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D-2013-036 HAS LEGAL FORCE**

DECISION

QUÉBEC

RÉGIE DE L'ÉNERGIE

D-2013-036	R-3809-2012	March 5, 2013
Phase 2		

PRESENT:

Marc Turgeon
Jean-François Viau
Françoise Gagnon
Commissioners

Gaz Métro Limited Partnership
Applicant

and

Intervenors listed below

Decision – Application concerning the setting of the rate of return

Application for approval of the supply plan and changes to Conditions of Service and Rates of Gaz Métro Limited Partnership effective October 1, 2012 – Phase 2

Intervenors

- Canadian Federation of Independent Business (Québec chapter) (CFIB);
- Groupe de recherche appliquée en macroécologie (GRAME);
- Industrial Gas Users Association (IGUA);
- Option consommateurs (OC);
- Regroupement des organismes environnementaux en énergie (ROEÉ);
- Regroupement national des conseils régionaux de l'environnement du Québec (RNCREQ);
- Stratégies énergétiques and Association québécoise de lutte contre la pollution atmosphérique (S.É./AQLPA);
- TransCanada Energy Ltd. (TCE);
- TransCanada Pipelines Limited (TCPL);
- Union des consommateurs (UC);
- Union des municipalités du Québec (UMQ).

1. INTRODUCTION

[1] On July 6, 2012, Gaz Métro Limited Partnership (“Gaz Métro” or “the distributor”) filed an application with the Régie de l’énergie (“the Régie”) for approval of its supply plan and changes to its *Conditions of Service and Tariff* effective October 1, 2012¹. It proposes to deal with this file in two phases.

[2] On July 19, 2012, the Régie issued decision D-2012-084 approving the proposal from Gaz Métro to proceed with review of the application in two phases.

[3] On November 23 and December 18, 2012, the Régie handed down its decision on phase 1 of the application except for items relating to the performance indicator².

[4] On December 14, 2012, the distributor filed a “*second re-amended application*”³ with the Régie presenting the various items listed as part of the application’s second phase, namely:

- I. Sales Development;
- II. Asset management;
- III. Investments;
- IV. Financial Strategy;
- V. Determination of revenue required, including the cost of distribution service;
- VI. Substitution and Energy Efficiency;
- VII. Cost Allocation;
- VIII. Vision, strategy and Rate Schedules;
- IX. Changes to *Conditions of Service and Tariff*;
- X. Document entitled *Conditions of Service and Tariff*.

[5] The findings sought by the distributor with regard to the rate of return described in Section IV of the “*Second re-amended application*” relating to the Financial Strategy are as follows:

¹ Application under sections 31(1), 32, 48, 49, 52, 72 and 74.

² Decisions D-2012-158 and D-2012-175.

³ Exhibit B-0123.

“ **DECLARE** that the rate of return established by applying the formula for the year 2013 is not reasonable;

“ **ALLOW** a rate of return of 9.3% on the common equity of Gaz Métro for rate-determination purposes;” [Gaz Métro emphasis]

2. PROCEDURAL DECISIONS

[6] On January 14, 2013, the Régie handed down procedural decision D-2013-003, in which it set the timetable for phase 2, specifically with respect to the application to determine the distributor’s rate of return (the Application).

[7] In that decision, the Régie laid out a specific approach with respect to the Application. A review of the relevant paragraphs would seem appropriate:

“ [20] Following a prima facie examination of the application, the Régie wonders if the context described previously and the reasons given by the distributor justify a further “in-depth review” of its rate of return.

[21] In its decision D-2011-182, the Régie determined that a reasonable rate of return to be authorized for the distributor was in the range of 7.71% to 9.60%. It noted that the rate of return of 7.92% generated by the AAF falls within that range.

[22] However, the Régie notes that there is indeed a significant gap between the anticipated risk-free rate that it had used in its decision D-2011-182 to determine the distributor’s authorized rate of return and the average of the anticipated risk-free rates established in August 2012 that are used in applying the AAF. The range used last year was between 3.91% and 4.50%, whereas the August 2012 average was 2.7%.

[23] Again, concerned with the regulatory costs associated with applications to determine the distributor’s rate of return, and for reasons of efficiency and effectiveness, the Régie feels that an approach tailored to the circumstances and one that respects both the interests of Gaz Métro and its customers needs to be adopted.

[24] Therefore, for 2013, the Régie feels it would be appropriate to suspend application of the AAF and maintain the rate of return on common equity set in 2012, that is, 8.90%.

[25] The Régie wishes to hear from the distributor and the other stakeholders on this proposal. ”

[8] In that same decision, the Régie called the participants to a hearing on this proposal. The hearing took place on February 14, 2013.

[9] On February 12, 2013, the Régie handed down procedural decision D-2013-024, which deals with request for information No. 2 from OC to the distributor. More specifically, in response to the request from OC for examination and cross-examination regarding the information that the distributor is required to produce, the Régie explained the following procedure that was to apply at the hearing on February 14, 2013:

“ [6] The purpose of the February 14, 2013 hearing is to hear the positions of the participants regarding the proposed handling of the issue of the distributor’s authorized rate of return stated by the Régie in its procedural decision D-2013-003. The Régie therefore feels that there is no need to hear witnesses or to proceed with cross-examinations. Therefore, each participant will be allowed to present whatever information it deems necessary through its counsel. ”

3. LEGAL CONTEXT

[10] As it indicated previously in procedural decision D-2013-003, the Régie proposes to suspend the Automatic Adjustment Formula (AAF) that was established in its decision D-2011-182 and maintain the rate of return on common equity that was set in 2012, that is, 8.90% (“the Proposal”).

[11] It seems an opportune time to review the events that led to this Proposal, as well as the jurisdictions and powers that are accorded to the Régie under the *Act respecting the Régie de l'énergie*⁴ (“the Act”) and the *Regulation respecting the procedure of the Régie de l'énergie*⁵ (“the Regulation”).

[12] Between 2007 and 2012, the Régie was asked, on five occasions, to decide on the distributor's rate of return⁶. Under the terms of the most recent application, the Régie set the rate of return at 8.90%, and after reviewing the applications and associated regulatory costs, it approved an AAF for three years, starting with 2013. The Régie also allowed the opportunity for the distributor to file another request “*if the situation so warrants*”⁷:

*“ [305] Without wishing to prevent Gaz Métro from filing an application with respect to the rate of return if the situation so warrants, the Régie believes that the effectiveness, efficiency and stability of the regulatory process support application of the AAF for a reasonably lengthy period before the factors in the formula are reviewed or before the method by which the ROE is established is reconsidered. **Therefore, the Régie approves application of the new AAF for a period of three years, starting with the 2013 rate case.** ”* [emphasis added]

[13] However, right from the first year the AAF was in effect, the distributor, without even questioning its relevance, alleged that the situation was such that the Régie needed to take another look at its rate of return⁸:

“ Gaz Métro remains favourable to maintaining the existing automatic adjustment formula. While the existence of such formulae over the past few years has not produced results that Gaz Métro feels are reasonable, it feels that it is in the best interests of all stakeholders that it be maintained in the future. In effect, Gaz Métro feels that in a situation of relative market stability, the Formula provides useful information on the type of adjustment that needs to be made to the authorized rate of return. ”

[14] In order to justify a new study, the distributor claimed that applying the AAF resulted in a rate of return of 7.92% on common equity for 2013. It felt that this rate

⁴ R.S.Q., c. R-6.01.

⁵ (2006) 138 G.O. II, 2279.

⁶ Files R-3630-2007 (D-2007-116), R-3662-2008 (D-2008-140), R-3690-2009 (D-2009-152), R-3752-2011 (D-2011-182) and R-3809-2012.

⁷ File R-3752-2011, decision D-2011-182.

⁸ Exhibit B-0156, page 5.

cannot be described as reasonable, based on the three criteria recognized by the courts for establishing the standard for a reasonable return. More specifically, Gaz Métro considers that the criterion of comparable investment has not been met, because of the instability in the financial markets, primarily the drop in risk-free rates. So the distributor has asked the Régie to set the rate of return for the 2013 at 9.3%⁹.

[15] The Régie's jurisdiction over the rate of return allowed to the distributor is described in section 32 of the Act as follows:

“ 32. The Régie, on its own initiative or on the application of any interested person, may

(1) determine the rate of return of the electric power carrier or the electric power distributor or of a natural gas distributor;

[...]” [emphasis added]

[16] Under this provision, in order to set the distributor's rate of return, the Régie may act *“on its own initiative or on the application of any interested person”*. Since this provision is not mentioned in section 25 of the Act, the Régie is therefore not required to hold a public hearing:

“ 25. The Régie shall hold a public hearing:

(1) when examining an application under section 48, 65, 78 or 80;

(2) when determining the elements making up operating costs and determining an amount pursuant to section 59;

(2.1) (subparagraph repealed);

(3) when so required by the Minister, on any energy matter.

The Régie may call a public hearing on any matter within its jurisdiction. ”

[17] In order to avoid any ambiguity regarding the Régie's jurisdiction with respect to rates of return, it would be helpful to recall the distinction between section 32 and the third paragraph of section 49 of the Act. Section 49 states that the Régie shall, when setting a rate under section 48 of the Act, *“allow a reasonable return on the rate base”*.

⁹ Exhibit B-0156, pages 31-32.

Since section 48 of the Act is governed by section 25 of the Act, the Régie must therefore “*hold a public hearing*”.

[18] The Régie’s jurisdiction under section 32 of the Act and under sections 48 and 49 of the Act are distinct from one another and are given different procedural handling. On this point, one can refer to decision D-2012-076¹⁰:

“ [68] *When, from time to time, it performs this exercise [determining a rate of return], basically by relying on expert testimony, the Régie sets an “authorized” rate of return. Next, this authorized rate will be used as an input in the setting of fair and reasonable rates.* ” [emphasis added]

[19] Therefore, the Régie first sets the rate of return for a particular distributor under the terms of section 32 of the Act. Then, based on sections 48 and 49 of the Act, when the Régie is setting rates, it ensures that those rates allow for a reasonable return on the rate base.

[20] In this case, the Régie has before it an application to set the distributor’s rate of return under section 32 of the Act. The Régie does not exercise this jurisdiction, or any other jurisdiction, in the abstract or in a vacuum. Under its mission, and with its powers and judicial knowledge, the Régie has the expertise and the jurisdiction that enables it to process a case based on a given context and determine the appropriate procedural path to be followed. Further, when it exercises one or other of its powers, the Régie must “*reconcile the public interest, consumer protection and the fair treatment*¹¹” of the distributor.

[21] As stated by authors Pierre Issalys and Denis Lemieux:¹²

“ *Because of their ongoing oversight role of an economic activity sector, regulatory bodies have powers that are much broader than those of administrative tribunals. This mission extends substantially beyond the jurisdictional function framework. Regulatory bodies do not limit themselves to issuing orders, as is typically done by an administrative or judicial tribunal, at the request of one of the parties to a contest regarding the way in which a rule of law*

¹⁰ File R-3693-2009.

¹¹ Section 5 of the Act.

¹² P. Issalys, D. Lemieux, *L’Action gouvernementale*, 3^e édition, Éditions Yvon Blais Inc., 2009, pages 460-462.

is applied to a situation that is relatively easy to delineate. They are asked to decide upon issues that are more “open”, taking into account a broader, and more mobile, factual context and based on rules that are not all legal standards and which, even when they are, often remain very flexible. The discretionary power framework of these bodies is therefore, in many cases, rather weak.

[...] Regardless of the type of decision required, because of the very multi-functional nature of their mission, regulatory bodies have their own information sources. Their investigational, documentation and analytical services are able to bring to the debates that unfold before them a relatively independent contribution, compared with the contributions of the other parties or intervenors. In this regard, regulatory bodies find themselves in a situation that is very much different from that of a judicial tribunal or most of the administrative tribunals. They are not exclusively dependent on the “evidence” brought before them by the governed parties. They are able to rely, not only on the specialized expertise of their members, but also on the often significant human and material resources at their disposal for the purpose of carrying out their regulatory missions. [...], while the judiciary rule only on matters that have been brought before them, based solely on what they have heard, members of regulatory bodies engage in a broader collegiality, and are assisted by permanent collaborators whose job it is to contribute to their decisions through studies, reports and opinions [...]” [emphasis added]

[22] Similarly, the Régie stated in its decision D-99-110:¹³

“Economic regulatory bodies such as the Régie enjoy, when it comes to evidence, a certain level of discretion that the courts do not have. It is generally acknowledged that they may make more liberal use of their own expertise and the doctrine of judicial notice. [...] “Their power to act proprio motu with regard to rates allows them to rely on their own experience and information that in their possession when it comes to making a decision.”” [emphasis added]

[23] It is against this background that the Régie, following a *prima facie* examination of the Application, and as indicated in its decision D-2013-003:

- noted that the rate of return of 7.92% generated by the AAF for 2013 is within the range of 7.71% to 9.60% set out in its decision D-2011-182¹⁴;

¹³ Exhibit C-UC-0003, pages 7-11.

¹⁴ Decision D-2011-182, paragraph 307.

- noted a material discrepancy between the forecast risk-free rate used in that decision in order to determine the rate of return and the forecast risk-free average established in August 2012 that are used in applying the AAF; the range used in 2011 was between 3.91% and 4.50%,¹⁵ while the August 2012 average was 2.7%¹⁶;
- proposed maintaining the rate of return on common equity set in 2012, that is, 8.90%.

[24] With respect to the application review process, the Régie established, in decision D-2013-003, a procedural method that differs from the one provided for in connection with the other items that needed to be reviewed as part of phase 2 of this file. It is useful to recall that, under section 12 of the Regulation, for any subject not requiring a public hearing, as is the case here, “*the Régie determines the appropriate procedure*” Also, sections 13, 14, 24 and 49 of the Regulations authorize the Régie to give specific instructions for the holding of a hearing and the procedure to be used:

“ 13. The Régie may issue directions for the conduct of the hearing and the preparation of a timetable and schedule, and fix the time within which participants are to present their positions.

14. The Régie may issue directions for the conduct of working sessions or any other procedure chosen.

24. Unless the Régie issues directions to the contrary, a participant in an oral hearing may call and examine witnesses, examine the other participants’ witnesses and present the participant’s position. [...]

49. The Régie must take all the necessary measures to ensure a fair, expeditious and simple proceeding.” [emphasis added]

[25] In summary, the Régie’s proposal and the process used in its review result from the powers granted to it under the Act and Regulations, and are part and parcel of its mission, specifically balancing the public interest, consumer protection and fair treatment of the distributor.

¹⁵ Decision D-2011-182, paragraph 211.

¹⁶ Exhibit B-0156, page 30.

4. POSITIONS OF PARTICIPANTS

4.1 DISTRIBUTOR'S POSITION

[26] For purposes of exercising the Régie's jurisdiction in matters involving rates, the distributor pointed out a number of "*considerations and objectives*", namely:¹⁷

- “(a) a balance between the public interest, consumer protection and fair treatment of the distributor within the meaning of section 5 [of the Act];
- (b) the pursuit of the objectives of efficiency, simplicity and streamlining of the rate-setting procedure;
- (c) seeking economies of resources and a reduction in the regulatory costs associated with an application to set a rate of return;

it being understood that, if adopting an automatic adjustment formula will foster the attainment of the objectives set out in sub-paragraphs 12(b) and (c), applying it should, over the long term, lead to the establishment of a reasonable rate of return based on the criteria and standard recognized for that purpose by the Régie and other Canadian regulators.”

[27] Given the statutory requirements that apply to the Régie, and taking into account these "*other considerations and objectives*", the distributor concluded that the Régie's approach is based on circumstances, even though the 8.90% rate of return is, in its estimation, "*a rate that is too low to meet the criterion of comparable investment*"¹⁸.

[28] Finally, referring to the predictable level of the risk-free rate for applying the AAF, the impending filing of the rate case for 2014, as well as efficiency gains and savings, the distributor feels that the AAF should be suspended for the years 2013 and 2014, and that, over the longer term, in 2015, the AAF will be deemed to be in its third and final year of application¹⁹.

¹⁷ Exhibit B-0243, paragraph 12.

¹⁸ Exhibit B-0243, paragraph 18.

¹⁹ Exhibit B-0243, paragraph 19.

4.2 IGUA'S POSITION

[29] At the outset, counsel for the IGUA stated that²⁰:

“ [...] I would be intellectually dishonest if I told you that the figure of 7.92% that would result from application of the automatic adjustment formula this year is not historically low; and I am cautious with my words.

First, it is undeniable that there has been an exceptional drop in the risk-free market rates since decision D-2011-182. At the time, there was mention of a range of from 3.91% to 4.5%, and with a literal application of the formula, based on forecasts from August two thousand twelve (2012), we would have been at two point seven percent. This is a drop, something that has virtually never been seen. [...]”

[30] Under these circumstances, the IGUA feels that the Régie's proposal represents a “*fair and reasonable compromise*” for 2013, and “*in an attempt to reduce the regulatory burden and cut back on regulatory costs*” it supports the distributor's suggestion to also maintain the rate of return at 8.90% for 2014²¹.

4.3 CFIB'S POSITION

[31] According to the CFIB, the process used by the Régie in connection with this case “*is not uninteresting*”. It claims to be “*interested in seeing the Régie develop alternative regulatory means of ensuring that there is fluidity in the cases [...]*”²².

[32] However, the CFIB feels that the process that has been used does not comply with the Régie's normal procedure, namely one in which the participants have no opportunity to assess the quality of the distributor's evidence, given the absence of any information, expertise or hearing on the merits. It states:

²⁰ Exhibit A-0095, page 48.

²¹ Exhibit A-0095, pages 51-52.

²² Exhibit A-0095, page 55.

“ It has been said that “the factual evidence and expertise put forth by Gaz Métro that analyzes in detail the most recent economic developments”. We do not disagree that there are perhaps, and certainly there are, a number of economic developments, but to do so without minimal debate seems to us to be not only problematic, but contrary to the spirit of the Act and contrary to the Act itself, and contrary to the very process that the Régie began as part of its public hearings.

Given such a fundamental and important issue, why would the intervenors be prevented from having a debate on the issue at a time when, with respect to the supply plan, there will be a debate on the incentives to be brought in? ”

[33] The CFIB also referred to the gap between the amounts committed to date by the distributor on its application for a change in the rate of return and the amounts granted to the participants under decision D-2013-003²³.

[34] Finally, the CFIB stated that the exemption from the rule set out in decision D-2011-182, namely the implementation of the AAF, could be contrary to the principle of decision-making consistency²⁴:

“ The principle of decision-making consistency invites the decider to examine each situation, asking him- or herself to what extent the reasons that previously justified a given result — the formula fifteen (15) months ago — in a similar situation, could justify the same result in a new situation under examination — the situation we have today — in such a way that the parties subject to jurisdiction do not receive, on the same issue, diametrically opposed responses... ”

[35] Briefly, the CFIB sees an “*inequity in the process*” used by the Régie in this case and feels that the procedure used to determine the rate of return “*could be tantamount to an arbitrary setting*”, which “*constitutes a dangerous precedent*”²⁵.

[36] Subsidiarily, the CFIB is of the view that a rate of 8.4% would be acceptable²⁶.

²³ Exhibit A-0095, page 58.

²⁴ Exhibit A-0095, page 61.

²⁵ Exhibit A-0095, page 69.

²⁶ Exhibit A-0095, page 70.

4.4 OC'S POSITION

[37] Like the CFIB, OC raised the issue of procedural fairness²⁷:

“ We find ourselves before you without any ammunition: no expertise, no evidence, and I would add no budget to enable us to carry out the necessary review. So, it is certain that from a procedural standpoint, I am one hundred percent (100%) in agreement with the CFIB that this must not constitute a precedent, what we are doing here today, because that poses some rather basic questions regarding the audi alteram partem rule. ”

[38] Therefore, in the absence of a full hearing on the rate of return, the position of OC is to maintain application of the AAF. OC added that the AAF established by the Régie “necessarily means that we have to take the good years with the bad years”. It added²⁸:

“If the formula means, this year, that Gaz Métro would have a higher rate of return than it should, would Gaz Métro have come before you to request a lower rate of return? The question answers itself. You cannot have a three-year formula and then say, “Well, we like the current formula when it suits us, but we don’t like it when it doesn’t suit us”. ”

[39] Regarding the regulatory costs associated with the rate of return, OC submits that the distributor has nothing to lose by filing an application each year²⁹:

“ [...] Year after year, they attempt to argue against the rate of return and it becomes a “win-win” situation: either they win their case when the rate of return rises, or they lose their case but, at any rate, the process has cost them nothing because the bill for it is paid by consumers. For consumers, it is a “lose-lose” proposition: either they gamble that the rate of return will increase, in which case their bills go up, and even if they win and the rate of return does not increase, they still have to foot the bill. [...] ”

²⁷ Exhibit A-0095, page 73.

²⁸ Exhibit A-0095, pages 75-76.

²⁹ Exhibit A-0095, page 77.

[40] According to OC, the regulatory costs incurred to date in connection with this subject can be described as “*unreasonable*” and should be borne by the distributor’s shareholders, not by its customers³⁰.

[41] Finally, as a subsidiary position, OC would be prepared to accept, for the years 2013 and 2014, a rate of return of 8.4% for a period of two years, which would be half-way between the 7.9% rate applied under the AAF and the one proposed by the Régie, that is, 8.90%³¹.

4.5 POSITION OF S.É./AQLPA

[42] S.É./AQLPA stated, primarily because of the increased costs associated with greenhouse gas emissions, that it is favourable to the Régie’s proposal, that is, “*that an exception be made to the mechanisms provided for setting the rate of return for a period of two years*”³².

[43] With regard to the procedure, S.É./AQLPA stated that the precedent rule (*stare decisis*) does not apply to the Régie and described its understanding of the current hearings as follows³³:

“ What we understand is that, in today’s hearing, the Régie does not have before it... is not required to decide, after today’s hearing, on the advisability of the application from Gaz Métro, to review, in two thousand twelve (2012), two thousand and thirteen (2013), the rate of return. It is not dealing with the merit of this application. What we understand is that the Régie has submitted a proposal that can be described as a regulatory relief in order to find out what the various participants would think of the middle-ground proposal from the Régie. ”

³⁰ Exhibit A-0095, page 80.

³¹ Exhibit A-0095, pages 81-82.

³² Exhibit A-0095, pages 84-86.

³³ Exhibit A-0095, pages 89-91.

4.6 UC'S POSITION

[44] The UC began by referring to its letter of February 7, 2013 to the Régie, in which it expressed its position with regard to the Proposal³⁴:

“ The UC wishes to point out that in the context where Gaz Métro agreed to and adopted the Régie’s proposal, the UC did not submit any evidence to the contrary and withdrew its initial request as formulated. The UC would not contest such a request out of a concern for regulatory efficiency in the handling of the case and in order to contain costs. However, in the circumstances where Gaz Métro stays with its initial application, the UC will object to suspension of the automatic adjustment formula as proposed by the Régie. ”

[45] It explained its understanding of the Régie’s approach as follows³⁵:

“ [...] I don’t think that the Régie has said, or even implied, in its decision, that seven point ninety-one (7.91) was not reasonable. What it said is that there seems to be evidence that could result in a debate. I am attempting to avoid a debate, so I am not offering you an arbitrarily selected rate. What you are saying is: I am continuing to apply last year’s rate, that is, the formula is not being applied, last year’s rate is being applied. ”

[46] However, the UC expressed reservations. If the applicable rate of return is the one from 2012, the regulatory costs incurred to date by the distributor with respect to the change in its rate of return, which it describes as “*astronomical*”³⁶, should not be included in the cost of service. It then posed the following question³⁷:

“ [...] have the returns of our neighbours and competitors been revised upward since two thousand twelve (2012)? Has there been this much difference? Do we need an expert and do we need to spend some three hundred thousand dollars (\$300,000) on an expert to determine this, to provide advance proof of reasonableness? ”

³⁴ Exhibit C-UC-0019.

³⁵ Exhibit A-0095, pages 98-99.

³⁶ Exhibit A-0095, page 104.

³⁷ Exhibit A-0095, page 97.

4.7 CONCLUSION

[47] To sum up, the distributor, the IGUA and S.É./AQLPA claim to favour the Proposal, as formulated by the Régie. The distributor, supported by the IGUA and S.É./AQLPA, suggests, without making it a condition of the Proposal's acceptance, that it be applied for a period of two years.

[48] The UC is also favourable to the Proposal, insofar as the regulatory costs incurred by the distributor and associated with the rate of return for 2013 not be included in the cost of service.

[49] The CFIB and OC feel that the Proposal and the process used by the Régie are not in compliance with the rules of procedural equity, and the CFIB also feels that the principle of decision-making consistency has not been respected. Finally, the CFIB and OC propose, subsidiarily, a rate of 8.4% and OC proposes that it be effective for a period of two years.

5. OPINION

[50] For the reasons described below, the Régie is of the opinion that the AAF be suspended and that the distributor's rate of return be maintained at 8.90%, but only for the year 2013.

[51] The comments from the participants can be categorized according to the following three themes: first, the issues of procedural fairness and decision-making consistency, secondly the issue of determining a rate of return of 8.4% or 8.90% for a period of two years and, finally, the issue of costs.

5.1 PROCEDURAL FAIRNESS AND DECISION-MAKING CONSISTENCY

[52] According to the CFIB and OC, the process proposed by the Régie for determining the rate of return does not follow the rules of procedural fairness. Since the normal procedure established by the Régie has not been followed (requests for information,

examination and cross-examination, oral submissions), they are not able to evaluate the distributor's claims regarding the reasonableness of the rate of return resulting from the AAF set by the Régie in decision D-2011-182.

[53] In exercising its powers, the Régie is required to apply the rules of procedural fairness, the content of which varies according to circumstances, the legal framework and the nature of the issue before it³⁸:

“ The principal characteristic of the audi alteram partem rule in common law is flexibility; the Supreme Court expressed it this way: [...] Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. ” [emphasis added]

[54] Regarding the Proposal, there is no doubt that the Régie has complied in all respects with the rules of procedural fairness. The Régie set out the process in its procedural decision D-2013-003 and all the participants were heard at the hearing held on February 14, 2013.

[55] The CFIB and OC questioned whether the Régie necessarily needs to proceed in full with the Application or can, as is the case here, formulate a proposal and decide on the matter after hearing the participants on that proposal.

[56] As stated in paragraph 3 of this decision, the Application is based on section 32 of the Act. Given its jurisdiction and powers, the Régie has full jurisdiction to formulate the Proposal. Consequently, the Régie is of the opinion that the Proposal and the process followed in reviewing it meet the test of procedural fairness.

[57] As for the issue of decision-making consistency, the decisions referred to by the CFIB relate to the existence of contradictory case law (jurisdictional conflict) because of divergent decisions by deciders within a single organization³⁹. But this is obviously not the case here. Moreover, the Régie noted that in one of its decisions, the Supreme Court specified that the decision-making autonomy of administrative tribunals takes precedence over the goal of decision-making consistency⁴⁰.

³⁸ P. Garant, *Droit administratif*, 6th edition, Éditions Yvon Blais, 2010, page 629.

³⁹ Exhibit C-CFIB-0019 and C-CFIB-0020.

⁴⁰ Exhibit C-CFIB-0019, pages 795-801.

5.2 RATE OF RETURN AT 8.4% OR AT 8.90% FOR A PERIOD OF TWO YEARS

[58] On the one hand, the distributor, given the predictable level of the risk-free rate used for application of the AAF, the imminent filing of the rate case for 2014, and savings and efficiency gains, would like to have the AAF suspension apply for the years 2013 and 2014. The IGUA and S.É./AQLPA are in favour of this request from the distributor.

[59] On the other hand, while the CFIB and OC are opposed to the Régie's proposal, they have proposed, as an alternative, setting the rate of return at 8.4%, that is, half-way between the AAF rate established in 2012 and the Régie's proposal.

[60] Finally, the UC is prepared to accept the Régie's proposal to the extent that the regulatory costs associated with review of the rate of return for this year are not borne by the distributor's customers. The CFIB and OC also questioned the amount of the costs incurred to date by the distributor⁴¹.

[61] Applying the Régie's proposal over a period of two years or setting the rate of return at 8.4% are areas that are outside the framework of the hearing for this case, which deals with the Proposal as presented by the Régie in its procedural decisions D-2013-003 and D-2013-0024.

[62] While the Proposal is not accepted unanimously, it has been favourably received by a number of the participants. Therefore, the Régie considers that enough elements have been brought forward at the hearing to enable it to determine that the Proposal ensures a balance between the public interest, consumer protection and fair treatment of the distributor.

5.3 COSTS INCURRED BY GAZ MÉTRO

[63] With respect to the issue of costs incurred to date by the distributor in presenting its Application, like some of the participants, the Régie is concerned by the amount involved.

⁴¹ Exhibit B-0242.

[64] Further, the Régie has held this concern since 1999, the year in which it established the AAF for the purpose of regulatory streamlining and to reduce public hearing costs⁴².

[65] In 2011, with its decision D-2011-182, the Régie implemented an AAF for a period of three years for reasons of efficiency and stability in the regulatory process. The Régie also recognized the possibility that the distributor could be allowed, before the end of this period, to file a new application, should the situation so require. The Régie feels that it would have been better for the distributor to present the changes in circumstances to it before incurring any costs.

[66] However, this hearing is not the appropriate forum for allowing or rejecting these types of expenses as part of the distributor's cost of service. This issue will receive further in-depth study as part of the review of the cost of service.

[67] Since the AAF will apply in 2014, however, the Régie expects that the distributor, if it feels that circumstances require that the suspension of the AAF be extended for one additional year, will submit an application dealing with the conditions for the advance opening [of the case] at the appropriate time, and before it incurs any significant costs, specifically costs involving outside resources (expert witnesses, legal expenses, etc.).

⁴² File R-3690-2009, decision D-2009-156, paragraph 201.

[68] **For these reasons,**

The Régie de l'énergie:

SUSPENDS application of the Automatic Adjustment Formula for the year 2013;

MAINTAINS the rate of return on common equity set in 2012, i.e. 8.90%.

Marc Turgeon
Commissioner

Jean-François Viau
Commissioner

Françoise Gagnon
Commissioner

Representatives

- Canadian Federation of Independent Business (Quebec section) (CFIB), represented by André Turmel;
- Gaz Métro Limited Partnership (Gaz Métro), represented by Vincent Regnault and Hugo Sigouin-Plasse;
- Groupe de recherche appliquée en macroécologie (GRAME), represented by Geneviève Paquet;
- Industrial Gas Users Association (IGUA), represented by Guy Sarault;
- Option consommateurs (OC), represented by Éric David;
- Regroupement des organismes environnementaux en énergie (ROÉÉ), represented by Franklin S. Gertler;
- Regroupement national des conseils régionaux de l'environnement du Québec (RNCREQ), represented by Annie Gariépy;
- Stratégies énergétiques and Association québécoise de lutte contre la pollution atmosphérique (S.É./AQLPA), represented by Dominique Neuman;
- TransCanada Energy Ltd. (TCE), represented by Pierre Grenier;
- TransCanada Pipelines Limited (TCPL), represented by Pierre Grenier;
- Union des consommateurs (UC), represented by Hélène Sicard;
- Union des municipalités du Québec (UMQ), represented by Steve Cadrin.