition adjustments should be included in the rate base where they represent prudent investments which were necessary or advisable from the standpoint of public interest, p. 453.

BRITISH COLUMBIA PUBLIC UTILITIES COMMISSION

Valuation, § 222 — Rate base determination — Inactive utility property.

14. Inactive utility property which has been in use and may come into use again in the near future may be included in a rate base, p. 454.

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Valuation, § 139 — Rate base determination — Interest during construction.

15. Interest during construction should be included in a rate base if construction is reasonably continuous, p. 454.

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Valuation, § 139 — Interest during construction — Suspension of construction period.

16. Interest during the period of suspension of construction of public utility property should be charged to the operating expenses of the utility, rather than included in the rate base, p. 454.

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Valuation, § 115 — Rate base determination — Cost of financing.

17. The cost of financing, comprising underwriters' compensation or investment dealers' brokerage and issuing companies' out-of-pocket expenses arising out of new security issues applied to the construction of utility property, is an essential part of the historical cost and is clearly a part of prudent investment, p. 455.

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Valuation, § 249 — Rate base determination — Donations.

18. Funds such as donations were treated as noninterest-bearing monies and no return was allowed thereon in the calculation of the rate of return, although such funds were not deducted from the rate base, p. 455.

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Valuation, § 251 — Rate base determination — Customers' deposits.

19. Funds such as customers' deposits were treated as noninterest-bearing monies and no return was allowed thereon in the calculation of the rate of return, although such funds were not deducted from the rate base, p. 455.

Valuation, § 299.1 — Working capital allowance — Tax money.

20. Funds such as monies on hand for payment of taxes were treated as noninterest-bearing monies and no return was allowed thereon in the calculation of the rate of return, although such funds were not deducted from the rate base, p. 455.

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Valuation, § 104 — Accrued depreciation estimates — Depreciation reserve.

21. The amount of the depreciation reserve cannot be taken as a measure of accrued depreciation, p. 456.

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Valuation, § 287 — Working capital allowance — Meaning of working capital.

22. Working capital, for regulatory purposes, should be the funds necessary for the carrying on of the business efficiently, whereas the accounting concept of working capital is the difference between current liquid assets and current liabilities, p. 457.

Return, § 11 — Basis for computation — Prudent investment.

23. A fair and reasonable return is determined by setting up a rate base founded on the monies prudently invested and allowing a rate of return equal to the cost of those monies to the utility, p. 462.

Return, § 26 — Reasonableness of return — Interest rate.

24. The weighted average of the interest rates actually paid or determined by the Commission on funds from various sources becomes the rate of return on a rate base, p. 462.

RE BRITISH COLUMBIA ELECTRIC RY. CO. LIMITED

Reserves — Use by utility — Interest rate.

25. It is unreasonable that a public utility should be charged interest on the reserves used for expansion at the same rate as it is allowed to make on its investment, p. 462.

Reserves — Use by utility — Interest rate.

26. The rate of return debited a public utility on reserves used for expansion should be lower than the lowest rate at which the utility may secure funds from any other source, p. 462.

Return, § 26 — Reasonableness — Common stock equity.

27. The allowed rate of return on a public utility's common stock equity must be appreciably higher than on a fixed interest-bearing security, p. 463.

Return, § 26 — Reasonableness — Common stockholders.

28. A return of $7\frac{1}{2}$ per cent on the common stock equity was held to be reasonable, in view of the present trend toward cheaper money, p. 463.

Return, § 83 — Combined utilities.

29. A return of 5.3 per cent on an undepreciated rate base and of 5.8 per cent on a depreciated rate base was deemed to be fair and reasonable for related public utility companies furnishing electric, gas, transportation, and water service, p. 463.

Return, § 6 — Method of calculation.

30. A fair return for related utilities furnishing electric, gas, transportation, and water service was calculated by multiplying the undepreciated rate base by its appropriate rate of return and deducting from the product the interest on the depreciation reserve, and by also multiplying the depreciated rate base by the appropriate rate of return and then deeming the mean of these two results as the fair return, p. 464.

Expenses, § 114 — Income taxes — Excess profits taxes.

31. Income taxes proper should be included in operating expenses, whereas excess profits taxes should be excluded, p. 464.

By the COMMISSION: By order dated August 15, 1939, the Commission, on its own motion instructed an inquiry into the operations of the British Columbia Electric Railway Company Limited and its associated and subsidiary companies to determine what rates should be charged to the public in conformity with the provisions of the "Public Utilities Act."

For the purpose of the inquiry the Commission directed that an investigation be made into the properties and operations of the companies. Mr. S. R. Weston, chief engineer to the Commission, was instructed to ascer-

tain by appraisal the value of the properties of the companies used or prudently and reasonably acquired to enable the companies to furnish public utility service in the areas in which they operate and to report his findings to the Commission.

The accounting firm of George A. Touche and Company was instructed to examine the accounts of the companies, and to report to the Commission.

Dr. H. J. MacLeod, head of the department of mechanical and electrical engineering at the University of British Columbia, was retained to

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assist and advise the Commission and its staff in this work.

The report of the chief engineer was submitted to the Commission on August 8, 1941. The report gives a full explanation of the purpose, scope, and method of the appraisal and the general history of the companies' operations, and sets out the information in an orderly and intelligible manner. The property is classified according to the methods recommended by the National Association of Railroad and Utilities Commissioners. As the approach to a determination of value must be related to the purpose for which the valuation is to be used, the report sets out a general scheme of regulation in which the appraisal naturally fits and provides for such modifications and changes as the scheme of regulation may require.

The report of the accounting company was submitted to the Commission in October, 1941. Both reports were made available to the public on November 1, 1941, and the authors were available at all times to assist any interested parties in arriving at a proper understanding of the information set out.

Representatives of the municipalities served by the companies signified their readiness to appear and public hearings were begun on August 24, 1942, and continued, with occasional adjournments, until January 12, 1943.

The first hearings were held in the courthouse at Vancouver, where matters of common interest to all services and areas were discussed. Following this, hearings were held at Vancouver, Victoria, New Westminster, Kamloops, Port Alberni, and Qualicum, where matters of particular interest

to the various areas were dealt with. The final hearings were held in the courthouse, Vancouver, where the summing up and arguments of the various interested parties, representing the consumers; the companies, and of the staff of the Commission, were heard.

There are two distinct stages in any rate investigation. The fairness and reasonableness of rates as indicated by the total revenue received from the services must first be considered. Then the fairness and reasonableness of rate schedules under which the total revenue is collected from the various consumers must be considered. These findings deal with the first stage only.

At the local hearings some evidence on rate structures was heard, but for the time being these matters will be dealt with individually as they arise in order that any obvious discriminations may be removed. Before a full revision of rate schedules is made, a further intensive study by the Commission will be necessary and further hearings will be held.

Procedure

Procedure at the general hearings followed closely that of the courts, but would have been more familiar to the public south of the international boundary where the use of referees by the courts is quite a common practice. In this case the staff of the Commission was in the position of a referee and brought in a report which was reviewed by the Commission after the comment and criticism of the parties interested were heard. The staff of the Commission outlined the general scheme of regulation. The engineer presented the appraisal re-

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port. He was immediately followed by the representatives of the accounting firm who presented a statement of the companies' revenues and expenses. This completed the presentation by the staff, who were then subject to cross-examination by the various parties interested.

Following this, the representatives of the companies presented evidence and discussion and were cross-examined by the representatives of the municipalities and the staff of the Commission. The representatives of the municipalities then followed with their submissions and were subject in turn to cross-examination.

At the local hearings the procedure was considerably less formal. The staff of the Commission outlined the scheme of regulation, with particular reference to the problems of the area concerned. Discussion of phases of particular interest to the area then occurred. This, as indicated above, in some cases included a criticism of rate schedules.

When the general hearings were reconvened, the argument of the various parties was heard in the reverse order in which the evidence and discussions were heard.

APPEARANCES: S. R. Weston and John Parton, for the Investigation; for the British Columbia Electric Railway Company Limited, Associated and Subsidiary Companies, E. H. Adams and W. G. Murrin; D. E. McTaggart, K. C. and E. N. R. Elliott, for the city of Vancouver; F. L. Shaw and E. S. Farr, for the city of Victoria and the municipality of Saanich; R. F. Blandy and F. L. Shaw, for the municipality of Oak Bay and the

Union of B. C. municipalities; R. F. Blandy, for the city of Kamloops; H. N. Lidster and R. E. Potter, for the city of New Westminster; G. Robson and J. E. Sears, for the municipality of West Vancouver; C. C. Bell, for the municipality of Burnaby; J. G. Farmer, for the municipality of Surrey; A. S. Duncan and H. J. Sullivan, K. C., for the Fraser Valley Reeves' Association; G. Campbell and F. L. Shaw, for the city of Port Alberni; A. C. McCullough and F. L. Shaw, for the city of Alberni; E. D. Thwaites, for the Qualicum Beach Board of Trade.

The case now before this Commission has no near parallel in the history of public utility regulation. The number of separate corporations involved, the number and diversity of the services rendered, and the number and extent of the communities covered, make the case quite unique. Since the first of these utility services was inaugurated in 1860, fifty-five incorporated companies have had a part. Of these, some twenty-nine are still in existence, and seventeen of them have been the subject of this inquiry. Five distinct services are being given in thirty municipalities, and twelve other communities. Three municipally owned utilities have been absorbed. These companies, services, and communities are inextricably interlocked. Their transformation into units, as required by the act, has been a major task. There has been no precedent for this work in the annals of regulatory bodies on the Continent. There is no broad road for the Commission to follow. Each step in the intricate analysis of the involved in-

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formation available had to be pioneered.

The only guide has been the general principles of regulation on which "of making many books there is no end." Regulation, like law, is not an exact science. Its principles have been, and are being, evolved from a long history of decisions by courts and Commissions. These decisions, in their turn, are influenced by the gradual but constant change in economic, political, and social conditions.

During the progress of this case a major change in concept of regulation is in the process of making. The recent decision in the Natural Gas Pipeline Case by the Supreme Court of the United States (1942) 315 US 575, 86 L ed 1037, 42 PUR(NS) 129, 62 S Ct 736, upsets, at least in part, the doctrine set up by the famous Smyth v. Ames Case (1898) 169 US 466, 42 L ed 819, 18 S Ct 418, one of the most frequently cited cases in American Utility law.

The decisions by American Commissions have an educational value, but being bound by legislative restrictions, which do not apply in this country, they must not be too closely followed. Canadian cases are few in number, and limited in scope.

The effect of the changed attitude of the United States Supreme Court on the practice of American Commissions has not yet fully developed. The case before the Commission presents features which have not appeared in any cases on record. Accordingly, the Commission has not slavishly adhered to the precepts found in the textbooks, or been bound by the decisions of those who have gone before, but has endeavored without deviating from

the authority granted by the act to implement the intention of the legislature and through the exercise of sound judgment and common sense to arrive, by its own paths, at a decision that will be fair and equitable to all parties. It may be that some trails have been blazed that will be broadened by others into more direct and smoother roads to that common goal.

In particular, the Commission, in line with or perhaps in advance of the more progressive regulatory bodies, has endeavored to make regulation a continuing process. Regulation by the courts was found to be inadequate, and is illogical because the primary function of a court is to remedy past wrongs. Commissions were brought into being to prescribe standards for the future. In this respect the general practice has gone only part way. The adequacy of future rates is determined on records of past performances. Rate changes are necessarily periodic and the rates set in these periodic revisions do not coincide with changes in cost of service.

It is intended in the scheme adopted to provide for simple annual adjustments of the rate base and rate of return, for annual review and continuous supervision of operating expenses, and for adjustment of rates to cost of service without too frequent rate revisions. This, it is confidently believed, will result in stability in the industry, in reduced costs of operation and financing, and in a reduction in the cost of service to the consumer.

Division into "Units"

The British Columbia Electric Rail-

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way Company Limited and its associated and subsidiary companies, hereinafter referred to as the companies, operating under the "Public Utilities Act," supply electric light and power, gas, transportation, and water in the southwest portion of the Province. Under the provisions of the act, the Commission is required to consider each class or category of service as a self-contained unit, and may take into account distinct areas served. Under these directions the Commission, in determining the cost of providing service, divided the operation of the companies into the following services and areas, each of which was considered as a separate unit:

Electric Service—Lower Mainland

Electric light and power service on the lower mainland, including islands in the Fraser river, from the coast to the easterly boundaries of Kent and Chilliwack municipalities, excluding the village of Harrison Hot Springs and including the mines and village at Britannia beach, the settlement of Shalalth and the valley of Bridge river and Cadwallader creek from a point north of Shalalth to the Pacific Eastern Mine.

Electric Service—Vancouver Island South

Electric light and power on Vancouver island south from Jordan river to the northerly boundary of Shawnigan Land District.

Electric Service—Alberni

Electric light and power in the cities of Alberni and Port Alberni.

Electric Service—Kamloops

Electric light and power in the city

of Kamloops, and along the North Thompson river.

Electric Service—Newcastle, Nanoose

Electric light and power along the east coast of Vancouver island from Craig's crossing to Dashwood.

Electric Service—Comox, Nelson

Electric light and power in the village of Royston and vicinity.

Gas Service—Lower Mainland

Gas service in the cities of Vancouver, New Westminster, the city and district of North Vancouver, and the University district at Point Grey.

Gas Service—Vancouver Island South

Gas service in the city of Victoria, the municipality of Oak Bay and parts of the municipalities of Esquimalt and Saanich.

Urban Transportation—Lower Mainland

Transportation by street railway and bus in the cities of Vancouver, North Vancouver, New Westminster, the municipality of Burnaby, the district of North Vancouver, and the University district at Point Grey.

Urban Transportation—Vancouver Island South

Transportation by street railway and bus in the city of Victoria, and the municipalities of Oak Bay, Esquimalt, and Saanich.

Interurban Transportation—Lower Mainland

Interurban transportation from Vancouver through Burnaby and New Westminster to Chilliwack, and from Vancouver to Steveston.

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Water Service—Comox, Nelson

Waterworks service in Cumberland and vicinity.

Only one objection was made to this division. The representatives of the municipalities objected to the inclusion of the Bridge River Electric System in the Lower Mainland area. This will be dealt with in the findings on that unit.

The services listed above will hereinafter be referred to separately or collectively as units.

[1] Some fourteen active companies are involved in giving service. In one case, five different companies own property used in one unit. On the other hand, one company operates eight different units. Consequently, in determining the value of the property used and the cost of operation of the separate units, the identity of the companies involved must be disregarded.

The financing of the various units has been done jointly, to the benefit of the smaller, less profitable ones. It is impossible to segregate the securities used to obtain funds for the various units, and the cost of money used in acquiring the separate units cannot be determined. The companies have had a common depreciation reserve applicable to all units. Consequently the rate of return should be made uniform for all units, and calculated on the cost of money to the organization as a whole.

The depreciation reserve for each unit can be dealt with by allotting it on the basis of cost of property used, modified by an estimate of the useful life of the structures involved.

Cost accounts and property records were kept by the individual companies,

and from checks made by the Commission's accountants, were found to be honest and accurate reflections of the funds invested. From these records and other information available, the engineers built up a priced inventory of property which had to be segregated by the Commission's staff to the various units. No objections were lodged against the methods employed in this segregation. Objections to the inclusion or exclusion of various items will be discussed later.

[2-4] The direct costs of acquisition or of material and labor had been well recorded and could be determined with little difficulty. The indirect costs of engineering, superintendence, overhead, interest during construction, etc., require special treatment. These indirect costs were charged by the companies, in some instances to operation, in others to capital account, on various arbitrary formulae which cannot be accepted.

The representatives of the municipalities argued that any of these costs which had been charged by the companies to operation cannot be transferred to capital account, and cite the directions contained in the Standard System of Accounts adopted by the Federal Power Commission or recommended by the National Association of Railroad and Utilities Commissioners, to support their contention. These systems of accounts are of quite recent origin, and it is not to be expected that the accounts of these companies, dating in one instance from 1860, would conform to present practice.

Indirect Costs

Capital expenditures ordinarily include indirect as well as direct costs.

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Thus the costs of financing and the costs of interest during construction, both indirect costs, are always treated as necessary capital expenditures on a plant, because it costs money to haul funds into the treasury just as truly as it costs money to haul a generator from the factory to the generating plant.

The representatives of the municipalities argued, however, that though these are usually treated as capital expenditures, still, in this case, they should be disallowed for the reason that they had been treated by the company as operating costs and therefore had been paid by the consumers. The fact that in the accounts of the companies these items were entered as operating costs does not alter their character as capital expenditures. Under proper treatment these items would have been charged to capital account and the funds would have been available to the shareholders for their own use.

The "Public Utilities Act" is not retroactive, but imposes upon the Commission a definite duty to perform, and that duty is to allow a fair return on the appraised value of the company's property as it is today. In appraising the property, the Commission is bound to allow all indirect as well as direct capital expenditures regardless of whether the company entered these in its accounts as such or not.

Even if it is considered that these monies had been repaid by the consumers, the situation is not altered. Let us suppose a case where the utility in the past has charged such high rates to the consumers that it has already, before regulation, recovered

the full amount of its total capital expenditure, direct as well as indirect, in addition to its proper dividends, then following the above reasoning of the representatives of the municipalities the property of the utility would have no value at all because it had already been repaid. This would be entirely contrary to the instructions of the act.

The manner in which such items have been dealt with in the past in the companies' accounts is not important. Some items of expenditure clearly belong in one category or the other—capital costs or operating costs—others not so clearly. These latter items must be classified by the Commission on their merits not on how they have been treated by the company. The staff of the Commission, by a careful analysis of five years of the companies' operation, has determined that the ratio of indirect to direct costs for that period is 8.8 per cent. The charges made by the companies as indirect costs have been carefully eliminated and the percentage determined by the staff has been added to direct costs. This percentage is lower than those recognized by authorities who have dealt with this question, and has been adopted in the appraisal.

[5] The operating accounts of the utilities have been kept on a company basis. The Commission's accountants have analyzed these accounts and segregated them on the basis of units using the same division of services and areas as was used by the engineers. No objection was made to this scheme.

A number of adjustments were necessary in allotting the company ex-

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penditures and revenues to the units, and in these allotments the judgment of the accountants is sound. The inclusion or exclusion of items objected to by the representatives of the municipalities or the company will be discussed later.

The above method of dealing with the property and operations of units, eliminates any question of the corporate relationship of the companies. The capital setup of the various companies or of the holding organization has no bearing of any kind on the result. Ownership of stock of one company by another of the group or by the holding company, intercompany loans, interest bearing or otherwise, overcapitalization of any of the group or of the holding company or any possible adverse effect of interlocking directorates cannot in any way affect the capital or operating costs determined by the staff of the Commission. These intercorporate relationships have been fully investigated and reported on by the staff of the Commission. They may affect the distribution of returns to investors. They have no part in determining the cost of providing service to the consumer. They can be dismissed from further consideration.

Cost of Service

The cost of service includes operating expenses and (§ 15) the fair and reasonable return, etc. Operating expenses include wages, cost of consumable supplies, taxes, legal and engineering costs (if not included in wages), fees, rentals, and provision for depreciation. These operating expenses have been and will be carefully scrutinized by the staff of the Com-

mission, and any items which should not be included eliminated. Fair and reasonable return is calculated on a "rate base," which includes the appraised value of the property and the amount of money necessary to carry on the business of the utility, namely, the working capital.

Appraised Value

Value, as mentioned in §§ 15 and 44, and defined in § 2 of the act, was the subject of a large part of the submissions at the hearings before the Commission. The representatives of the municipalities dealt at great length with the practices of United States Commissions. The practice of these Commissions has been strongly influenced, if not dictated, by the decisions of the courts that every factor affecting value, i.e., original cost, reproduction cost, going concern value, etc., must be taken into account. The Supreme Court decision in the Natural Gas Pipeline Case, brought down in 1942, 315 US 575, 86 L ed 1037, 42 PUR(NS) 129, 62 S Ct 736, gives the Commissions much greater freedom of action. When the effects of this decision have had time to develop, the practices of the United States Commissions may be of value as a guide. Until that time, and under the different conditions prevailing in this Province, they are not very helpful.

[6] The representatives of the municipalities have cited British and Canadian cases to show that exchange value or the price of property in an open market is the only concept. The cases cited deal with transfers of property or with taxation, and have no application to the process of regulation. Exchange value is based on the earn-

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ing capacity of the property but in the case of a regulated public utility the earning capacity is fixed by the decision of a regulatory body. Therefore exchange value cannot be used for the purposes of regulation.

Mr. Justice Brandeis, in the Southwestern Bell Telephone Case herein-after referred to, has stated: "Value is a word of many meanings. That with which Commissions and courts in these proceedings are concerned, in so-called confiscation cases, is a special value for rate-making purposes, not exchange value."

The term "value," is one of the most elusive and variable in the English language. It has no general definition that will apply without qualification in all uses of the word. The concept of value advocated by the representatives of the municipalities will not serve the purpose of regulation.

Value

[7] The legislature of British Columbia is free to make its own definition of the meaning of the word "value" and it has said in § 2 of the act, being the interpretation section, that the word value when used throughout the act shall mean "value as determined by the Commission." This means, if it means anything, that the Commission shall decide what elements constitute value under the act. Then, in order to guide the Commission in this work of determining what the essential elements of value shall be, the legislature in § 44 directs the Commission to consider "every fact which in the judgment of the Commission has any bearing on this value and particularly to consider the

amount of money actually and reasonably expended in the undertaking in order to furnish service reasonably adequate to the requirements of the community served by the company, as the community exists at the time of the appraisal."

It will be seen from this that the legislature emphasizes the "actual and reasonable expenditure in the undertaking," or in other words, historic cost and prudent investment as the dominant elements of value, while leaving the importance or bearing of any other facts on that value, entirely to the judgment of the Commission.

Under the powers thus given, the Commission, after having given full consideration to other measures of value such as reproduction cost and exchange value has come to the conclusion that historic cost, that is to say, cost to the present utility when prudently invested, less depreciation, is the fairest measure of value which can be used in this appraisal.

This measure of value was the one urged by Mr. Justice Brandeis in the celebrated Southwestern Bell Telephone Case (Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission) 262 US 276, 67 L. ed 981, PUR1923C 193, 43 S Ct 544, 31 ALR 807, quoted with approval by Jones & Bigham "Principles of Public Utilities" 1939 Edition at page 240, and submitted in evidence by the representatives of the municipalities.

Mr. Justice Brandeis said in part, PUR 1923C at p. 214: "The adoption of the amount prudently invested as the rate base and the amount of the capital charge (referring to the cost of money) as the measure of the rate

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of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as matter of opinion. It would not fluctuate with the market price of labor, or materials or money. It would not change with hard times or shifting populations. It would not be distorted by the fickle and varying judgments of appraisers, Commissions, or courts. It would, when once made in respect to any utility, be fixed, for all time, subject only to increases to represent additions to plant, after allowance for the depreciation included in the annual operating charges. The wild uncertainties of the present method of fixing the rate base under the so-called rule of *Smyth v. Ames* (*supra*) would be avoided; and likewise the fluctuations which introduce into the enterprise unnecessary elements of speculation, create useless expense, and impose upon the public a heavy, unnecessary burden."

[8] The users cannot in reason expect service below cost, and under public or private ownership, cost must include a fair return on the monies provided and prudently used in giving service. Under public ownership, part of the cost may be secured by taxation. Under private ownership the entire cost must be paid by the consumers. In either case those who supply the funds are entitled to a return on the monies they have advanced and to a reasonable assurance that their investment will be preserved in-

tact so long as proper service is provided and there is a reasonable assurance that it will continue. If this is not forthcoming the flow of funds necessary for the continued operation and expansion of the utility will cease and service to the consumers will become inadequate.

So long as the plant is kept in operation and funds are kept available for replacing perishable parts of the property, the investors cannot withdraw their funds and the investment is not reduced. A public utility property under regulation can only produce to its owner the return allowed by the regulatory body. It is entitled to earn a return on the monies prudently invested. It follows that a practical measure of value of a utility plant for regulatory purposes is the amount of money provided and prudently used by the investors in giving the service.

[9] Professor Farr, a witness for the municipalities, in his approach to value discussed at length the outstanding securities of the companies. Valuation of a plant on the basis of the outstanding securities is equivalent to the valuation of the property on the basis of the mortgage it carries. Such a method would severely penalize a conservative corporation which had reduced or foregone dividends in the past and invested its earnings in the property. How the monies prudently used were secured by the investors, by the sale of stock or bonds, returned dividends or otherwise, does not affect value. Nor has the price paid for the securities of the companies any bearing on the value of the plant used in giving service. The extensive calculations made by Professor Farr are not pertinent.

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Oak Bay Case

The representatives of the municipalities cited the decision of this Commission in the Victoria—Oak Bay Case as a precedent which should be followed. This case and the one now before us have little or nothing in common. The service value of the property in that case had not been maintained. No depreciation reserve was maintained. The funds supplied by the consumers had been used to reduce the city's indebtedness. Neither the service value of the system nor the investment by the utility had been maintained.

The concept of value—prudent investment—adopted by the Commission is the same in both cases. The method of arriving at that value in two such dissimilar cases is naturally different.

Reproduction Cost

[10] The counsel for the companies cited United States cases tending to show that reproduction cost new should be considered as a factor in estimating value. These citations are subject to the same criticism as those of the municipalities mentioned earlier. It may well be that the practices of the United States Commissions will be materially changed by the decision in the Natural Gas Pipeline Case, *supra*. To be influenced by past practices which are now likely to be abandoned would be a grave mistake.

Reproduction cost has not been generally accepted by authorities in the United States. Mr. Justice Brandeis with the concurrence of Mr. Justice Holmes in the Southwestern Bell Telephone Case, *supra*, before the

United States Supreme Court, PUR 1923C at p. 200, sets out a lengthy and able argument against its use and deals particularly with the contention made by the companies in this case that consideration of reproduction cost is necessary for the reasonable protection of the investor.

This eminent jurist assumes and with reason, that if the current prices of labor and material are to be applied to the plant of a company the current cost of money should be used as the rate of return. He gives an illustration which may be summarized as follows:

A company at times of high costs of construction and financing raised for additions to plant \$1,000,000 on a 9 per cent basis and found a decade later that the value of the plant (disregarding depreciation) was only \$600,000 and the fair return on money 6 per cent. On a reproduction cost basis the company would be entitled to a return of \$36,000 per year whereas \$90,000 would be required for capital costs. In such a case the shareholders would have to find \$54,000 a year from some outside source or lose the property to the bondholders. On the other hand a company built a plant at times of low cost for \$1,000,000 raising capital to the extent of \$750,000 by an issue of 30-year bonds at 5 per cent and to the extent of \$250,000 by an issue of stock at par. In time the price level went up 75 per cent and interest rates rose to 8 per cent. The reproduction cost of the plant became \$1,750,000. On a reproduction cost basis a fair return would amount to \$140,000 per year. Of this the bondholders would receive \$37,500 and the shareholders \$102,500, a return of 41

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per cent per annum on their investment of \$250,000. It will thus be seen that the investor is not protected under this measure of value during a deflationary period while being over-protected when prices are inflationary, an undesirable result in either case.

The companies' claim for the consideration of reproduction cost as a protection to the investors is dismissed.

The companies' claim to an increment of value because of the rise in price of material and labor cannot apply in a valuation for regulatory purposes. It may well be considered in a valuation for sale or expropriation particularly in the case of a plant which had passed through a single change in price level. Even for sale or exchange the claim becomes unnecessary when a plant, as in this case, has passed through a number of cycles of price change which have been in a large measure compensatory.

And in the case of sale or exchange, replacement cost or the cost of a modern substitute plant which would give the same service is a better criterion.

There is no legal obstacle to prevent the Province or any local governing body from constructing its own plant to provide the service. The value in an open market cannot exceed this replacement cost. Estimates of such cost will vary widely and may have little relation to reproduction cost.

The purpose for which a valuation is to be used must always be borne in mind. For the purpose of regulation, reproduction cost as a measure of value is unsound and quite impractical in that its use would result in a

constantly changing rate base and costs to the consumer. The rates to the consumer lag behind the changes in cost with the result that if the changes are too frequent the rates are never in line with actual cost.

Development Costs

[11] The companies argued that going concern value represented by development cost should be included in the appraised value of the property. The main item of development cost cited was loss due to the lag in use of new plant facilities. The companies submitted a table of hypothetical losses due to lag, but gave no direct evidence that such losses were shown in the companies' accounts, and were not recouped in subsequent years. Under regulation the entire cost of new plant is included in the rate base at the time the plant goes into production, and the costs of carrying such plant are permitted in operating expenses from that date.

In *Federal Power Commission v. Natural Gas Pipeline Co.*, decided by the Supreme Court of the United States in 1942, *supra*, 42 PUR(NS) at p. 131, a similar claim for development costs or going concern value was made by the appellant company because of the costs of nonproductive plant capacity, i.e., lag costs. Chief Justice Stone who delivered the judgment of the court had this to say about it (page 139):

"None of these items appear in the companies' capital account. With the possible exception of expenditures for securing new business, they are synthetic figures arrived at by estimating the amount of expense attributable to the current cost of main-

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tenance of the excess capacity of the plant during periods when the excess capacity was not used. But the interest charges, taxes, and other costs of maintaining this excess capacity during the period when not in use have not been capitalized by the companies on their books and so far as appears were paid from current earnings. The same is true of the expenditure for advertising and other expenses of acquiring new business."

And again at page 141:

"Whether there is going concern value in any case depends upon the financial history of the business.

This is peculiarly true of a business which derives its estimates of going concern value from a financial history preceding regulation. That history here discloses no basis for going concern value, both because the elements relied upon for that purpose could rightly be rejected as capital investment in the case of a regulated company, and because in the present case it does not appear that the items, which have never been treated as capital investment have not been recouped during the unregulated period."

In the case before this Commission the companies, prior to regulation treated investment in plant as capital on which a profit was to be earned and charged the carrying costs of such plant to operating expenses. As in the case quoted above and for the same reason, the accounts of the companies disclose no basis for the inclusion of development costs. These costs have no place in the determination of value. The fact that a plant has been operated for some time at a deficit does not increase its value for

any purpose. The companies' claim for \$8,000,000 development costs is rejected.

Utility Plant Acquisition Adjustment

[12, 13] The term "Utility Plant Acquisition Adjustment" appears in a number of places in the schedules attached. This term is used in the system of accounts recommended by the NARUC to denote the difference between the price paid in the acquisition of utility plant and the cost of that plant to the original owner.

The representatives of the municipalities, other than Kamloops, argued that original cost to the Utility first putting the plant to public service should be used as the basis of value. Adherence to this idea would in some cases, preclude the amalgamation of competing properties or the transfer of plant from a utility to one which, through its larger operations and sounder financial standing could effect decided saving in operating costs and cost of expansion.

Section 15 of the act states that so long as the rates are not "excessive as being more than a fair and reasonable charge for services of the nature and quality furnished," the Commission must give the 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." It is only reasonable to assume that the capacity and design of plants acquired in operating condition were dictated by the best engineering and financial knowledge of the day. The words "prudent" and "reasonable" must apply to the price paid. Unless there is

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evidence to show that the price was determined by some consideration not consistent with public interest, it must be accepted as prudent. Section 44 directs the attention of the Commission to the "amount of money actually and reasonably expended in that undertaking." "Undertaking" can only refer to the undertaking of the utility to "furnish service etc.," and the "amount-expended" must mean the amount expended by the utility under review.

Amalgamation of competing properties may eliminate duplicate distribution lines, increase load factor, and reduce relative operating and overhead costs. When this is so, there is a definite reduction in cost of service and under regulation these savings go to the consuming public, and if the suggestion of the municipalities is adopted, the investors would receive no return on funds which made these savings possible. These funds may well be as much a part of the prudent investment as money spent on construction. In those cases, where utility plant acquisition adjustments represent prudent investments which were necessary or advisable from the standpoint of public interest, they should be included in the rate base.

Inactive Utility Property

[14] The staff of the Commission in its report on property by services has included certain items classified as "Inactive Utility Property." Where such items had been in use and are now inactive but may again come into use in the near future, they are properly included in the rate base. Where such items had not been used,

but had been prudently acquired, they should, in general, be excluded from the rate base until brought into use, and interest on the value should be allowed in operating expenses in the interval. Inactive property which was not prudently acquired and which is not likely to come into use has been excluded from the rate base. As the results to the utilities and the consumers are practically the same, and inclusion in the rate base is simpler for accounting purposes, some small items, which properly belong in the second class have been included in the rate base to avoid setting up special accounts.

The details of the items which make up the totals of inactive property shown in the report have been carefully considered, and each item will be dealt with on its merits in the determination of value of the separate units. All inactive items will be reviewed annually by the staff of the Commission and reclassified as their status changes. Plant, which ceases to be useful actually and potentially, will be written off to depreciation reserve, or amortized.

Interest during Construction

[15, 16] When construction of plant extends over an appreciable period, some portion of the monies involved is expended some time before the plant becomes revenue producing, and interest on these monies is a definite part of the cost of construction. The usual method in determining cost is to add interest during the active construction period to the actual amounts expended and to include the cost so determined in the rate base at the time the production

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commences. The companies in this case have not adopted a uniform practice in charging interest during construction, and as stated earlier these charges have been eliminated and interest has been calculated by the staff of the Commission on the basis of the amounts actually expended, and the duration of construction.

If construction is reasonably continuous this interest is a legitimate portion of the value of plant, and should be included in the rate base. If, for economic reasons, construction prudently begun is suspended, a different treatment is indicated. If suspension continues for a considerable time, the interest may bear an undue proportion to the monies actually expended, and if added to the cost would distort the value of the plant. In such cases, the interest during the period of suspension should be charged to the operating expenses of the utility. This is what has been done by the companies with suspended construction on the bridge river development since 1933. This treatment should be continued.

Cost of Financing

[17] The costs of financing included by the staff of the Commission comprise only underwriters' compensation or investment dealers' brokerage, and issuing companies' out-of-pocket expenses arising out of new security issues applied to the construction of property. Discount (or premium) to the investor, and costs as above, of refunding issues or of securing funds used in the purchase of property constructed by others, have been eliminated.

The costs included constitute the

outlay necessary at the time of the issue of securities to obtain from the public the funds required for the construction of property.

The cost of financing included by the staff is an essential part of the historic cost, and is clearly a part of prudent investment.

Undepreciated Value

The undepreciated value for regulatory purposes made on the basis of historic cost or prudent investment of the property in each unit is set out in the findings of the individual units and in Schedule A attached. [Schedule A omitted here.]

The total for all the properties of the associated companies is \$109,663,815.

Donations, etc.

[18-20] Donations, customers' deposits, monies on hand for payment of taxes, etc., require special treatment. These funds are used by the utility in construction or replacement of plant or as working capital. They do not represent a decrease in property value or in the amount of working capital as defined in this judgment. But as the shareholders do not provide these funds they are not entitled to a return on them. One method of treatment is to deduct such funds from the rate base but in this case this is impractical. These funds, with the exception of customers' deposits, are not related to the units of service, and cannot be segregated except on some purely arbitrary basis.

The method used is to treat these funds as noninterest-bearing monies and no return is allowed on them in the calculation of the rate of return. The ultimate result to the consumers

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is the same. Though the funds in question are not deducted from the rate base, they have a compensating effect in reducing the rate of return on that rate base.

Depreciation

[21] The effect of depreciation on value has long been and still is the subject of controversy. All physical property is subject to depreciation. Parts of the plant wear out and must be replaced in whole or in part. Provision for such replacement is recognized as part of the cost of service which must be supplied by the customers as part of the rates paid. If funds for this purpose were provided as needed, and immediately used, the property of the utility and its investment would be maintained intact, and no depreciation problem would be involved. But in order that the burden of this requirement may be distributed equitably over the consumers of different periods, the funds are collected in approximately equal annual instalments and are held by the utility until needed.

The annual allowance for depreciation is related as closely as possible to the gradual loss in plant value. The funds cannot be used as provided to make good that loss and must be held until gradual deterioration accumulates to the point where retirement or replacement is necessary. Funds must always be on hand in anticipation of this. The accumulation of these funds constitutes the depreciation reserve.

Depreciation arises from two general causes: (1) wear and tear on physical plant, usually referred to as physical depreciation, and; (2) obsolescence and inadequacy, usually referred to as functional depreciation.

It is difficult, if not impossible to estimate depreciation in terms of money. Physical depreciation is at best a matter of engineering opinion, and estimates may vary widely. These estimates are generally based on the useful life of various units of plant as determined by experience with similar units, but this is an uncertain guide. Some units of plant actually improve with age and use. A rebuilt generator or turbine may have a higher efficiency than when new.

Functional depreciation so-called is even more difficult to determine. Obsolescence and inadequacy are often sudden in their incidence. They may be caused by a development of science, a trend of human habit or fancy, a change in government policy, a catastrophe or other unforeseeable circumstance. These incidents may occur tomorrow or in a hundred years. Until they do occur, they cause no loss of either exchange or service value.

The amount of the depreciation reserve cannot be taken as a measure of decrease in plant value. In the first place this amount, prior to regulation, depends on the policy of the utility, and it may or may not bear a proper relation to true depreciation. Even if the amount of the reserve is considered reasonable and proper, its relation to value depends on the purpose for which the valuation is made.

In a valuation for regulation, service to the customers and the monies invested are the important factors. If the plant is properly maintained the amount of the depreciation reserve has no effect on the quality of the service. The reserve must be held and used for replacement and cannot be used in the reduction of capital invested.

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In a valuation for sale or exchange, only a part of the reserve represents a loss in plant value. If, as assumed, the reserve is reasonable and proper, it must contain provision for both physical and functional depreciation, and the part of the functional element of the reserve which is set up against the unforeseeable causes outlined above does not represent a loss in property value. It is instead, of the nature of an insurance premium which accumulates in the hands of the utility. If, as in the case of fire insurance, this premium had been paid to an insurance company, it would clearly be part of the cost of providing service, and the deduction of the amount of the premiums so paid from the value of the plant would be absurd. In a valuation for sale or exchange, the physical element of the reserve and only part of the functional element should be deducted. This would involve the segregation of the reserve into its constituent parts. In a utility of long standing and varied interests, such a segregation could only be made by the exercise of judgment based on experience in operation. There is no evidence before the Commission in this case that would be helpful for such a purpose.

Fortunately, as the valuation in this case is being made for regulatory purpose rather than for sale, this segregation can be avoided.

In a scientifically pure valuation for regulatory purpose, made on the basis recommended by the representatives of the municipalities, i.e., by deducting depreciation from the determined undepreciated value, the physical element of the reserve should be treated as a decrease in plant value. That part of

the functional element which represents no property loss should be considered as a provision of funds by the customers in advance of requirement, and should be treated along with other such funds as set out in the paragraph on Rate of Return following.

The only purpose served by this treatment would be adherence to academic accuracy of method. The same practical results in rate determination can be achieved by deducting the total reserve from the determined undepreciated value and by disregarding the reserve in the calculation of the rate of return. In this way the expense and uncertainty of the segregation of the reserve can be eliminated.

The chief engineer of the Commission, after a careful study, has reported that in his opinion the depreciation reserve set up by the companies is reasonable and sufficient, and the Commission so finds. The allotment of the total reserve to individual units has been carefully worked out.

The value for regulatory purposes based on historic cost less depreciation reserve is set up for each unit in the individual findings and in Schedule A. The total undepreciated historic cost less the total depreciation reserve is \$77,045,071. It should be clearly understood that neither this amount, nor the amount previously stated as undepreciated historic cost is fixed as the value of the property for any other purpose than that of regulation under the "Public Utilities Act."

Working Capital

[22] The representatives of the municipalities argued that the utility should not be allowed a return on working capital unless it appeared in

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the utilities' balance sheet—that the definition of working capital should be that adopted for accounting purposes, namely the difference between current liquid assets and current liabilities.

The staff of the Commission submitted that working capital for regulatory purpose should be the funds necessary for the carrying on of the business efficiently, and that it has no necessary relation to the accounting concept. The companies agreed with the submission of the staff:

The Commission accepts the definition of the staff. Funds for carrying on the business must be provided. These funds are practically constant in amount and depend on the nature of the business, not on its temporary financial standing. The utility may, at times, have funds on hand from customers' deposits, unpaid taxes, or other sources, or may, at other times, be operating on bank credits, but this does not affect the fixed amount necessary for the conduct of the business. The amount of these latter funds will be subject to frequent change. Under the scheme of continuous regulation proposed, the rate of return will be subject to frequent adjustments. The working capital, once set, will be fixed until some major alteration in the utilities' operations necessitates a change. Accordingly, the funds mentioned above, namely customers' deposits, unpaid taxes, etc., will be taken care of in calculating the rate of return and will not confuse the issue of working capital.

The amount of working capital cannot be accurately calculated. The Commission's accountants recommended the amount of \$3,500,000, which is appreciably below the per-

centage which working capital bears to operating costs as generally allowed by various Commissions in the United States. At the hearings, the evidence of the companies was insufficient to support a claim for \$250,000 for prepayment of property taxes, and this amount was deducted. The Commission considered that the allowance suggested for "buffer cash" was excessive, and the amount of this item was reduced from \$750,000 to \$250,000. The balance \$2,750,000 was increased to make allowance for the increases in business between 1939 and 1941 by \$122,000, bringing the amount to be included in the rate base as working capital to \$2,872,000.

In this case the working capital set out above must be allocated to the various units. Working capital requirements for the various services furnished by the companies differ. In transportation service the revenues come in daily—in electricity and gas the revenues do not come in until some time in the month following. This and all other such factors have been carefully considered in the allocation made by the staff. The amounts so allocated are set out in the findings on individual units.

Interest Credit Plan

The staff of the Commission recommended that the value for regulatory purposes to be included in the rate base be undepreciated historic cost and that depreciation be provided for in a manner which would produce results in close accord with a rate base founded on historic cost, less the accumulated depreciation reserve. In the recommended scheme the return on the undepreciated value of the property is

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made up only in part by the consumers, the balance being provided by interest on the depreciation reserve. The gross revenue required is determined by adding a return on the undepreciated rate base to the operating expenses. From this amount interest on the depreciated reserve is deducted to determine the net revenue to be provided by the consumers. The argument in favor of the scheme may be summarized as follows:

The object of regulation is to insure that service be provided at cost. The provision of service requires labor and capital, and both of these are entitled to their wages, the wages of capital being a fair return on the monies provided for the purpose. In a service inaugurated under regulation, a property appraisal would not be necessary. The monies used could be checked as provided and as plant is constructed. The purpose of an appraisal is to determine what monies have been provided before regulation began, and this appraisal logically should be made on a prudent investment basis.

In addition to a fair return on the monies advanced, those who provided the capital must be assured that that capital is not dissipated, and for this purpose depreciation must be provided by the users of the service. The purpose of this provision is not to reduce or increase, but to keep intact, the capital provided. The prudent investment is not changed, and the proper return to the investors—wages or rental on the capital—is unchanged. If depreciation could be provided for just as it occurred, there would be no problem, but this is a practical impossibility. Funds must be available as elements

of plant are retired, and must be provided in advance, hence the depreciation reserve.

If the depreciation reserve were held by the consumers, any interest accruing thereon could be used as part of the payment to the utility. For their protection, control of the reserve remains with the investors. This is reasonable when the customers get the benefit of the interest. This is the essential feature of the plan. The fair return is calculated on the undepreciated prudent investment and interest on the depreciation reserve is calculated and deducted to find the amount of revenue to be made up by the customers. Under this system an accurate determination of depreciation is unnecessary. If the annual contribution is too high, the reserve increases, and the interest thereon increases and reduces the payment by the consumers. If the contribution is too low, the reverse process applies.

The plan provides for a simple determination of the rate base which can be quickly brought up-to-date by including additions to plant and betterments and by subtracting retirements.

The representatives of the municipalities argued that the scheme is contrary to all established regulatory practice, that no precedent for its use can be found. They claimed that the scheme was complicated and hard to follow and that, if, as stated, the results were the same, the generally recognized practice intelligible to the public should be adhered to. They advocated that the depreciation reserve be deducted from original cost to determine the property value constituent of the rate base, thereby assuming what they admitted may be far from

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true that the depreciation reserve is a correct expression of the amount of the depreciation.

The interest credit plan has much to recommend it. It is the purest and most accurate approach to cost of providing service yet presented, and if the recent changed attitude of the United States Supreme Court has the expected result of removing the restrictions that have hampered the Commissions south of the line, the plan advocated by the staff of this Commission may well become standard practice. On the other hand, the objections of the interested parties are well taken. At a time when regulatory practices may be undergoing pronounced change and social and economic conditions are disturbed by a world war, it may be inadvisable in a Province where systematic regulation of utilities is in its infancy to depart too radically from accepted standards. Fortunately, when all angles are considered, the effect of the two plans is the same in the aggregate.

There is some slight difference in results in individual units, depending upon the ratio of the depreciation reserve to the prudent investment. This difference becomes more marked as the amount of reserve approaches the amount of the prudent investment, but in this case, the fair return element is a small part of the cost of providing service. In no case is the difference in the two methods sufficient to have any practical effect on the rates to be charged.

The duty imposed on the Commission by the act is to protect the public from rates that are excessive as

being more than a fair and reasonable charge for service, and to give the public utility a fair and reasonable return.

Chief Justice Stone, in delivering the judgment of the United States Supreme Court in *Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 US 575, 86 L ed 1037, 42 PUR(NS) 129, 138, 62 S Ct 736, makes the following statement:

"The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

This Commission is free from the restriction imposed by the Constitution on similar bodies in the United States, and is clearly not bound "to the service of any single formula or combination of formulas." The plans proposed by the staff of the Commission, and by the representatives of the municipalities, produce results in close accord. The difference is generally less than the tolerance allowed in rounding out figures. Either method will fully answer the requirements. Accordingly, the Commission does not

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at the present time commit itself to either formula. The difference is negligible and where it is perceptible the mean is adopted for mathematical accuracy.

Rate Base

The term "rate base" is in general use and may be defined as the amount on which the fair return, to the utilities is calculated. Its main constituents are appraised value of property and working capital. From the sum of these is deducted any items included on which a fair return is not to be allowed. The rate base may be "depreciated" or "undepreciated." In a depreciated rate base depreciation or some equivalent thereof is deducted from the undepreciated appraised value. The depreciated rate base multiplied by the allowed rate of return gives the net fair return to the utility. In an undepreciated rate base the undepreciated appraised value is used. The undepreciated rate base multiplied by the allowed rate of return gives the gross return from which a deduction to provide for depreciation is made to determine the net fair return. The depreciated and undepreciated rate bases are both set up for each unit of the company's service, the mean of the property values at the beginning and end of the year and the mean of the depreciation reserves at the beginning and end of the year being used throughout. The totals of the rate bases for all services combined for 1942 are:

Undepreciated	\$109,589,499
Depreciated	78,951,523

Common Stock Equity

The Commission finds the depreciated rate base for 1942 to be		\$78,951,523
Against this the companies have the following liabilities:		
Bonds, debentures and other fixed interest bearing securities		45,448,636
Open accounts, including donations, etc.		2,314,910
Total		\$47,763,546

The Commission finds the undepreciated rate base for 1942 to be		\$109,589,499
Against this the companies have the following liabilities:		
Depreciation reserve		30,637,976
Bonds, debentures and other fixed interest bearing securities		45,448,636
Open accounts, including donations, etc.		2,314,910
Total		\$78,401,523

The rate base less the liabilities in each case gives the amount of \$31,187,977. This constitutes the common shareholders equity in the property. This common stock equity has no direct relation to the amount of common stock issued or the amount of money paid for that stock. It represents the difference between the value of assets and the amount of the liabilities of the companies.

Operating expenses, annual depreciation and interest on the indebtedness of the companies must be met out of annual revenues before anything is available for a return on the common stock equity, which must accordingly absorb the full effect of variation in the total revenue.

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Rate of Return

[23, 24] The act, § 15, associates fair rates to the consumer with a fair return to the utility.

It was necessary for the legislature to insist upon a fair and reasonable return to the utility for the reason that unlike most business and industrial enterprises, where fresh capital expenditures are infrequent, a public utility, and more particularly one supplying electricity to the public, is continually expanding and making new capital expenditures and the utility must go to the public to get the money for such development.

To get the required money, it must compete in the money markets with others requiring capital, and hence it follows that the investor must see the opportunity to earn a fair return on his money from the utility or he will not invest.

In fact, fair rates to the consumer are inseparably connected with a fair return to the utility for the reason that if a utility is not allowed a fair return on its investment, further monies to carry on the business cannot be obtained except at higher rates of interest, if at all. This means a higher cost of money, hence higher rates to the consumer as rates are built upon cost of providing service.

Under the scheme proposed by the staff, and accepted by the Commission, the fair and reasonable return is determined by setting up a rate base founded on the monies prudently invested and allowing a rate of return equal to the cost of those monies to the utility. The cost of funds secured by bonds and preferred stock of the companies under review, held by the public, is the effective rate of interest

on those securities. The cost of funds secured by the issue of bonds of the utility companies to the holding company is not the nominal interest rate on those bonds, but the effective interest rate paid by the holding company to secure the money. Donations, noninterest-bearing customers' funds, accumulations of unpaid taxes, etc., are without cost to the utility. The cost of monies used from reserves, and of those monies which represent the common shareholders equity are the only items on which the judgment of the Commission must be exercised. The weighted average of the interest rates actually paid or determined by the Commission on funds from these various sources becomes the rate of return on the rate base.

[25, 26] The representatives of the municipalities argued that the utility should be charged interest on the reserves used for expansion at the same rate as it is allowed to make on its investment. This is unreasonable. The return to the utility is calculated on the cost of monies from various sources, reserves, bonds, debentures, preferred and common stocks. The reserves carry no risk of any kind. They cannot command a higher rate than the first mortgage bonds, otherwise the utility would invest the reserves in outside securities and borrow money outside the business.

Accumulations to reserve funds are added annually and cannot always be invested in the business immediately. There may be no construction or replacement project available for that purpose. The accumulations may have to be deposited at bank rates of interest in the interval.

Moreover there would be no gain

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to the consumer by forcing the utility to pay a high rate for use of the reserve because that would increase the cost of money to the utility which again would automatically raise the fair rate of return which is built upon the actual cost of money.

It follows that the rate of return debited the utility on the reserve should be lower than the lowest rate at which the utility may secure funds from any other source. A rate of 4 per cent is indicated, and used as the cost of these funds to the utility.

[27, 28] Operating expenses, annual depreciation provision, interest on the fixed indebtedness of the company, and taxation must be met from annual revenue before anything is available to the common stockholders. In the years of low revenue there may be little or nothing available for common stock dividends. As an offset, the allowed rate of return on the common stock equity must be appreciably higher than on fixed interest bearing securities.

For the past four years since regulation became an active issue, the companies have been paying a 2 per cent dividend on Class A—B. C. Power Corporation stock, which has sold on the market at an average of \$25. This is some indication that the investing public, without knowledge of the proposed stabilization reserve, requires a return of 8 per cent on this type of security.

When much of the speculative element is eliminated by the proposed method of regulation, it is quite safe to predict that investors will be prepared to provide funds for utility needs at something less than 8 per cent on this type of investment.

When, in addition to this there is at the present time a definite trend towards cheaper money, a return of 7½ per cent on the common stock equity appears to be a fair rate to allow for the estimated cost of these funds to the utility.

Under the system of continuous regulation proposed, the rate base will be adjusted annually and the rate of return will be adjusted frequently to give effect to changes in the relative amounts of funds derived from reserves, bonds, and stock. At such times the rate set on the common stock equity should be adjusted to give effect to any changes in the cost of money as reflected in the current return on securities of like character.

[29] The effect of the policy adopted in setting up the rate base, on the rate of return is shown in Schedule B. If an undepreciated rate base is adopted and interest on the depreciation reserve is deducted, the depreciation reserve and the rate set thereon must be included in the calculation of the rate of return. If a depreciated rate base is adopted the depreciation reserve does not enter into the calculation. As the rate set on the depreciation reserve is lower than that allowed on other securities, the calculated average is lower for an undepreciated than for a depreciated rate base.

The weighted averages of interest rates are calculated in Schedule B. This is based on 7½ per cent on the common shareholders' equity. This percentage is arbitrary, and is only justified by the assumption that regulation will enhance the security behind the common stock equity.

Accordingly, a rate of return of

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5.3 per cent on an undepreciated rate base and of 5.8 per cent on a depreciated rate base is deemed to be fair and reasonable.

Fair Return

[30] To implement the requirements of the act, the Commission must determine the "fair return" to the public utility on "each distinct class or category of service." The steps approaching this determination have been set out above. As explained under "Interest Credit Plan," the last step in the approach may be made in two ways which produce practically the same results. In one, the depreciated rate base is multiplied by the appropriate rate of return. In the other, the undepreciated rate base is multiplied by its appropriate rate of return and from this product is deducted the interest on the depreciation reserve. The mean of these two results is the fair return as determined and found by the Commission. This fair return is set out for each distinct class or category of service in the individual findings which follow.

Operating Expenses

Operating expenses in the broadest sense include all outlays necessary for a continuous operation of the business, which do not enhance the value of the plant or increase the owner's equity. In this sense, the annual provision for depreciation is an operating expense. Other such expenses are wages, cost of consumable supplies, legal and engineering costs (if not included in wages), fees, rentals, legitimate donations, insurance, and taxes. Property taxes have always been and still are included in operat-

ing costs without question. Until income taxes on profits assumed their present proportions they were similarly treated.

The representatives of the municipalities argued that income taxes generally, and the increase caused by the war, particularly, should not be considered as operating expenses and so passed on to the consumers, but should be paid out of the return on investment, and cited the recent decision of the Federal Power Commission to this effect. The argument of the representatives of the municipalities does not go to the root of the matter.

The return on investment must be sufficient and should be not more than sufficient to induce the investing public to provide the funds necessary for expansion of the business. Anything more than that is unfair to the consumer, anything less must result in curtailment of proper service. Utility business is normally expanding and if the return to the investor is not sufficient the funds necessary for expansion will not be forthcoming and proper service cannot be maintained.

The investor is concerned only with the return which reaches him, either in dividends or in increase in equity in his property. How the return is calculated does not affect his readiness to invest. The net return to him in funds available for his own use is the controlling factor. Consequently, if taxes are to be deducted from the return, the rate of return must be raised to compensate. The result to the consumer is the same in the end.

[31] If the cost of service to the consumer is to be kept to the minimum, the investors must be allowed a return sufficient, and only sufficient,

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to induce them to furnish the funds necessary for proper operation and expansion of the service. The determination of this return requires the most careful consideration and judgment on the part of the regulatory body and all factors which affect the amount of the return should be disposed of in advance. Income tax at the rates now prevailing is a very large factor. The very large increase in income tax in the past few years has resulted in much confusion of thought regarding the proper treatment. The Federal Power Commission in *Detroit v. Panhandle Eastern Pipe Line Co.* (1942) 45 PUR(NS) 203, 219, made the following pronouncement:

"So that there may be no confusion concerning the tax situation in connection with the companies subject to our jurisdiction, where necessary to stabilize utility rates at reasonable levels during the war emergency period, we propose to allow as proper operating expenses only such taxes as may be termed ordinary or normal. For the purpose of distinguishing between ordinary or normal and war emergency or abnormal taxes, we conclude that the basis prescribed in the 1940 Revenue Act establishes the highest possible level of Federal taxes which may be allowed as an element of operating expense for such purpose. The 1941 Revenue Act and the pending 1942 proposal certainly reflect abnormal tax requirements for war purposes."

In spite of this statement of its opinion and intention in this matter, the Commission made its finding and order allowing the company as a fair rate of return $6\frac{1}{2}$ per cent on the rate

base, clear, after allowing the full amount of the 1941 Federal Income Tax (31 per cent) as an operating expense; and further expressed the opinion that the amount of operating revenue it was allowing the company would be sufficient to cover the full amount of the expected Federal Income Tax for 1942 (namely 45 per cent) as an operating expense.

The decision, in point of fact, really classifies all Federal Income Taxes as necessary operating expenses, though reading the opinion of the Commission would give one the contrary view. This unprecedented action of a Commission (or a court) giving a decision diametrically opposed to its reasons for judgment (or opinion as it is termed by the Commission) wipes out any value the case might otherwise have had as a precedent.

The only direct and positive method is the inclusion of income tax in operating expenses. In most cases this is a simple problem. In this case it is quite complicated.

In the process of regulation in its simplest form, there are three distinct steps:

1. The rate base, rate of return, and operating expenses are determined,
2. From these factors, the gross revenue which the utility should be allowed to make is worked out,
3. The rates are adjusted to produce as nearly as possible the revenue allowed.

Inclusion of income tax introduces another step. Income tax is calculated on the net taxable revenue, which is derived from the allowed gross revenue determined above. The tax must be added to the allowed gross

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revenue before the rates are adjusted.

In the case now before the Commission, there are several complications. Income taxes as paid by this group of utilities are levied and paid on a company basis and are not related in any way to the business of the units which must be recognized by the Commission, each of which must be considered separately, and for each of which income tax must be determined.

Income taxes in Canada are imposed under two acts, the Income Tax Act and the Excess Profits Act. Part of the tax levied under the latter act is a straight percentage on profits and can for all practical purposes be added to the tax levied under the former act. Under the provisions of these acts, the maximum revenue the utility can retain and pass on to the investors is 60 per cent of 116 $\frac{2}{3}$ per cent of "Standard Profits," so-called. Anything in excess of this 60 per cent must be passed on to the government, regardless of which act authorized the levy. The remaining 40 per cent may properly be considered as income tax, and the excess over 116 $\frac{2}{3}$ per cent as "Excess Profits."

The years on which standard profits are calculated, 1936 to 1939, were years of relatively low revenue to the companies under review and the amount the companies can retain after paying taxes on the above basis is not sufficient to provide the return calculated as necessary for the successful continuation of the business. The revenue collected on the present rates will exceed 116 $\frac{2}{3}$ per cent of standard profits but the excess will be taken by the Federal government as excess profits, and will be of no benefit to the utility. Under the present

conditions it is impossible for the utility to earn and retain a fair and reasonable return.

For practical purposes income tax proper amounts to 40 per cent of 116 $\frac{2}{3}$ per cent on standard profit and only the additional amount collected by the government should be regarded as excess profits, and the income tax payable is fixed at 40 per cent of 116 $\frac{2}{3}$ per cent of standard profits, and that amount should be included in operating expenses.

For regulatory purposes this amount will be allocated to the various units in proportion to the income tax payable in respect of the various units during the standard profit period.

Nothing corresponding to income tax is levied on publicly owned and operated utilities. All but a negligible part of the electric power used in British Columbia is generated and sold by privately owned utilities. By the impost of income tax on utilities, the Dominion Treasury collected nearly \$6,000,000 from the users of electricity in British Columbia in 1942, and not a corresponding dollar from users in Ontario. This is the biggest individual cause of the differential in rates in the two Provinces.

Cost of Service.

The constituent parts of cost of service as defined earlier can now be brought together. This is done for each unit in the individual findings.

Revenues

Revenues of the companies from the various units of service have been segregated by the staff of the Commission for the years 1939 to 1942, inclusive. The relation of these revenues to the cost of service is shown

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in the individual findings and in Schedule C.

The "Public Utilities Act" requires the Commission in effect to permit a utility to collect revenue that will equal the cost of service. The deductions from the revenue of a public utility company under the Income and Excess Profits Tax Acts leave to the utility in this case an amount insufficient for that purpose. The amount retained by the companies for 1942 after payment of Dominion imposts is only sufficient to pay a return of 5.2 per cent on a depreciated rate base instead of 5.8 per cent set by the Commission as a fair return. This is in spite of the fact that the net revenues for 1942 exceeded those of 1941 by \$1,400,000. Until some change is made in the Dominion regulations it will be impossible to implement the intent of the "Public Utilities Act" in the above respect. Any increase in net revenue is appropriated by the Federal government and is of no benefit to the utility, and so long as the net revenues do not go below the amount set by the Dominion regulations, a decrease adversely affects the revenues of the Crown, but has no effect on the utility. (See Schedule D.) [Schedule D omitted herein.]

Investigation indicates that the aggregate net revenues of those companies for 1942, after requirements for operation and depreciation are deducted, are not only in excess of what the companies can retain under the Dominion tax laws, but are actually in excess of what is considered necessary for a fair return. On the basis of the 1942 revenues, a reduction in charges to customers in some units of service is clearly indicated. An in-

spection of the business of the companies during the past five years indicates just as clearly that these revenues have been stimulated by war activities and cannot be considered to be normal. If the many schemes for rehabilitation accomplish the desired results, these revenues may be maintained. If not, they may be materially decreased on or shortly after the cessation of hostilities, and charges now reduced will have to be restored.

Charges to customers may be reduced in two ways: by a downward revision of the rate schedules, or by a percentage discount on bills compiled under the existing schedules. A change in rate structure is necessarily a slow process. A painstaking and time consuming analysis of a mass of detail must be made before proper adjustment of the various rates can be arrived at. The effects of a change in rate structure are uncertain and slow to develop. Before the effects are obtained, the situation which justified the change may be reversed. The time is not now opportune for readjustment of the rate structure. Any change at the present time should be made in the simplest and most flexible way to be easily modified as the unstable conditions of the time may require. A percentage alteration of those charges which appear most out of line with the cost of service will best serve this purpose. A percentage change can be put into effect immediately, and can be terminated or altered at short notice.

A preliminary study of the schedules in force discloses that even in the profitable units the rate in some portions of the areas prescribed are unduly preferential and are at present

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appreciably below the cost of service. This may have resulted from the use of promotive rate schedules which have not borne fruit or from extension into districts where development has been slow or from the effect of agreements which however well conceived may have forced the utility to make reductions which were not justified. Whatever the cause, the result has been discrimination against the users in more profitable areas. These discriminations will properly be adjusted when rate structures are re-arranged.

Stabilization Reserve

The operating expenses and revenue of a utility are subject to pronounced annual fluctuations. The effect of a rate change cannot be definitely foretold.

The close adjustment of revenue to cost of service is impossible. If it could be done, it would result in a constantly changing rate structure which would be unsatisfactory to both the utility and the consumer. The staff of the Commission has recommended, and the Commission approves of the establishment of a stabilization reserve into which any difference between revenue and cost will be placed until it is evident that the situation is not a temporary one, and that a change in rates is really justified. This reserve will always be under the direct control of the Commission. It may be either a positive or a negative amount in the utilities' accounts.

The limit, positive, or negative, to which the reserve may accumulate should be based on the annual business of the utility, with reasonable

consideration of general economic conditions prevailing. When the limit is reached an adjustment in the rate structure is indicated. Like the depreciation reserve, and under the supervision of the Commission, this reserve when positive should be used in the business of the utility, and interest thereon should be treated as part of the general revenue. If because of a continued depression the reserve becomes negative, the utility should be credited with interest.

The effect of such a reserve will be to stabilize the rate to the consumers and the return to the investors. The common stock equity will lose its speculative character and will ultimately be entitled to about the same rate of return as fixed interest bearing securities. The cost of monies to the utility, and the cost of service to the consumer will be accordingly reduced.

The business of the companies under review has been abnormally stimulated by the war, and were it not for existing taxation the gross revenue would quickly build up a stabilization reserve to the limit. The revenue which is actually available, after income and excess profits tax are deducted, will not be sufficient to pay the costs of service, which include operation costs and a fair return on investment. The establishment of the reserve will necessarily have to be deferred.

The "Public Utilities Act" requires that "each distinct class or category of service shall be considered as a self-contained unit." As set out earlier, the operations of the utilities under review have been divided into twelve separate units, each of which must now be separately considered. The

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general principles set out above shall apply to all units, the method of determining the rate base, the treatment of depreciation and operating costs and the rate of return being the same in all cases. The application of these

principles to the separate units will now be developed.

[Detailed discussion and findings as to separate units, applying regulatory principles announced above, are omitted.]

BRITISH COLUMBIA PUBLIC UTILITIES COMMISSION

Re British Columbia Electric Railway
Company Limited et al.

November 13, 1943

I NVESTIGATION into rates and service of public utility company;
temporary rate reduction through omission of billing ordered.

For first report, see ante, p. 438.

Rates, § 1 — Method of reduction — Omission of billing — War conditions.

Omission of billing of customers for a definite period, instead of making a percentage alteration in rates, has the advantage of giving consideration to the unstable character of the situation during war conditions, and, apart from the effect of reducing revenues, this to some extent is a recognition of the inconvenience experienced by the public during war owing to inferiority of service necessitated by shortage of materials and equipment and war restrictions in general.

By the COMMISSION: In the first report of the Public Utilities Commission on the investigation into the rates and service of the British Columbia Electric Railway Company Limited, it was found that, on the basis of the 1942 revenues, a reduction in charges to customers in some units of service was indicated. An inspection of the business during the past five years indicated also that these revenues cannot be considered to be normal. Their continuance at present levels cannot be assumed.

It was also reported that because

of the abnormal conditions at the present time it is not opportune to make a complete revision of rate structures. Hearings with regard to rates were postponed until a later date. It is the opinion of the Commission that any change at the present time should be made in the simplest and most flexible way to be easily modified as the unstable conditions of the time may require.

It is the opinion of the Commission, however, that the revenues of the company are such as to justify some relief to the customers of the

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company, particularly in the electric service. The question arises as to the manner of giving such relief. A percentage alteration in those charges which appear most out of line was suggested in our first report. We find that the application of this method would likely involve some delay as its adoption is based to some extent on the full findings of the report.

In view of this, believing the customers to be entitled to some immediate relief, we recommend that this be given through the omission of billing of customers for a definite period. This method has the advantage of giving consideration to the unstable character of the situation at the present time, due to war conditions. Such a method would give immediate relief and allow further time for the consideration of the first report of the Commission in the future, as it would not necessarily involve the full acceptance of that report. This method would be essentially temporary in character, and would leave the Commission free to make such further orders in the future as are deemed desirable in the circumstances.

Apart from the effect of this in reducing the revenues of the company, it would, to some extent, be a recognition of the inconvenience experienced by the public at the present time due to inferiority of service, necessitated by shortage of materials and equipment, and war restrictions in general.

With regard to the period for non-billing of customers to be established, it is recommended that on the basis of the excess of earnings over cost in the various areas, this be one month in the lower mainland area and two

months in all other areas served by the company, the details and application to be embodied in an order of the Commission.

ORDER

Whereas upon investigation by the Commission it was found that on the basis of the 1942 revenues of the company a reduction in charges to customers in some units of service was indicated:

Whereas an inspection of the business of the company during the past seven years has indicated that its present revenues cannot be considered to be normal and their continuance cannot be assured:

Whereas because of the abnormal conditions at the present time it is not opportune to make a complete revision of the rate structures:

Whereas the revenues of the company at the present time are such as to justify some immediate relief to customers of the electric service:

And whereas the method of giving such relief should be temporary in character:

Now therefore it is *ordered*:

That no charges shall be made by the said company for electrical power or energy furnished to the public under the categories, schedules, or codes, and within the respective distinct areas and during the periods herein set forth:

1. *Lower Mainland Area* (as defined in the report of this Commission dated July, 1943, ante, p. 438).

In this area there shall be no charge made for the equivalent of one month's bill to the customers served under the rate codes and categories as set out below, commencing with the

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meter reading of November 18, 1943, and covering each and every meter reading taking place within the normal monthly billing period immediately following the said November 18, 1943.

The aforesaid shall apply to

(a) All residential and domestic lighting, cooking, water heating, and auxiliary heating under Codes 06, 08, 9, 19, 39, 41, 42, 43, and 44 as filed with this Commission, and flat rate water heating;

(b) All commercial lighting and heating furnished under Codes 06, 07, 08, 23, 24, 25, 29, and 39, as filed with this Commission, and flat rates for signs;

(c) Those commercial power installations furnished with electrical energy under Codes 11 and 13, as filed with this Commission;

(d) All municipal street lighting;

(e) All public schools and general hospitals;

(f) Bulk energy supplied to the corporation of the city of New Westminster.

Provided, however, that in cases where the foregoing applies where the amount of current consumed by any customer during the aforesaid no-charge period is abnormally high, a charge may be made by the company with the consent of the Commission, for current consumed in excess of the consumption during the month's billing period immediately preceding.

2. Vancouver Island South Area (as defined in the report of this Commission dated July, 1943, ante, p. 438).

In this area there shall be no charge made for the equivalent of two months' bills to the customers served under the rate codes and categories as

set out below, commencing with the meter reading of November 5, 1943, and covering each and every meter reading taking place within the two monthly billing periods following the said November 5, 1943.

The aforesaid shall apply to

(a) All residential and domestic lighting, cooking, water heating, and auxiliary heating under Codes 8, 9, 10, 11, 16, 16A, 17, 17A, 22, 26, 28, 29, 30, and 31, as filed with this Commission, and flat rate water heating;

(b) All commercial lighting and heating furnished under Codes 12, 13, 14, 15, 18, 19, 20, 21, 23, 24, and 25, as filed with this Commission, and flat rates for signs;

(c) Those commercial power installations furnished with electrical energy under Codes 40, 41, 42, and 45 as filed with this Commission;

(d) All municipal street lighting;

(e) All public schools and general hospitals.

Provided, however, that in cases where the foregoing applies where the amount of current consumed by any customer during the aforesaid no-charge period is abnormally high, a charge may be made by the company with the consent of the Commission, for current consumed in excess of the consumption during the two months' billing periods immediately preceding.

3. Alberni Area (including the Cities of Alberni and Port Alberni, and territories adjacent thereto).

In this area there shall be no charge made for the equivalent of two months' bills to the customers served under the rate codes and categories as set out below, commencing with the meter reading of November 10, 1943, and covering each and every meter

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reading taking place within the two normal monthly billing periods consecutively following the said November 10, 1943.

The aforesaid shall apply to

(a) All residential and domestic lighting, cooking, water heating, and auxiliary heating under Codes 51, 54, and 55, as filed with this Commission;

(b) All commercial lighting and heating furnished under Codes 57 and 58, as filed with this Commission;

(c) Those commercial power installations furnished with electrical energy under Codes 59 and 62, as filed with this Commission;

(d) All municipal street lighting;

(e) All public schools and general hospitals.

Provided, however, that in cases where the foregoing applies where the amount of current consumed by any customer during the aforesaid no-charge period is abnormally high, a charge may be made by the company with the consent of the Commission, for current consumed in excess of the consumption during the two months' billing periods immediately preceding.

4. *Newcastle-Nanoose Area* (including the East Coast of Vancouver Island, from Craig's Crossing to Dashwood).

In this area there shall be no charge made for the equivalent of one month's bill to the customers served under the rate codes and categories as set out below, commencing with the meter reading of November 16, 1943, and covering each and every meter reading taking place within the normal monthly billing period immediately following the said November 16, 1943.

The aforesaid shall apply to

(a) All residential and domestic

lighting, cooking, water heating, and auxiliary heating under Codes 36, 37, 54, and 55, as filed with this Commission;

(b) All commercial lighting and heating furnished under Code 38, as filed with this Commission;

(c) All commercial power installations in that area;

(d) All public schools and general hospitals.

Provided, however, that in cases where the foregoing applies where the amount of current consumed by any customer during the aforesaid no-charge period is abnormally high, a charge may be made by the company with the consent of the Commission, for current consumed in excess of the consumption during the month's billing period immediately preceding.

5. *Comox-Nelson Area* (including the village of Royston and vicinity).

In this area there shall be no charge made for the equivalent of one month's bill to the customers served under the rate codes and categories as set out below, commencing with the meter reading of November 25, 1943, and covering each and every meter reading taking place within the normal monthly billing period immediately following the said November 25, 1943.

The aforesaid shall apply to

All residential and commercial electrical service as furnished under Code 35, as filed with this Commission.

Provided, however, that in cases where the foregoing applies where the amount of current consumed by any customer during the aforesaid no-charge period is abnormally high, a charge may be made by the company with the consent of the Commission, for current consumed in excess of the

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consumption during the month's billing period immediately preceding.

6. *Kamloops Area* (including the city of Kamloops and adjacent areas served by the company).

In this area no charge shall be made for the equivalent of two months' bills to the customers served under the rate codes and categories as set out below, commencing with the meter reading of November 18, 1943, and covering each and every meter reading taking place within the two normal monthly billing periods consecutively following the said November 18, 1943.

The aforesaid shall apply to

(a) All residential and domestic lighting, cooking, water heating, and auxiliary heating under Codes 19, 41, 42, and 43, as filed with this Commission;

(b) All commercial lighting and heating furnished under Codes 7, 8, 15, 23, 24, 25, and 29, as filed with this Commission;

(c) Those commercial power installations furnished with electrical energy under Code 11, as filed with this Commission;

(d) All municipal street lighting;

(e) All public schools and general hospitals.

Provided, however, that in cases where the foregoing applies where the amount of current consumed by any customer during the aforesaid no-charge period is abnormally high, a charge may be made by the company with the consent of the Commission, for current consumed in excess of the consumption during the two months' billing period immediately preceding.

UNITED STATES SUPREME COURT

McLean Trucking Company, Incorporated
et al.

v.

United States of America et al.

No. 31

321 US 67, 88 L ed —, 64 S Ct 370

January 17, 1944

A PPEAL from decree refusing to set aside order of the Interstate Commerce Commission authorizing consolidation of certain motor carriers; affirmed. For lower court decision, see (1942) 48 F Supp 933.

Consolidation, merger, and sale, § 4.4 — Jurisdiction of Federal Commission — Merger of motor carriers — Violation of Antitrust Law.

1. The Interstate Commerce Commission has statutory authority to approve a merger of motor carriers which, in the absence of such approval, would constitute a violation of the Antitrust Laws, p. 479.

TAB 36

Man.
C.A.

The goods which the petitioner has sold have not ceased, notwithstanding the bankruptcy, to remain in the possession of the buyer Rosenzweig. It is still he who is proprietor, if he ever has become so, notwithstanding he has paid nothing of what he had to pay to become proprietor and to legitimately take possession of same.

He will continue to be so till the sale by the trustee or a settlement with his creditors. As for the trustee, he is only a mandatory. He is not a third party. Allow, if you wish, that he represents the creditors, still he has no more rights than they insofar as the property right is concerned. Now, they, the creditors, are not proprietors. The estate of the debtor does not belong to them. They have not acquired any real right on same. Above all they cannot claim any right on same beyond what the debtor himself could claim. They have no more rights than he had himself, being only his creditors. If there was in his estate something which did not belong to him, he has not become the proprietor of same by the fact of his bankruptcy. Equally, if his property right was subject to a resolute condition before his bankruptcy, bankruptcy does not make that right absolute. This is precisely the case concerning the merchandise bought from the petitioner. The bankrupt had only a resolvable right in same, the resolute condition being always implied in all moveable sales. His right remains after bankruptcy what it was before.

The Bankruptcy Act, 1919 (Can.), ch. 36, has effected no change in our former laws concerning sale. The privileged rights of the unpaid seller are still the same, they have not been affected. I am of opinion that there is nothing to find fault with in the judgment of the Superior Court, of which the trustee complains. I would consequently, dismiss the appeal with costs.

As to the motion for dismissal of the appeal, it loses all its utility since the Court disposes of the case on the merits. I would dismiss it without costs.

BERNIER, J., concurs in dismissing the appeal.

Appeal dismissed.

Distinguished
Great Northern Ry. v.
Cole Agencies et al.
(1964) 49 W.R. 153
Man. Q.B. Chambers

TRUSTEE COMPANY v. MANITOBA BRIDGE & IRON
WORKS LTD.

*Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and
Dennistoun, J.J.A. November 15, 1922.*

PARTIES (§ IIB—119)—ADDING PARTIES DEFENDANT—ACTION COM-
MENCED AGAINST PROVINCIAL COMPANY—DOMINION COMPANY

PURCHASING ASSETS AND ASSUMING LIABILITIES—MANITOBA
KING'S BENCH RULE 220—DISCRETION OF COURT.

Man.

C.A.

In an action for breach of contract against a provincial company, where it appears after the action has been commenced that a Dominion company has been incorporated bearing the same name as the provincial company, and has purchased the assets of the old company, and assumed certain of its liabilities, Manitoba K.B. Rule 220, para. 2, enables the Court or Judge to add the Dominion company as a party defendant, on an application to amend the statement of claim, and where the Referee in Chambers has allowed the amendment and his decision has been upheld by a Judge of the King's Bench, the Court of Appeal will not reverse such decision, the liability of the company added, being dependant on evidence to be given at the trial and not on mere interlocutory proceedings in the action.

[*Gas Power Age v. Central Garage Co.* (1911), 21 Man. L.R. 496, discussed.]

APPEAL by defendant from the judgment of the Court of King's Bench affirming the Referee in Chambers allowing the plaintiff to amend his statement of claim by adding a party defendant. Affirmed.

The judgment appealed from is as follows:—

This is an action for damages for breach of a contract made in 1915 by the defendants with Tremblay, McDermott Co. for the supply of steel for the construction of the Greater Winnipeg Water District aqueduct.

The plaintiff is the assignee under the Bankruptcy Act of the Tremblay, McDermott Co. The breach of contract complained of took place in the years 1916 and 1917. Subsequently, a company bearing the same name as the defendant company was incorporated under the Dominion Companies Act, R.S.C. 1906, ch. 79, and in the spring of 1918 the defendants assigned and transferred to this new company all its assets in consideration of its capital stock, and at the same time the defendants ceased to do business, the business thereafter being carried on by the new company.

After defence filed, the plaintiff applied and obtained from the Referee an order permitting it to add the new company as a defendant and to amend the statement of claim so as to claim damages against the new company. From this order the defendants appeal.

It is not charged that the incorporation of the new company and the transfer to it of the assets of the defendants was made with any fraudulent intent. Counsel for the plaintiff admitted that the situation is the same as though the sale and transfer of the defendants' assets had been made to a corporation of different name and different shareholders, which had no other relation to the plaintiff or defendants than that created by the agreement made between

Man. the defendants and the new company for the sale and trans-
 C.A. fer to the latter of its assets. He bases the right to add the
 TRUSTEE new company as a defendant upon the ground that the new
 Co. company is liable for the damage claimed (1) Because the
 v. contract was made with the defendants "its successors and
 MANITOBA assigns," and (2) Because by the agreement between the
 BRIDGE & defendants and the new company the latter agreed to as-
 IRON sume and pay all the liabilities of the defendants, including
 WORKS LTD. the liability arising under the original agreement.
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 C. J. M.

The *ratio decidendi* of *Gas Power Age v. Central Garage Co.* (1911), 21 Man. L.R. 496, shews that if the plaintiff had joined the new company as a defendant at the commencement of the action it could not have had its name stricken out. If the plaintiff might have made the new company an original defendant it should now be permitted to add it.

I do not think that I should determine in a summary way that the plaintiff has no cause of action against the new company. That question can best be decided at the trial.

I think the order of the Referee was right and I, therefore, dismiss the appeal, but, under all the circumstances, with costs in the cause.

I. Pitblado, K.C., and *W. J. Moran*, for appellant.

E. K. Williams, for respondents.

PERDUE, C.J.M.:—The plaintiff, the Trustee Company, is the trustee in bankruptcy of the J. H. Tremblay Company, Ltd. The action is brought to recover damages alleged to have arisen from a breach of contract on the part of the defendants in failing to supply all steel reinforcing bars required by the plaintiffs, other than the Trustee Company, in connection with the construction of a 20 mile section of the aqueduct of the Greater Winnipeg Water District. The defendants, the Manitoba Bridge and Iron Works, Ltd., by their statement of defence, besides denying liability and raising other defences, stated that since May, 1918, they have not been carrying on any business. The company was incorporated under the laws of the Province of Manitoba, and I shall refer to it as the "provincial company." The affidavit of one of the solicitors of the plaintiffs, filed upon the motion to amend, states that he had made enquiry and had been informed and believed that in or about the month of April, 1918, the defendant desired to become incorporated or to carry on business as a Dominion company; that the new company, as incorporated under the Companies Act, R.S.C. 1906, ch. 79, took over the assets and liabilities of the defendant company which originally

was liable for the performance of its obligations under the agreement sued upon. This information came to the solicitor after the defence had been filed. It appears from the examination of an officer of the defendant company and from documents produced that in or about the month of May, 1918, a company was incorporated under the Companies Act of Canada bearing the same name as the provincial company, which new corporation will be referred to as the "Dominion company." A by-law was passed by the shareholders of the provincial company on May 14, 1918, enacting that the company should sell to the Dominion company the whole of its undertaking, business and assets and that the company might accept as consideration for such sales fully paid shares of the Dominion company. At the same time, a further by-law was passed to sell to the Dominion company all the real estate of the provincial company at the price of \$250,000 payable in fully paid-up shares of the latter company. These by-laws appear to have been approved and confirmed at a special meeting of the shareholders of the provincial company. The terms set out in these by-laws appear to have been accepted by the Dominion company and the transaction carried through. An agreement was executed by the two companies on May 27, 1918, setting out the terms of the purchase by the Dominion company of the whole undertaking, business and assets of the Manitoba company. One of the recitals states that the Dominion company was formed for that purpose. The new company undertook to pay, satisfy and discharge all debts, liabilities, contracts, etc., of the old company.

On the application of the plaintiffs an order was made by the Referee in Chambers on April 16, 1921, allowing the plaintiffs to amend the statement of claim by adding the Dominion company as a party defendant and making the amendments set out in the order. By these amendments it is alleged that the incorporation of the Dominion company: "Was obtained with the intention and for the purposes of having it take over the undertaking and all the assets and assume all the liabilities of the provincial company, and such incorporation was granted subject to these conditions"; that subsequently:—"The Dominion company did agree to assume and pay all the liabilities of the provincial company, including the liabilities arising under the agreement referred to in para. 6 hereof," being the agreement to furnish the steel. The amendment further alleges that the Dominion company did take over the business, assets and

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Man. undertaking of the provincial company, and did actually
 C.A. assume all the liabilities of the latter, and "did become and
 TRUSTEE remained liable for all matters and things in the agreement
 Co. referred to in para. 6 hereof and on the part of the provin-
 v. cial company therein agreed to be performed."
 MANITOBA The provincial company appealed from the above order.
 BRIDGE & The appeal was heard and dismissed by Mathers, C.J.K.B.,
 IRON and the same company now appeals to this Court from the
 WORKS LTD. dismissal.

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One would naturally expect that in view of the facts and matters alleged in the statement of claim, the provincial company would desire, or at all events be willing, that the Dominion company should be made a party defendant, so that in the event of the first company being held liable in damages to the plaintiffs it might have relief over against the new company. But the opposition to the addition of the Dominion company as a party comes from the provincial company.

King's Bench Rule 220, para. 2, is as follows:—

"The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and upon such terms as may appear to the Court or Judge to be just, order that the name of any party, whether as plaintiff or defendant, improperly joined, be struck out, and that the name of any party, whether plaintiff or defendant, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the action, be added."

Our R. 220 is English Order 16. R. 11. The decisions on the English rule show that it should be so construed as to effectuate what was one of the objects of the Judicature Acts, namely, to bring all parties before the Court at the same time so that the disputes may be determined without the delay, inconvenience and expense of separate actions and trials. See *Montgomery v. Foy, etc., Co.*, [1895] 2 Q.B. 321, per Lord Esher, M.R. at p. 324; *Byrne v. Brown* (1889), 22 Q.B.D. 657, at pp. 666-667. The power is discretionary; *Lancaster Banking Co. v. Cooper* (1878), 9 Ch. D. 594; *Wilson & Sons v. Balcarres, etc., Co.*, [1893] 1 Q.B. 422; *Robinson v. Geisel*, [1894] 2 Q.B. 685, at pp. 688, 689. As to the exercise of this discretion, it was held in *Edward v. Lowther* (1876), 45 L.J. (C.P.) 417, 34 L.T. 255, that if the plaintiff wishes to add as defendant any person not originally made a defendant, he can obtain leave to do so under

this rule, and in ordinary cases such application will be granted on the terms of his paying the costs of, and thrown away by reason of the addition. In the same case, Lindley, L.J., said that the practice in chancery was to add a party as a matter of course.

The main objections urged on the appeal from the order were: (1) That there was no privity of contract between the plaintiffs and the Dominion company sought to be added as a party; (2) That there was no novation whereby the plaintiffs could maintain an action against the Dominion company. To these objections, taken on a mere application to amend, the answer is two-fold: (1) The Referee exercised his discretion in adding the defendant and the Chief Justice has upheld the Referee; (2) If this Court were to reverse the order on the above objections it would be trying and disposing of the merits of the claim the plaintiffs are setting up against the Dominion company. It would, in my opinion, be improper to do so at this stage where the Court is only considering the propriety of allowing an amendment to the statement of claim. We do not know what evidence, documentary or other, may be adduced during the progress of the suit or at the trial tending towards establishing a direct liability on the part of the added defendant. It is important that the new company should be bound by the result of the issue between the plaintiffs and the old company. The questions arising between the different parties may be heard and decided in one suit and at one trial.

In furtherance of the above purposes, the plaintiffs should have leave to make such further amendments of the statement of claim as they may deem necessary. The appeal should be dismissed, the costs to be disposed of as set out in the judgment of my brother Cameron.

CAMERON, J.A.:—This action is brought to recover damages for breach of a contract by the defendant company incorporated under our provincial Act to supply the assignors of the plaintiff with all steel reinforcing bars in connection with certain work undertaken by them, and this is an appeal from an order of Mathers, C.J.K.B., ante p. 179, dismissing an appeal from an order of the Referee adding as defendant the Manitoba Bridge and Iron Works, Ltd., a company incorporated in April, 1918, under the Companies Act, R.S.C. 1906, ch. 79, and amending Acts, and allowing certain amendments to be made in the statement of claim.

Among the amendments set out in the Referee's order are the following:—

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Man. "14. In or about the month of April, 1918, the Dominion
 C.A. Company was incorporated under and by virtue of the
 TRUSTEE Dominion Companies Act, R.S.C., 1906, ch. 79, and amend-
 Co. ing Acts. Such incorporation was obtained with the intention
 v. and for the purpose of having the Dominion company take
 MANITOBA over the undertaking and all the assets and assume all the
 BRIDGE & liabilities of the provincial company, and such incorporation
 IRON was granted subject to these conditions. Subsequent to such
 WORKS LTD. incorporation and in or shortly after the month of April,
 Cameron, 1918, the Dominion company did agree to assume and pay all
 J. A. the liabilities of the provincial company including the
 liabilities arising under the agreement referred to in para. 6
 hereof.

In pursuance of such incorporation and agreement, the Dominion company did actually take over the business of the provincial company as a going concern and all the assets and undertaking of the provincial company, and did actually assume all the liabilities of the provincial company, and the Dominion company did become and remained liable for all matters and things in the agreement referred to in para. 6 hereof, and on the part of the provincial company therein agreed to be performed.

15. Until now, the plaintiffs have not been aware of the facts set out in para. 14 hereof.

By deleting the word 'defendant' occurring in the first line of claim (a) in said statement of claim, and by substituting, therefor, the following words 'defendants, the said provincial company and the Dominion company or one, or both.'

The appeal is brought by the original defendant company on the ground that there is no privity of contract between the plaintiff and the Manitoba Bridge and Iron Works, Ltd. (Dominion company) which would result, it is alleged, in misjoinder of parties and of causes of action.

For the appellants it was argued that there were alleged in the amendments no such privity of contract and no such substitution of the Dominion company for the provincial company in the contract, the subject of the action, as would constitute a novation in law and subject the Dominion company to liability. It was contended that the Court should disallow amendments which did not disclose a cause of action.

As to novation it was argued that an agreement by the Dominion company to become liable would be necessary, and

that such agreement is not alleged. Now the amendment says:—

“The Dominion company did agree to assume and pay all the liabilities of the provincial company, ‘including that under the contract in question.’”

That appears to allege a promise by the Dominion company to pay the liability on the contract in question. It further appears in the amended pleading that it was not until after the action was brought that the plaintiff had knowledge of these facts and thereupon the plaintiff proceeded to add the Dominion company as party to the action, and asked relief therein against either company or both. It may be that the amendments, as they are now drawn, can be read as sufficient to support a new contract on which the Dominion company is liable to the plaintiff, but they cannot be said to be in really satisfactory form for that purpose. If the plaintiff intends to rest its case on such a substituted contract it would be well to have the allegations with reference thereto set forth in clear terms. There is also the important question whether the legal position of the Dominion company as successor of the provincial company is not such as to make the former primarily liable for the debts of the latter. Decisions on this subject in England that might be of value in cases arising under laws governing the creation of corporations are difficult to find. There are distinctions between the rights and powers of companies in England and those of companies organised in this Province and under Dominion Legislation. In England companies are quasi-partnerships founded on a memorandum of association and governed by its special articles. With us companies (when not incorporated by special Acts) are created by the issue of letters patent pursuant to general Acts, and in that respect our law is similar to that prevailing in the United States and the tendency is to vest corporations with the fullest powers that may be necessary for their purposes.

On this question, the following is to be found in 10 Cyc., *sub tit* Corporations, p. 287:—

“With regard to liability for debts of the old corporation the general rule is that a new corporation organized to succeed an old one is not liable for the debts of the latter. The new corporation will, however, be liable for the debts of the old one: (1) Where the circumstances are such as to warrant the conclusion that the former is not a separate and distinct corporation, but merely a continuation of the latter, and hence the same person in law; and (2) where it has, in

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Man. express terms or by reasonable implication, assumed the
 C.A. debts of the old corporation, where this liability is imposed
 by the statute under which the reorganisation takes place,
 TRUSTEE or where such liability is imposed upon it by the decree of
 CO. the Court on foreclosure.”
 v.
 MANITOBA In the case of a corporation that can be spoken of as a
 BRIDGE & consolidated corporation, which this Dominion company
 IRON may be, the statement is to be found in 14A Corp. Jur., sec.
 WORKS LTD. 3659, p. 1072:—
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“A consolidated corporation is answerable for the debts, obligations, and liabilities of the constituent corporations, whether arising *ex contractu* or *ex delicto*. This is true not only where liability is imposed on the consolidated corporation by statute, or by the charter of the consolidated company, or by the agreement of consolidation, but also where the constituent corporations go out of existence without any arrangement as to payment of their debts and liabilities, and the performance of their obligations being made.”

It is pointed out in Thompson on Corporations, 2nd ed., vol. 5, para. 6080, that in the treatment of the question of the liability of the succeeding corporation there is practically no difference between the rights, duties and liabilities of either the old or new corporations, whether the succession was brought about by re-organisation, merger or consolidation. And in para. 6083 it is said:—

“Whether or not the succeeding corporation will be liable for the obligations or torts of the old, depends on circumstances, etc. . . . The consolidated corporations as a rule, even in the absence of statute or agreement, assumes all the liabilities of the constituent companies and then may be enforced by a direct action against it, as it is presumed to have notice of the rights of creditors.”

There can be no question that a company may purchase the entire assets of another company without assuming its liabilities. That the consideration is paid in stock of the purchasing corporation can make little, if any, difference. It would be a matter of evidence at the trial whether a given transaction was an outright sale or purchase or whether it constituted a succession, merger or consolidation, or whatever might be the proper term to describe it, with its attendant legal implications. It may be that in this case the transaction was a purchase or acquisition of the assets of the provincial company without there being imposed on or assumed by the Dominion company a liability which the plaintiff can enforce. On the other hand, the identity of

the provincial company may be so preserved and continued in the Dominion company that the latter continues to bear the liabilities of the former and is bound thereby. But all these are matters proper for determination on the evidence at the trial and not on mere interlocutory proceedings in the action.

It is at least peculiar that the objection here is taken not by the new company but by the old. The Dominion company has not appealed from the order made. It is difficult to see how the provincial company can be prejudicially affected by the Dominion company being made a party to the record. Either the provincial company is liable on the contract pleaded or it is not, and its whole interest in the action lies in that issue. If it is not liable no question of any kind affecting the Dominion company arises. If it is liable then it would seem reasonable that the question of the Dominion company's liability should be tried out forthwith without putting the plaintiff to the necessity of commencing another action and proceeding to a second trial.

The amendments allowed by the order do not set out, as they should, with precision the material facts on which the plaintiff bases its claim against the added defendant. It would be reasonable, in the circumstances, to allow the plaintiff to make such further amendments to the statement of claim as it may deem advisable, and sufficient time should be given for that purpose. There may be serious questions of law arising in this matter affecting the Dominion company that must be settled some time, and there is no sound objection to having them disposed of in the same action in which the claim against the provincial company is heard and determined. As I see the situation, whatever objections there may be really simmer down to a question of costs, which can be adequately dealt with at the trial.

I would, therefore, dismiss the appeal, with the proviso that the plaintiff have leave further to amend the statement of claim within 10 days from the date of this order. The costs of this appeal should be in the disposition of the judge at the trial. The costs of making any further amendments to the pleadings should be costs to the defendant, the provincial company, in the cause.

FULLERTON, J.A. (dissenting) :—This action was brought against the Manitoba Bridge & Iron Works to recover damages for breach of a contract made in 1915, to deliver steel reinforcing bars. The statement of claim alleges that the breach occurred in February, 1917. The original defendant

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Man. to the action, which I will hereafter refer to as the old com-
 C.A. pany, was incorporated under the Companies Act, R.S.M.
 TRUSTEE 1913, ch. 35. In April, 1918, a company was incorporated
 Co. under the Dominion Companies Act R.S.C. 1906, ch. 79,
 v. bearing the same name as the old company. This company,
 MANITOBA which I will hereafter refer to as the new company, pur-
 BRIDGE & chased all the assets of the old company, the consideration
 IRON being the assumption of certain of its liabilities and the
 WORKS LTD. allotment to the old company or its nominees of 7,327 shares
 Fullerton, of fully paid-up shares in the capital stock of the new com-
 J. A. pany.

After the defence had been filed the Referee on the appli-
 cation of the plaintiff made an order adding the new com-
 pany as a party defendant and allowing the plaintiff to
 amend its statement of claim by alleging that the new com-
 pany agreed to assume and pay the liabilities of the old com-
 pany. Mathers, C.J.K.B., dismissed an appeal from the
 order of the Referee.

In his reasons for dismissing the appeal he says, ante at
 p. 179:

“It is not charged that the incorporation of the new com-
 pany and the transfer to it of the assets of the defendants
 was made with any fraudulent intent. Counsel for the plain-
 tiff admitted that the situation is the same as though the
 sale and transfer of the defendants’ assets had been made to
 a corporation of different name and different shareholders,
 which had no other relation to the plaintiff or defendants
 than that created by the agreement made between the de-
 fendants and the new company for the sale and transfer
 to the latter of its assets. He bases the right to the new
 company as a defendant upon the ground that the new com-
 pany is liable for the damage claimed: (1) Because the
 contract was made with the defendant “its successors and
 assigns”; and (2) Because by the agreement between the
 defendants and the new company the latter agreed to as-
 sume and pay all the liabilities of the defendants, including
 the liability arising under the original agreement.

The *ratio decidendi* of *Gas Power Age v. Central Garage
 Co.* (1911), 21 Man. L.R. 496, shows that if the plaintiff
 had joined the new company as a defendant at the com-
 mencement of the action it could not have had its name
 stricken out. If the plaintiff might have made the new com-
 pany an original defendant it should now be permitted to
 add it.

I do not think that I should determine in a summary way

that the plaintiff has no cause of action against the new company. That question can best be decided at the trial.

With great respect for the opinion of the Chief Justice, I am unable to take the view he does of the effect of *Gas Power Age v. Central Garage Co.* In that case, the action was brought against the Central Garage Co. to recover damages for breach of contract to pay for advertising and against two individual defendants for damages for conspiracy to induce and inducing the defendant company to break its contract. The whole case turned on the construction of R. 219 of the King's Bench Rules (now 196), and the question was not whether the plaintiff had any cause of action against the individual defendants but whether such cause of action should be joined with the cause of action against the garage company. The existence of the causes of action was taken for granted. In the present case counsel for the old company did not attempt to argue that under R. 196 the two causes of action could not be joined. His whole contention was that the material filed in support clearly showed that the plaintiff had no cause of action against the new company. I do not think it at all follows from *Gas Power Age v. Central Garage Co.* that "if the plaintiff might have made the new company an original defendant it should now be permitted to add it." When an action is begun the plaintiff may make any persons he pleases defendants and providing he shows on the face of the pleadings a good cause of action, the Courts, in the absence of proof that the action is clearly frivolous or vexatious or in any way an abuse of the process of the Court, will not dispose of it summarily, but will allow it to go down to trial. When, however, after action begun, an application is made by the plaintiff to add a defendant, the material in support of such application must show at the very least a triable action against such proposed defendant.

Has the plaintiff here shown the existence of any cause of action against the new company? I am satisfied that he has not. The plaintiff was not a party to the contract between the old and the new company and even if it were the fact, which it is not, that the new company by that contract assumed liability for the very breach of contract in respect of which this action is brought, the plaintiff for lack of privity could not maintain an action upon it. On the argument before us, counsel for the plaintiff did not attempt to support the judgment on this ground, but raised an entirely new and novel ground. He said that liability followed as a

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Man. matter of law from the purchase by the new company of
 C.A. the assets of the old. The only case cited by him in sup-
 TRUSTEE V. Cobourg, Peterborough, etc., R. Co. (1868), 14 Gr. 571.
 Co. In that case an Act of the Legislature, 1865 (Can.), ch.
 v. 81, authorised two companies to unite and for the more
 MANITOBA BRIDGE & IRON WORKS LTD. effectual carrying into effect of the said union:—
 Fullerton, J. A. “[To] ‘consolidate their respective debts, and unite their
 stocks, properties and effects, and on such terms, either of
 complete or partial union, and either of joint or separate,
 or absolute or limited liabilities to third parties,’ as the com-
 panies should deem meet; and any agreement for the pur-
 pose, under the seals of the companies, ratified by two-thirds
 of the shareholders of each, was declared to be ‘valid and
 binding, to all intents and purposes, in the same manner as
 if the same had been incorporated with the Act.’”

A deed of union was executed which provided for the absolute union of the companies and declared that the statutes regulating the companies should continue to govern and regulate the new company. By an Act passed long prior to the merger the holders of the bonds of one of the companies had the option of converting their bonds into paid-up new stock. The action was brought by two holders of bonds on behalf of themselves and all the other bondholders, against the new company claiming under the Act to have their bonds converted into the stock of the new company.

Mowat, V.C., decided in favour of the plaintiff but the whole case turned on the proper construction of the deed of union and of the several statutes involved, and, in my view, is no authority for the proposition put forward by the plaintiff.

On the argument reference was made to a paragraph in 14A Corp. Jur., at p. 1072, which reads as follows:—(See judgment of Cameron, J.A., at p. 186):

Consolidation is defined in 14A Corp. Jur., sec. 3630, p. 1054, as follows:

“When the rights, franchises, and effects of two or more corporations are by legal authority and agreement of the parties combined and united into one whole and committed to a single corporation, the stockholders of which are composed of those, so far as they choose to become such, of the companies thus agreeing, this is in law and in common understanding a consolidation of such companies.”

Clearly under the above definition there can be no question of consolidation between the two companies in the present case. There is merely a purchase by the new company of the assets of the old. In 14A Corp. Jur., sec. 3662, p. 1076, the law in the case of such a purchase is laid down as follows:—

“In the absence of a statute or contract imposing liability, one corporation which makes a *bona fide* purchase of all the property of another corporation for an adequate consideration is not liable for the debts of the selling corporation, nor does it hold such property subject to any lien or obligation toward the creditors of the selling corporation.”

That this is the law here I think there can be no doubt.

Mitchell on Canadian Commercial Corporations states at ch. 33, p. 1374, that “amalgamation” is the English equivalent of the American term “consolidation,” and at p. 1377, speaking of the effect of amalgamation, he says:—

“Apart from statute, the position of a company which amalgamates with another by agreement is analogous to that of a man who enters into partnership with another; the two companies do not become jointly liable to their respective creditors, and neither do the shareholders in one company become debtors to the creditors of the other. . . . A creditor can only claim against the purchasing company where the latter has become liable to him by reason of some agreement, express or implied, between it and him.”

By an amendment to the Companies Act of Manitoba, R.S.M. 1913, ch. 35, in sec. 2 of 1913-14 (Man.), ch. 22, it is provided that:—

“Every company . . . shall have power to sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of the company, if authorised so to do, by the vote of a majority in number of the shareholders present or represented by proxy at a general meeting duly called for considering the matter and holding not less than two-thirds of the issued capital stocks of the company.”

There is no provision in this statute making the purchasing company liable for the debts and obligations of the selling company and one would expect that if such liability were ever contemplated it would have been expressly provided for.

MAN.
C.A.
TRUSTEE
Co.
v.
MANITOBA
BRIDGE &
IRON
WORKS
LTD.
Fullerton, J.A.

MAN. The statement of claim is not framed in such a way as
 C.A. to cover the point which the plaintiff has apparently raised
 for the first time in this Court, and as I take the view that
 TRUSTEE the purchase by the new company cannot possibly make it
 Co. liable for the debts of the old company, nothing would be
 v. gained by allowing an amendment.
 MANITOBA I would allow the appeal and set aside the order of the
 BRIDGE & Referee.
 IRON
 WORKS LTD.

DENNISTOUN, J.A.:—I was much impressed by Mr. Pit-
 blado's argument on this case that there are here no suffi-
 cient allegations of privity of contract between the plaintiff
 and the added defendant; nor of novation, involving as it
 does the release of one obligation, and the substitution of
 another, with the consent of both debtor and creditor, and
 the *animus novandi*; nor of fraud; nor of the creation of a
 trust; nor of any clear-cut cause of action.

Mr. Williams admits that the amendments are "inartistic" and do nothing more than suggest a possible cause of action but contends that "as it is not obvious no cause of action will lie" the case should proceed to trial.

The Referee in Chambers and Mathers, C.J.K.B., have decided that there is something to be tried and I hesitate to take an opposite view upon a point of practice which involves the exercise of a judicial discretion.

I, therefore, agree that the appeal be dismissed, with to the plaintiff to further amend so as to make clear to the trial Judge the causes of action which he will attempt to establish when the time comes for so doing.

I agree with the disposition of the costs made by Cameron, J.A.

Appeal dismissed.
