CANADA

PROVINCE DE QUÉBEC
DISTRICT DE [INSÉRER]

RÉGIE DE L'ÉNERGIE

No : R-4156-2021 Phase 2

Énergir, s.e.c.

(ci-après « **Énergir** »)

Gazifère inc.

(ci-après « **Gazifère** »)

Intragaz, s.e.c.

(ci-après « **Intragaz** »)

ci-après collectivement désignées les « **Demanderesses** »

LISTE DES SOURCES NON DISPONIBLES EN LIGNE

LÉGISLATION	**ONGLET**
Projet de règlement modifiant la Loi sur les normes d'efficacité énergétiques de certains appareils fonctionnant à l'électricité ou aux hydrocarbures, D 28-21, 2021, GOQ, 22 juin 2022, 154e année, nº25 à la p 3491;	**1**
JURISPRUDENCE	**ONGLET**
Bluefield Water Works & Improvement Co. v Public Service Commission of West Virginia 262 U.S. 679 (1923), à la p 692;	**2**
Northwestern Utilities Ltd. v. Edmonton (City), 1929 CanLII 39 (SCC), [1929] SCR 186, (j. Lamont) aux pp 192-193;	**3**
ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board) [2006] 1 RCS 140 au para 70;	**4**
British Columbia Electric Railway Co. v Public Utilities Commission, [1960] SCR 837;	**5**
Federal Power Commission v. Hope Natural Gas 320 U.S. 591 (1944), p. 603;	**6**

Sierra Club du Canada c. Canada (Ministre des Finances), [2002] 2 R.C.S. 522, para 53 et 60;	**7**
West Virginia et al v Environmental Protection Agency et al, 985 F (3d) 914 (DC Cir June 30, 2022);	**8**
Liberty Utilities (Gaz Nouveau-Brunswick) LP représentée par son associée commanditée, Liberty Utilities (Gaz Nouveau-Brunswick) Corp. c Commission de l'énergie et des services publics du Nouveau-Brunswick, 2022 NBCA 29;	**9**
TransCanada PipeLines Limited v National Energy Board et al., [2004] C.A.F. 149;	**10**
DOCTRINE	**ONGLET**
Leonard Saul Goodman, The Process of Ratemaking, vol 1 (Vienna, VA: Public Utilities Reports, 1998);	**11**
Leonard Saul Goodman, The Process of Ratemaking, vol 2 (Vienna, VA: Public Utilities Reports, 1998);	**12**
Jonathan A Lesser & Leonardo R Giacchino, Fundamentals of Energy Regulation (Vienna, VA: Public Utilities Reports, 2007);	**13**
Asa Hopkins, Alice Napoleon & Kenji Takahashi, ''Gas Regulation for a Decarbonized New York: Recommendations for Updating New York Gas Utility Regulations'' (June 29, 2020) Synapse Energy Economics;	**14**
Kathleen McShane & Michael Cleland, eds, "Fair return" in Gordon Kaiser and Bob Heggie Energy Law and Policy (Toronto: Carswell, 2011);	**15**
Laurence Booth, Sean Cleary et Pamela Peterson Drake, *Corporate Finance: Financial management in a global environment*, (USA: Wiley, 2014);	**16**
DÉCISIONS DES AUTRES RÉGIES CANADIENNES	**ONGLET**
AUC Decision 27084-D01-2022;	**17**
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Montréal, le 12 juillet 2022

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Règlement modifiant le Règlement sur le prélèvement du Comité paritaire de l'entretien d'édifices publics, région de Montréal

Loi sur les décrets de convention collective
(chapitre D-2, a. 22, al. 2, par. *i*)

1. L'article 5 du Règlement sur le prélèvement du Comité paritaire de l'entretien d'édifices publics, région de Montréal [1] est modifié par l'ajout, à la fin, de l'alinéa suivant :

« Le prélèvement et la contribution au régime de retraite collectif doivent être payés séparément. ».

2. Le présent règlement entre en vigueur le quinzième jour qui suit la date de sa publication à la *Gazette officielle du Québec*.

77499

Projet de règlement

Loi sur la Régie de l'énergie
(chapitre R-6.01)

Loi modifiant la Loi sur les normes d'efficacité énergétique et d'économie d'énergie de certains appareils fonctionnant à l'électricité ou aux hydrocarbures
(2021, chapitre 28)

Quantité de gaz naturel renouvelable devant être livrée par un distributeur
— Modification

Avis est donné par les présentes, conformément aux articles 10 et 11 de la Loi sur les règlements (chapitre R-18.1), que le projet de règlement modifiant le Règlement concernant la quantité de gaz naturel renouvelable devant être livrée par un distributeur, dont le texte apparaît ci-dessous, pourra être édicté par le gouvernement à l'expiration d'un délai de 45 jours à compter de la présente publication.

Ce projet de règlement a pour objet de préciser les matières, les sources d'énergie ou les processus de fabrication requis pour que le gaz naturel ou l'hydrogène de source renouvelable ajoutés au gaz naturel constituent du gaz de source renouvelable.

Ce projet de règlement vise également à augmenter la quantité minimale de gaz de source renouvelable devant être livrée annuellement par un distributeur et à établir selon quelles modalités la quantité d'hydrogène de source renouvelable livrée est comptabilisée. Il prévoit en outre que le gaz de source renouvelable doit être livré pour consommation finale dans le territoire sur lequel porte le droit exclusif d'un distributeur.

L'étude du dossier ne révèle aucun impact négatif touchant spécifiquement les petites et moyennes entreprises, mais il est estimé qu'il y aura des coûts supplémentaires pour les distributeurs et les consommateurs de gaz naturel et que ce surcoût pourrait constituer une contrainte à la compétitivité des entreprises.

Des renseignements additionnels concernant ce projet de règlement peuvent être obtenus en s'adressant à monsieur Xavier Brosseau, directeur des approvisionnements et des combustibles propres, ministère de l'Énergie et des Ressources naturelles, 5700, 4e Avenue Ouest, bureau A-422, Québec (Québec) G1H 6R1, téléphone : 418 627-6385, poste 708351, courriel : xavier.brosseau@mern.gouv.qc.ca.

Toute personne intéressée ayant des commentaires à formuler au sujet de ce projet de règlement est priée de les faire parvenir par écrit, avant l'expiration du délai de 45 jours mentionné ci-dessus, à madame Dominique Deschênes, sous-ministre associée à l'innovation et à la transition énergétiques, ministère de l'Énergie et des Ressources naturelles, 1300, rue du Blizzard, bureau 200, Québec (Québec) G2K 0G9.

Le ministre de l'Énergie et des Ressources naturelles,
JONATAN JULIEN

Règlement modifiant le Règlement concernant la quantité de gaz naturel renouvelable devant être livrée par un distributeur

Loi sur la Régie de l'énergie
(chapitre R-6.01, a. 112, 1er al., par. 4° et 5°;
2021, chapitre 28, a. 8, par. 1°)

1. Le titre du Règlement concernant la quantité de gaz naturel renouvelable devant être livrée par un distributeur (chapitre R-6.01, r. 4.3) est modifié par le remplacement de « naturel » par « de source ».

[1] Le Règlement sur le prélèvement du Comité paritaire de l'entretien d'édifices publics, région de Montréal a été approuvé par le décret numéro 2626-85 du 11 décembre 1985 (1985, *G.O.* 2, 6992) et a été modifié par les décrets numéros 673-2001 du 30 mai 2001 (2001, *G.O.* 2, 3574) et 1025-2011 du 28 septembre 2011 (2011, *G.O.* 2, 4595).

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2. Ce règlement est modifié par l'ajout, avant l'article 1, du suivant :

« **0.1.** Pour les fins de la Loi sur la Régie de l'énergie (chapitre R-6.01) et du présent règlement, le gaz naturel est de source renouvelable s'il est produit :

1° soit à partir de matière organique non fossile dégradée au moyen de processus biologiques, notamment par digestion anaérobie, ou au moyen de procédés thermochimiques, notamment par gazéification;

2° soit à partir d'hydrogène produit conformément au deuxième alinéa et de monoxyde ou de dioxyde de carbone non fossile.

Une autre substance ajoutée au gaz naturel est de source renouvelable s'il s'agit d'hydrogène qui est produit :

1° soit à partir de matière organique non fossile dégradée au moyen de procédés thermochimiques, notamment par gazéification;

2° soit par l'électrolyse de l'eau réalisée grâce à de l'électricité provenant exclusivement de sources d'énergie renouvelable;

3° soit lors d'un procédé industriel dont la fonction n'est pas d'obtenir cet hydrogène et qui est alimenté par de l'énergie provenant exclusivement de sources renouvelables. ».

3. L'article 1 de ce règlement est modifié :

1° dans le premier alinéa :

a) par l'insertion, après « annuellement », de « , pour consommation finale dans le territoire sur lequel porte son droit exclusif, »;

b) par le remplacement de « naturel » par « de source »;

2° dans le deuxième alinéa :

a) par l'ajout, à la fin du paragraphe 1°, des sous-paragraphes suivants :

« *d)* un taux de 0,07 à compter de l'année tarifaire du distributeur débutant en 2028;

e) un taux de 0,1 à compter de l'année tarifaire du distributeur débutant en 2030. »;

b) par la suppression, dans les paragraphes 2°, 3° et 4°, de « , soustrait de toute quantité de gaz naturel renouvelable »;

3° par l'ajout, à la fin, de l'alinéa suivant :

« Lorsque le gaz de source renouvelable livré par un distributeur est de l'hydrogène produit conformément au deuxième alinéa de l'article 0.1, seule une proportion de 33 1/3 % de cet hydrogène peut être comptabilisée dans le calcul du total des livraisons représenté par les variables LRA3, LRA2 et LPA1, de même que dans le calcul de la quantité de gaz de source renouvelable que le distributeur livre pour remplir son obligation prévue au présent article. ».

4. Le présent règlement entre en vigueur le 1er janvier 2023.

77574

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Questioned
As of: June 29, 2022 6:28 PM Z

Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n

Supreme Court of the United States

Argued January 22, 1923. ; June 11, 1923, Decided

No. 256.

Reporter
262 U.S. 679 *; 43 S. Ct. 675 **; 67 L. Ed. 1176 ***; 1923 U.S. LEXIS 2676 ****

BLUEFIELD WATER WORKS & IMPROVEMENT COMPANY v. PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA ET AL.

Prior History: [****1] ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

ERROR to a judgment of the Supreme Court of Appeals of West Virginia, sustaining an order of a state commission fixing water rates, in a suit brought by the plaintiff in error to set the order aside.

Core Terms

percent, depreciation, rates, estimate, valuation, prices, plant, property value, confiscatory, final figure, prescribing, arrived, rate of return, circumstances, reproduction, cases, working capital, rate making, fair value, ascertain

Case Summary

Procedural Posture
Plaintiff public utility company appealed from an order of the Supreme Court of Appeals of the State of West Virginia, which upheld rates that were fixed by defendant state public service commission pursuant to defendant's statutory authority to fix just and reasonable rates.

Overview

Plaintiff public utility company furnished water to a city and its inhabitants. Defendant state public service commission, authorized by statute to fix just and reasonable rates, made its order prescribing rates. Pursuant to *W. Va. Code § 16*, plaintiff instituted proceedings to suspend and set aside the order. Plaintiff alleged that the order was repugnant to the *U.S. Const. amend. XIV* and deprived it of its property without just compensation and without due process of the law, and denied it equal protection. A final order was entered by the state supreme court of appeals which denied plaintiff relief and dismissed the petition. Plaintiff brought the case before the Court on a writ of error. Upon review the Court reversed the order. The Court held that it was erroneous for defendant not to accord proper, if any, weight to the enhanced costs of construction as of the time when the inquiry was made regarding the rates which resulted in a valuation that was considerably and materially less than what would have been reached by a fair and just consideration of all of the facts, and which was insufficient to yield plaintiff a reasonable return on the value of its property.

Outcome
The Court reversed the order which upheld the rates that were fixed by defendant state public service commission because defendant's failure to accord proper weight to the enhanced costs of construction as of the time when the inquiry was made resulted in a valuation of plaintiff public utility company's property that was considerably and materially less than what would have been reached by a fair and just consideration of all of the facts.

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Scope

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN1[] **Constitutional Law, Substantive Due Process**

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 *U.S. Const. amend. XIV*.

Energy & Utilities Law > Utility
Companies > Rates > General Overview

HN2[] **Utility Companies, Rates**

The value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, increases in value since it is acquired, the company is entitled to the benefit of such increase.

Energy & Utilities Law > Utility
Companies > Rates > General Overview

HN3[] **Utility Companies, Rates**

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.

Energy & Utilities Law > Utility
Companies > Rates > General Overview

HN4[] **Utility Companies, Rates**

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

Energy & Utilities Law > ... > Rates > Ratemaking Factors > Rate of Return

Energy & Utilities Law > Utility
Companies > Rates > General Overview

HN5[] **Ratemaking Factors, Rate of Return**

The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

Energy & Utilities Law > Utility
Companies > Rates > General Overview

HN6[] **Utility Companies, Rates**

The question whether a rate yields such a return as not to be confiscatory depends upon circumstances, locality and risk, and no proper rate can be established for all cases.

Lawyers' Edition Display

Headnotes

Appeal -- Federal question -- Supreme Court of the United States. --

Headnote:

Questioning the validity of an order prescribing rates for a public utility, made under legislative authority, on the ground of repugnance to the Federal Constitution, raises a Federal question subject to review by the Supreme Court of the United States.

[For other cases, see Appeal and Error, 1645-1716, in Digest Sup. Ct. 1908.]

Public utilities -- rates -- consideration of present reproduction cost. --

Headnote:

Reproduction cost at present prices cannot be ignored

in fixing rates for a public utility established before the war.

Constitutional law -- due process -- judgment of court on facts. --

Headnote:

A public utility is, under the due process clause of the Federal Constitution, entitled to the independent judgment of the court as to both law and facts upon review of rates fixed by a public service commission.

[For other cases, see Constitutional Law, IV. b, 8, c, in Digest Sup. Ct. 1908.]

Constitutional law -- rates -- what are confiscatory. --

Headnote:

Rates which are not sufficient to yield a reasonable return upon the value of the property used at the time it is being used to render public service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property, in violation of the Federal Constitution.

[For other cases, see Constitutional Law, IV. b, 7. c, in Digest Sup. Ct. 1908.]

Public utilities -- rates -- to what is public utility entitled. --

Headnote:

A public utility is entitled to such rates as will permit it to earn a return upon the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties, but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

Public utilities -- right to return to which entitled. --

Headnote:

The return on investment which a public utility should be permitted to earn should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit, and enable it to raise money necessary for the proper discharge of its public duties.

Water -- rates -- allowance too low. --

Headnote:

Six per cent is too low to constitute just compensation for supplying a city with water where, for many years, the income was less than 5 per cent, and, for part of the time, approximated 3 per cent after an allowance for depreciation.

Syllabus

1. A judgment of the highest court of a State which upholds an order of a state commission fixing the rates of a public utility company over the objection that the rates are confiscatory and the order hence violative of the *Fourteenth Amendment*, is reviewable here, on the constitutional question, by writ of error. P. 683.

2. In estimating the value of the property of a public utility corporation, as a basis for rate regulation, evidence of present reproduction costs, less depreciation, must be given consideration. P. 689. Southwestern Bell Telephone Co. v. Public Service Commission, ante, 276.

3. A public utility corporation, challenging as confiscatory rates imposed by a state commission, is entitled, under the *due process clause of the Fourteenth Amendment*, to the independent judgment of the court as to both law and facts. Id.

4. Rates which are not sufficient to yield a reasonable return on the [****2] value of the property used, at the time it is being used to render the service of the utility to the public, are unjust, unreasonable and confiscatory; and their enforcement deprives the public utility company of its property, in violation of the *Fourteenth Amendment*. P. 690.

5. A public utility is entitled to such rates as will permit it to earn a return on the value of the property it employs for the convenience of the public equal to that generally being made at the same time, and in the same region of the country, on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly

profitable enterprises or speculative ventures. P. 692.

6. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain its credit, and enable it to raise the money necessary for the proper discharge of its public duties. Id.

7. A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities [****3] for investment, the money market, and business conditions generally. Id.

8. In this case, 6% was inadequate to constitute just compensation. P. 695.

89 W. Va. 736, reversed.

Counsel: Mr. Alfred G. Fox, with whom Mr. Joseph M. Sanders was on the briefs, for plaintiff in error.

Mr. Russell S. Ritz for defendants in error.

The judgment of the Supreme Court of Appeals of West Virginia herein does not declare valid any statute of the State or any authority exercised under the State, which is repugnant to the Constitution, treaties, or laws of the United States.

The most that can be claimed is that the Commission, acting under lawful authority in reaching the conclusion from a disputed state of facts, found and fixed the value of plaintiff's property for rate making purposes at an amount less than some other tribunal may have fixed and determined from a like state of facts. A judgment based upon such a state of facts does not raise such a federal question as gives a right of review from this Court to the highest court of the State by a writ of error.The Public Service Commission and the Supreme Court of Appeals acted under valid state authority. The authority or law under which [****4] these respective tribunals exercised jurisdiction not being repugnant to any federal law, what conclusions they may have reached from a given state of facts which furnishes the basis for the judgment complained of herein, does not present a question subject to be reviewed by writ of error. Such questions can be reviewed only on petition for a writ of certiorari. *Zucht v. King, 260 U.S. 174*; *Stadelman v. Miner, 246 U.S. 544*; *Philadelphia & Reading Coal Co. v. Gilbert, 245 U.S. 162*; *Ireland v. Woods, 246 U.S. 323*.

It is not here contended that a public utility is not entitled to a fair return upon the fair and reasonable value of all of its plant and property then used and useful in the public service, but we submit that the fair and reasonable value of a public utility's plant and property is not to be ascertained by adopting only one method of valuation to the exclusion of all other known methods and elements of value. A valuation of a public utility, such as would be fair to the public as well as the utility, should take into consideration the original cost or investment in the utility; the market value of its stocks or bonds, if any; the probable earning capacity of the property; [****5] the various rates it has received and the rate it is receiving; the amounts necessary to meet operating exenses; the ability of the utility to adequately perform the public service; the history of the operations of the utility; and perhaps other elements; and after taking all of these into consideration, fix a value that will be fair both to the public and to the utility. *Smyth v. Ames, 169 U.S. 466*; *San Diego Land & Town Co. v. Jasper, 189 U.S. 439*; *San Diego Land & Town Co. v. National City, 174 U.S. 739*; *Knoxville v. Knoxville Water Co., 212 U.S. 1*; *Des Moines Gas Co. v. Des Moines, 238 U.S. 153*; *Willcox v. Consolidated Gas Co., 212 U.S. 19*.

If by taking one element or method of value a conclusion is reached which is out of all proportion with a conclusion that may be reached by taking other methods, then that measure or method should be adopted which will, after taking into consideration all of the elements of value, make a fair and reasonable value on the utility's property, used and useful in the public service.

The reproduction theory of public utility valuation has been usually resorted to by the public to safeguard itself against values of public utilities, based upon [****6] inflated and watered stock investments, purporting to represent original cost. Practically all, if not all, of the decisions of this Court, in which this theory of valuation was even considered, were cases of this character; and even in them this Court has never held that the reproduction new theory at present prices was an exclusive method by which public utility values are to be determined. *Smyth v. Ames, supra*; Whitten, Valuation Public Service Corporations, c. V, p. 82, et seq.; 2 Wyman, Public Service Corporations, c. 32; *Coal & Coke Ry. Co. v. Conley, 67 W. Va. 129*; *Minnesota Rate Cases, 230 U.S. 352*.

If determining public utility values for rate-making purposes is to be accomplished by using the reproduction new theory at present prices, to the exclusion of every other element and method of values,

then it may well be seen to what uncertain, as well as unfair, consequences it may lead. If the market is abnormally low and a valuation on this theory is made at such a time, without, taking into consideration past costs or other elements of value, it would be manifestly unfair to the utility. Likewise, if this theory of valuation is used at a time of abnormally high prices [****7] in the market, such as was produced by the World War, and all other methods and elements of values are excluded, then it would be most unfair to the public, who would be expected to pay rates of return upon such unfair value so reached. *Potomac Electric Power Co. v. Public Utilities Comm., 276 Fed. 330*; New York Pub. Serv. Comm. No. 5, P.U.R. 930; *Newton v. Consolidated Gas Co., 258 U.S. 165*.

Opinion by: BUTLER

Opinion

[*683] [**675] [***1179] MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff in error is a corporation furnishing water to the city of Bluefield, West Virginia, [**676] and its inhabitants. September 27, 1920, the Public Service Commission of the State being authorized by statute to fix just and reasonable rates, made its order prescribing rates. In accordance with the laws of the State (§ 16, c. 15-0, Code of West Virginia) the company instituted proceedings in the Supreme Court of Appeals to suspend and set aside the order. The petition alleges that the order is repugnant to the *Fourteenth Amendment*, and deprives the company of its property without just compensation and without due process of law and denies it equal protection of the laws. [****8] A final judgment was entered denying the company relief and dismissing its petition. The case is here on writ of error.

1. The city moves to dismiss the writ of error for the reason, as it asserts, that there was not drawn in question the validity of a statute or an authority exercised under the State, on the ground of repugnancy to the Federal Constitution.

The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the State. The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this Court. The motion to dismiss will be denied. See *Oklahoma Natural Gas Co. v. [*684] Russell, 261 U.S. 290*, and cases cited; also *Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287*.

2. The commission fixed $460,000 as the amount on which the company is entitled to [****9] a return.It found that under existing rates, assuming some increase of business, gross earnings for 1921 would be $80,000 and operating expenses $53,000, leaving $27,000, the equivalent of 5.87 per cent., or 3.87 per cent. after deducting 2 per cent. allowed for depreciation. It held existing rates insufficient to the extent of $10,000. Its order allowed the company to add 16 per cent. to all bills, excepting those for public and private fire protection. The total of the bills so to be increased amounted to $64,000. That is, 80 per cent. of the revenue was authorized to be increased 16 per cent., equal to an increase of 12.8 per cent. on the total, -- amounting to $10,240.

As to value. The company claims that the value of the property is greatly in excess of $460,000. Reference to the evidence is necessary. There was submitted to the commission evidence of value which it summarized substantially as follows:

Aller au tableau1

[****10] [*685] It was shown that the prices prevailing in 1920 were nearly double those in 1915 and prewar time. The company did not claim value as high as its estimate of cost of construction in 1920. Its valuation engineer testified that in his opinion the value of the property was $900,000, -- a figure between the cost of construction in 1920, less depreciation, and the cost of construction in 1915 and before the war, less depreciation.

The commission's application of the evidence may be stated briefly as follows:

As to "a", supra. The commission deducted [***1180] $204,000 from the estimate (details printed in the margin), [1] leaving approximately $421,000 which it

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[1]

Aller au tableau2

contrasted with the estimate of its own engineer, $397,964.38 (see "d", supra).It found that there should be included $25,000 for the Bluefield Valley Water Works plant in Virginia, 10 per cent. for going value, and $10,000 for working capital. If these be added to $421,000 there results $500,600. This may be compared with the commission's final figure, $460,000.

[****11] [*686] As to "b" and "c", supra. These were given no weight by the commission in arriving at its final figure, $460,000. It said:

"Applicant's plant was originally constructed more than twenty years ago, and has been added to from time to time as the progress and development of the community required. For this reason, it would be unfair to its consumers to use as a basis for present fair value the abnormal prices prevailing during the recent war period, but when, as in this case, a part of the plant has been constructed or added to during that period, in fairness to the applicant, consideration must be given to the cost of such expenditures made to meet the demands of the public."

[**677] As to "d", supra. The commission taking $400,000 (round figures) added $25,000 for Bluefield Valley Water Works plant in Virginia, 10 per cent. for going value, and $10,000 for working capital, making $477,500. This may be compared with its final figure, $460,000.

As to "e" supra. The commission on the report of its statistician found gross investment to be $500,402.53. Its engineer applying the straight line method found 19 per cent. depreciation. It applied 81 per cent. to [****12] gross investment and added 10 per cent. for going value and $10,000 for working capital, producing $455,500. [2] This may be compared with its final figure, $460,000.

As to "f", supra. It is necessary briefly to explain how this figure, $452,520.53, was arrived at. Case No. 368 was a proceeding initiated by the application of the company for higher rates, April 24, 1915. The commission made a valuation as of January 1, 1915. There was presented two estimates of reproduction cost less depreciation, one by a valuation engineer engaged by the company [*687] and the other by a valuation engineer engaged by the city, both "using the same method." An inventory made by the company's engineer was accepted as correct by the city and by the commission. The method "was that generally employed by courts and commissions in arriving at the value of public utility properties under this method", and in both estimates [****13] "five year average unit prices" were applied. The estimate of the company's engineer was $540,000 and of the city's engineer, $392,000. The principal differences as given by the commission are shown in the margin.[3] The commission disregarded

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[2] As to "e". $365,445.13 represents investment cost less depreciation. The gross investment was found to be $500,402.53, indicating a deduction on account of depreciation of $134,957.40, about 27 per cent. as against 19 per cent. found by the commission's engineer.

[3]

Aller au tableau3

	Company	**City**
	engineer.	**engineer.**
1. Preliminary cost	$14,455	$1,000
2. Water rights	50,000	Nothing.
3.Cutting pavements over mains	27,744	Difference in depreciation allowed
$49,000	Preliminary organization and development cost	14,500
Bluefield Valley Water Works Plant	25,000	Water rights
50,000	Excess overhead costs	39,000
Paving over mains	28,500	[sic]
$204,000		

both estimates and arrived at $360,000. It held that the best basis of valuation was the net investment, i.e., the total cost of the property less depreciation. It said: "The books of the company show a total gross investment since its organization, of $407,882.00, and that there has been charged off for depreciation from year to year the total sum of $83,445.00, leaving a net investment of $324,427.00. . . . From an examination of the books . . . it appears that the records of the company have been remarkably well kept and preserved. It, therefore, seems that when a plant is developed under these conditions the net investment which of course means the total gross investment less depreciation is the very best basis of valuation for rate making purposes and that the other methods above referred to should [*688] be used only when it is impossible to arrive at the true investment. Therefore, after making due allowance for capital [***1181] [****14] necessary for the conduct of the business and considering the plant as a going concern, it is the opinion of the commission that the fair value for the purpose of determining reasonable and just rates in this case of the property of the applicant company, used by it in the public service of supplying water to the City of Bluefield and its citizens, is the sum of $360,000.00, which sum is hereby fixed and determined by the Commission to be the fair present value for the said purpose of determining the reasonable and just rates in this case."

233

4. Pipe lines from gravity springs

22,072

15,442

5. Laying cst iron street mains

19,252

15,212

6. Reproducing Ada Springs

18,558

13,027

7. Superintendence and Engineering

20,515

13,621

8.General contingent cost

16,415

5,448

$189,011

$63,983

In its report in No. 368, the commission did not indicate the amounts respectively allowed for going value or working capital. If 10 per cent. be added for the former, and $10,000 for the latter (as [****15] fixed by the commission in the present case) there is produced $366,870, to be compared with $360,000, found by the commission in its valuation as of January 1, 1915. To this it added $92,520.53 expended since, producing $452,520.53. This may be compared with its final figure, $460,000.

The State Supreme Court of Appeals holds that the valuing of the property of a public utility corporation and prescribing rates are purely legislative acts not subject to judicial review except in so far as may be necessary to determine whether such rates are void on constitutional or other grounds; and that findings of fact by the commission based on evidence to support them will not be reviewed by the court. *Bluefield v. Water Works Co., 81 W. Va. 201, 204*; *Coal and Coke Co. v. Public Service Commission, 84 W. Va. 662, 678*; *Charleston v. Public Service Commission, 86 W. Va. 536*.

In this case (*89 W. Va. 736*) it said (p. 738):

"From the written opinion of the commission we find that it ascertained the value of the petitioner's property for rate making [then quoting the commission] 'after [*689] maturely and carefully considering the various methods presented for the ascertainment of [****16] fair value and giving such weight as seems proper to every element involved and all the facts and circumstances disclosed by the record.'"

The record clearly shows that the commission in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted [**678] evidence; and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disregarded. This was erroneous. Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, ante, 276. Plaintiff in error is entitled under the *due process clause of the Fourteenth Amendment* to the independent judgment of the court as to both law and facts. *Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289*, and cases cited.

We quote further from the court's opinion (pp. 739, 740):

"In our opinion the commission was justified by the law and by the facts in finding as a basis for rate making the sum of $460,000.00 . . . In our case of *Coal & Coke Ry. Co. v. Conley, 67 W. Va. 129*, it is said: 'It seems to be generally [****17] held that, in the absence of peculiar and extraordinary conditions, such as a more costly plant than the public service of the Community requires, or the erection of a plant at an actual, though extravagant, cost, or the purchase of one at an exorbitant or inflated price, the actual amount of money invested is to be taken as the basis, and upon this a return must be allowed equivalent to that which is ordinarily received in the locality in which the business is done, upon capital invested in similar enterprises. In addition to this, consideration must be given to the nature of the investment, a higher rate [*690] being regarded as justified by the risk incident to a hazardous investment.'

"That the original cost considered in connection with the history and growth of the utility and the value of the services rendered constitute the principal elements to be considered in connection with rate making, seems to be supported by nearly all the authorities."

The question in the case is whether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power. ***HN1***[↑] Rates which are not sufficient to yield a reasonable return on the value of the property [****18] 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. "What the company is entitled to ask is a fair return upon the [***1182] value of that which it employs for the public convenience." *Smyth v. Ames, (1898) 169 U.S. 466, 547*.

"There must be a fair return upon the reasonable value of the property at the time it is being used for the public. . . .

"And we concur with the court below in holding that ***HN2***[↑] the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase." *Willcox v. Consolidated Gas Co., (1909) 212 U.S. 19, 41, 52*.

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be reasonable judgment having its basis [****19] in a proper consideration of all relevant facts." *Minnesota Rate Cases, (1913) 230 U.S. 352, 434*.

[*691] "And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property." *Smyth v. Ames, supra, 546, 547*.

". . . .The making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." Minnesota Rate Cases, supra, 454.

In *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, supra*, applying the principles of the cases [****20] above cited and others, this Court said:

"Obviously, the Commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914 and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per centum . . .It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of today."

[*692] It is clear that the court also failed to give proper consideration to the higher cost of construction in 1920 over that in 1915 and before the war, and failed to give weight to cost of reproduction less depreciation on the basis of 1920 prices, or to the testimony of the

company's valuation engineer, based on present [****21] and past costs of construction, that the property in his opinion, was worth $900,000.The final figure, $460,000, was arrived [**679] at substantially on the basis of actual cost less depreciation plus ten per cent. for going value and $10,000 for working capital. This resulted in a valuation considerably and materially less than would have been reached by a fair and just consideration of all the facts. The valuation cannot besustained. Other objections to the valuation need not be considered.

3. Rate of return. The state commission found that the company's net annual income should be approximately $37,000, in order to enable it to earn 8 per cent. for return and depreciation upon the value of its property as fixed by it. Deducting 2 per cent. for depreciation, there remains 6 per cent. on $460,000, amounting to $27,600 for return. This was approved by the state court.

The company contends that the rate of return is too low and confiscatory. HN3[] What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. HN4[] A public utility is entitled to such [****22] rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding [***1183] risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in [*693] highly profitable enterprises or speculative ventures. HN5[] The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

In 1909, this Court, in Willcox v. Consolidated Gas Co., 212 U.S. 19, 48-50, held that HN6[] the question whether a rate yields such a return as not to be confiscatory depends upon circumstances, locality and risk, and that no proper [****23] rate can be established for all cases; and that, under the circumstances of that case, 6 per cent. was a fair return on the value of the property employed in supplying gas to the City of New York, and that a rate yielding that return was not confiscatory. In that case the investment was held to be safe, returns certain and risk reduced almost to a minimum -- as nearly a safe and secure investment as could be imagined in regard to any private manufacturing enterprise.

In 1912, in Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U.S. 655, 670, this Court declined to reverse the state court where the value of the plant considerably exceeded its cost, and the estimated return was over 6 per cent.

In 1915, in Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 172, this Court declined to reverse the United States District Court in refusing an injunction upon the conclusion reached that a return of 6 per cent. per annum upon the value would not be confiscatory.

In 1919, this Court in Lincoln Gas Co. v. Lincoln, 250 U.S. 256, 268, declined on the facts of that case to approve a finding that no rate yielding as much as 6 per [*694] cent. on the invested capital could be regarded as [****24] confiscatory. Speaking for the Court, Mr. Justice Pitney said:

"It is a matter of common knowledge that, owing principally to the world war, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

In 1921, in Brush Electric Co. v. Galveston, the United States District Court held 8 per cent. a fair rate of return. [4]

In January, 1923, in Minneapolis v. Rand, the Circuit Court of Appeals of the Eighth Circuit (285 Fed. 818, 830) sustained, as against the attack of the city on the ground that it was excessive, 7 1/2 per cent., found by a special master and approved by the District Court as a fair and reasonable return on the capital investment -- the value of the property.

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[4] This case was affirmed by this Court, June 4, 1923, ante, 443.

Investors take [****25] into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it. In [*695] this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved. For example, the average rate of return on the total cost of the property from 1895 to 1915, inclusive, was less than 5 per cent.; from 1911 to 1915, inclusive, [**680] about 4.4 per cent., without allowance for depreciation.In 1919 the net operating income was approximately $24,700, leaving $15,500, approximately, or 3.4 per cent. on $460,000 fixed by the commission, after deducting 2 per cent. for depreciation. In 1920, the [****26] net operating income was approximately $25,465, leaving $16,265 for return, after allowing for depreciation. Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent. upon the value of the property [***1184] is substantially too low to constitute just compensation for the use of the property employed to render the service.

The judgment of the Supreme Court of Appeals of West Virginia is reversed.

Concur by: BRANDEIS

Concur

MR. JUSTICE BRANDEIS concurs in the judgment of reversal for the reasons stated by him in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, supra.*

Tableau1 (Retour au texte des documents connexes**)**

a. Estimate by company's engineer on basis of reproduction new, less depreciation, at prewar prices	$624,548.00
b. Estimate by company's engineer on basis of reproduction new, less depreciation, at 1920 prices	$1,194,663.00
c. Testimony of company's engineer fixing present fair value for rate making purposes	$900,000.00
d. Estimate by commission's engineer on basis of reproduction new, less depreciation at 1915 prices, plus additions since December 31, 1915, at actual cost, excluding Bluefield Valley Water Works, water rights and going value	$397,964.38
e. Report of commission's statistician showing investment cost less depreciation	$365,445.13
f. Commission's valuation, as fixed in Case No. 368 ($360,000) plus gross additions to capital since made ($92,520.53)	$452,520.53

Tableau1 (Retour au texte des documents connexes**)**

Tableau2 (Retour au texte des documents connexes**)**

Tableau2 (Retour au texte des documents connexes**)**

Tableau3 (Retour au texte des documents connexes**)**

Tableau3 (Retour au texte des documents connexes**)**

Fin du document

3

1928
*Oct. 24.
1929
*Feb. 5.

NORTHWESTERN UTILITIES, LIMITED ..... APPELLANT;

AND

THE CITY OF EDMONTON AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF ALBERTA..... RESPONDENTS.

THE CITY OF EDMONTON..... APPELLANT;

AND

NORTHWESTERN UTILITIES, LIMITED, AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF ALBERTA ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Public utilities—Public Utilities Act, Alta.—Hearings and investigations by Board of Public Utility Commissioners—Powers of Board—Obtaining of evidence—Absence of evidence—Order of Board fixing rates for gas supply in municipality by franchise holder—Return on investment—Inclusion in "rate base" of discount on sale of bonds—Appeal from Board's order—"Question of law."

The Board of Public Utility Commissioners of Alberta made an order in 1922 fixing rates chargeable for gas proposed to be supplied in the city of Edmonton by the predecessor of the appellant company. The Board fixed the rates on the basis of an allowance of 10% as a fair return on the investment in the enterprise, and in determining the "rate base" (the amount to be considered as invested in the enterprise) it included as a capital expenditure a sum which was the discount on the sale of the company's bonds. The rates were to continue in force for three years from the date on which gas was first

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

supplied. In 1926 the appellant company applied for continuation of the rates. On this application the city objected to such a high rate of return and to the inclusion in the rate base of the item for bond discount. The Board continued said item in the rate base, but reduced the return to 9% "in view of the elements which go to make up the rate base, and in view of the altered conditions of the money market." The parties appealed (by leave) to the Appellate Division, Alta., and then to this Court, the company against the reduction of the rate of return, and the city against the inclusion of the bond discount item in the rate base. The company contended that no evidence was adduced before the Board of "altered conditions of the money market," and that, without hearing evidence upon the point and giving the company opportunity to establish that the conditions of the money market had remained unaltered since 1922, the Board acted without jurisdiction in making the reduction. Under s. 47 of *The Public Utilities Act, 1923,* Alta., c. 53, as amended 1927, c. 39, an appeal lies from the Board upon a question "of jurisdiction" or "of law," upon leave obtained.

Held 1. The company's last mentioned contention involved a "question of law," and therefore it had a right to appeal.

2. The city's appeal failed; the question raised thereon was not one of jurisdiction or law.

3. The company's appeal failed. The Board had power to reduce the rate of return, notwithstanding that at the hearing before it no witnesses testified as to altered conditions of the money market. The company's contention that to alter the rate of return would be unfair to its shareholders who had invested in the enterprise after the order fixing the rates in 1922, was not a matter open for consideration upon the appeal, as it did not involve a question of jurisdiction or law.

Per Rinfret and Lamont JJ.: A consideration of ss. 21 (4) (5), 25, 43, and 44 of the said Act, the purposes of the Act, and the extent of the powers vested in the Board, leads to the conclusion that the intention of the legislature was to leave it largely to the Board's discretion to say in what manner it should obtain the information required for the proper exercise of its functions; it was not to be bound by the technical rules of legal evidence, but was to be governed by such rules as, in its discretion, it thought fit to adopt. An inference that it had not the proper evidence before it as to the altered conditions of the money market could not be drawn from the fact that no oral testimony in respect thereof was given at the hearing. The company had notice that a reduction was sought and that the city was attacking the methods and principles adopted in fixing the rate of return in 1922. This put the whole question of a fair return at large and informed the company that it would have to establish to the Board's satisfaction every element and condition necessary to justify a continuation of the 10% rate; and there was nothing in the record to justify the conclusion that the company had not the opportunity of making proof at the hearing as to the conditions of the money market.

Per Smith J.: The Board has power to reduce the rate of return without evidence; the question of a fair rate of return is largely one of opinion, hardly capable of being reduced to certainty by evidence, and appears to be one of the things entrusted by the statute to the judgment of the Board.

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NORTH-WESTERN UTILITIES LTD. v. CITY OF EDMONTON.

APPEALS by Northwestern Utilities, Limited, and the City of Edmonton, respectively, from the dismissal by the Appellate Division of the Supreme Court of Alberta of their respective appeals from the award of the Board of Public Utility Commissioners for the Province of Alberta fixing rates to be paid by consumers of natural gas, for the supply of which within the city of Edmonton the said company, Northwestern Utilities, Limited, has a franchise.

The company applied to the Board for an order continuing the rates which had been fixed for a certain period by an order of the Board made in 1922. The Board made an award fixing the rates, from which each party appealed to the Appellate Division. Under s. 47 of *The Public Utilities Act* of Alberta, 1923, c. 53, as amended 1927, c. 39, an appeal lies from the Board to the Appellate Division "upon a question of jurisdiction or upon a question of law," if leave to appeal is obtained as therein provided. Such leave to appeal was obtained, it being reserved to each party to move before the Appellate Division to set aside the order granting leave to the other party, on the ground that the matters as to which leave to appeal was given did not involve any question of law or jurisdiction.

The company's objection to the Board's award was that it fixed the rates on the basis of an allowance of only 9%, instead of 10% which was allowed under the order made in 1922, as the "rate of return" on the investment in the enterprise. The Board in its award said:—

> In view of the elements which go to make up the rate base, and in view of the altered conditions of the money market, the Board believes it is justified in reducing the rate of return that the company shall be allowed, to nine per cent., and the Board's estimates are on that basis.

The company contended that there was before the Board no evidence of any "altered conditions of the money market," that the "elements which go to make up the rate base" were the same as in 1922, and afforded no reason for changing the rate of return, that to reduce the rate of return would be unfair to its shareholders, who had invested in the enterprise after the order fixing the rates in 1922, that the money was invested and the plant constructed on the strength of the principles laid down in the 1922 award, and that it was clearly understood that the principles then adopted would govern all future revisions.

The city's objection to the award was that, in determining the "rate base" (the amount to be considered as invested in the enterprise) it included (as it had done in the 1922 award) as a capital expenditure a sum which was the discount on the sale of the company's bonds.

The Appellate Division dismissed both appeals (no written reasons being given). Subsequently it made separate orders giving each party leave to appeal to the Supreme Court of Canada. On an application by both parties in the Supreme Court of Canada, the appeals were consolidated.

By the judgment of this Court both appeals were dismissed with costs.

E. Lafleur K.C. and *H. R. Milner K.C.* for Northwestern Utilities, Limited.

O. M. Biggar K.C. for the City of Edmonton.

The judgment of Anglin C.J.C. and Mignault J., was delivered by

ANGLIN C.J.C.—While, with my brother Smith, I incline to the view that the appellant company may have some reason to complain of unfairness in the judgment of the Board of Public Utility Commissioners reducing the rate of return from 10% to 9%, I agree with the conclusion reached by my brother Lamont and concurred in by my brother Smith that it is not open to us to entertain the appeal of the company on that ground. It does not seem to raise either a question of law or jurisdiction within the purview of the statute on which the right of appeal rests. I would dismiss the appeal.

The judgment of Rinfret and Lamont JJ. was delivered by

LAMONT J.—These are separate but consolidated appeals by the Northwestern Utilities, Limited (hereinafter called the Company) and the City of Edmonton, respectively, from the dismissal by the Appellate Division of the Supreme Court of Alberta of their respective appeals against the award made by the Board of Public Utility Commissioners on an application by the company for an

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NORTH-WESTERN UTILITIES LTD. v. CITY OF EDMONTON.

Lamont J.

order fixing the price to be paid by the consumers of natural gas within the city. Subsequent to the dismissal of the appeals, the Appellate Division made separate orders giving each party leave to appeal to this Court. By a further order the appeals were consolidated.

The company is the successor of the Northern Alberta Natural Gas Development Company, which held a franchise from the city for the supply of natural gas to the inhabitants thereof.

Disputes having arisen between the Development Company and the city, and an action having been commenced, the parties, on August 28, 1922, agreed to a settlement of their difficulties. One of the terms of the settlement was that the prices or rates to be paid by the inhabitants of the city should be fixed by the Board of Public Utility Commissioners. An application was accordingly made to the Board, the parties were heard, and, on November 27, 1922, an order was made fixing the rates to be paid. These rates were to continue in force for three years from the date on which gas was first supplied to consumers.

In order to fix just and reasonable rates, which it was the duty of the Board to fix, the Board had to consider certain elements which must always be taken into account in fixing a rate which is fair and reasonable to the consumer and to the company. One of these is the rate base, by which is meant the amount which the Board considers the owner of the utility has invested in the enterprise and on which he is entitled to a fair return. Another is the percentage to be allowed as a fair return.

In the award of 1922, which came into operation in the fall of 1923, the Board included in the rate base as a capital expenditure the sum of $283,900 (10% of the cost of plant) as, " an allowance for the promotion and financing " of the company, and the sum of $650,000 which was the discount on the sale of the Development Company's bonds. It also determined that 10% was a fair return on the investment. The rates thus fixed by the Board, with certain alterations made with the consent of all parties, continued in force for three years. In October, 1926, the appellant company, which had succeeded to the rights of the Development Company, applied to the Board for an order continuing the rates for such period as the Board might see fit. In its

reply to the application the city submitted (par. 23) that the order of November, 1922, should in certain respects be disregarded. One of these was the following:—

(*e*) Rate of Return. It is submitted that the methods and principles adopted in the fixing of the rate of return are erroneous and that the rate of return allowed is too high.

The city also protested against including in the rate base the item for the promotion and financing of the company and the item for bond discount.

In its answer to the city's reply the company alleged (par. 10) that at the hearing in 1922 the city was fully and adequately represented, that it had submitted evidence, that upon the award being delivered it raised no objection to any part thereof, and, therefore, was now estopped from contending that the principles then laid down were wrong in principle or in fact.

In its award the Board continued both the above mentioned sums in the rate base, but reduced the rate of return to the company from 10% to 9%. The reason assigned by the Board for this reduction is as follows:—

In view of the elements which go to make up the rate base, and in view of the altered conditions of the money market, the Board believes it is justified in reducing the rate of return that the Company shall be allowed, to nine per cent., and the Board's estimates are on that basis.

From the award the parties appealed, first to the Appellate Division of the Supreme Court of Alberta, and now to this Court. The company appealed against the reduction of the rate of return on its capital expenditure to 9%. Referring to the reasons given by the Board for making the reduction the company in its factum says:—

1. The city adduced no evidence as to "altered conditions of the money market" and

2. "The elements which go to make up the rate base" in 1927 are the same as in 1922.

The city appealed against the inclusion in the rate base of the item of the bond discount above mentioned.

The *Public Utilities Act* allows an appeal from the Board only upon a question of jurisdiction, or upon a question of law, and even then only when leave to appeal has first been obtained from a judge of the Appellate Division.

As against the company's appeal the city raises the preliminary objection that no question either of jurisdiction or law is involved therein. In my opinion the objection cannot be sustained. The substance of the company's

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appeal is that the Board in making a reduction in the rate of return did so for two reasons, one of which was the "altered conditions of the money market," and that of this no evidence was adduced before the Board. The company contends that, without hearing evidence upon the point, and without giving it an opportunity to establish that the conditions of the money market had remained unaltered since 1922, the Board was without jurisdiction to make the reduction. This contention was not stated in this form in the order granting leave to appeal to the Appellate Division, but the fixing of the rate of return at 9% only, was there set out as an error of the Board in respect of which leave to appeal was granted.

Whether or not the Board can properly base an order (in part at least) on the existence of a state of fact of which no evidence was adduced before it at the hearing and as to which the party affected has not had any opportunity of being heard is, in my opinion, a question of law which depends for its answer upon the construction to be placed upon the *Public Utilities Act*.

I am, therefore, of opinion that the company had a right to appeal.

The question involved in this appeal is: Had the Board jurisdiction to find as a fact how the conditions of the money market had altered between November, 1922, and July, 1927, without any witness testifying at the hearing that an alteration had taken place.

As the Board was determining what would be a fair return on the capital invested by the company in the enterprise, and as it reduced the return from 10% to 9%, it can, I think, be taken that by "the altered conditions of the money market" the Board meant that the returns for money invested in securities in which moneys were ordinarily invested had decreased during the period in question. In other words, that the rate of interest obtainable for moneys furnished for investment was, generally speaking, lower by a certain percentage in 1927 than it was in 1922. That, in my opinion, is all that is involved in the finding.

The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other

hand, would secure to the company a fair return for the capital invested. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise. In fixing this net return the Board should take into consideration the rate of interest which the company is obliged to pay upon its bonds as a result of having to sell them at a time when the rate of interest payable thereon exceeded that payable on bonds issued at the time of the hearing. To properly fix a fair return the Board must necessarily be informed of the rate of return which money would yield in other fields of investment. Having gone into the matter fully in 1922, and having fixed 10% as a fair return under the conditions then existing, all the Board needed to know, in order to fix a proper return in 1927, was whether or not the conditions of the money market had altered, and, if so, in what direction, and to what extent.

For the city it was argued that, as one of the statutory powers of the Board was to deal with the financial affairs of local authorities (s. 20 (*d*)), and as this included the power to authorize the issue of new debentures by these authorities and to determine the rate of interest to be paid thereon and also the power to order a variation of the rate of interest payable upon any debt of the local authority (s. 103), the Board must necessarily be familiar with the rate of interest prevailing from time to time and therefore did not require to have witnesses called to furnish it with information which in the regular performance of its duty it was obliged to possess. In view of the powers and duties of the Board under the Act there is, in my opinion, considerable to be said for the city's contention. It is not necessary, however, to determine this question, for in the statute itself I find sufficient to justify the conclusion that the intention of the Legislature was to leave it largely to the discretion of the Board to say in what manner it should obtain the information required for the proper exercise of its functions.

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The material provisions of the Act on this point are as follows:—

21. (4) The Board may in its discretion accept and act upon evidence by affidavit or written affirmation or by the report of any officer or engineer appointed by it or obtained in such other manner as it may decide.

(5) All hearings and investigations before the Board shall be governed by rules adopted by the Board, and in the conduct thereof the Board shall not be bound by the technical rules of legal evidence.

Section 25 provides that upon a complaint being made to the Board that any proprietor of a public utility has unlawfully done or unlawfully failed to do something relating to a matter over which the Board has jurisdiction, the Board shall "after hearing such evidence as it may think fit to require" make such order as it thinks fit under the circumstances. Section 43 provides that the Board may "appoint or direct any person to make an inquiry and report upon any application * * * before the Board." And by section 44 the Board may "review, rescind, change, alter or vary any decision or order made by it." A perusal of these statutory provisions and a consideration of the purposes of the Act and the extent of the powers vested in the Board leads me to the conclusion that the Legislature intended to create a Board which in the exercise of its functions should not be bound by the technical rules of legal evidence but which would be governed by such rules as, in its discretion, it thought fit to adopt (s. 21 (5)). We have not been made acquainted with the rules, if any, adopted by the Board to govern its investigations. Nor do we know what information it possessed as to the altered conditions of the money market; but, as it had authority to act on evidence "obtained in such manner as it may decide" (s. 21 (4)), an inference that it had not the proper evidence before it cannot be drawn from the fact that no oral testimony in respect thereof was given at the hearing. If, in this case, the Board had asked its secretary to inquire from the various financial institutions in Edmonton if there had been any alteration in the conditions of the money market between 1922 and 1927, and the secretary had reported that there had been a certain decrease in the returns from invested capital, would it have been necessary to call witnesses to verify the report? In my opinion it would not. Nor would it have been necessary to afford to either party an opportunity to controvert before the

Board the information so obtained. Then would it have been necessary to mention in the award that the fact that such altered conditions had been established to the satisfaction of the Board by a report of its secretary? I can find nothing in the Act requiring mention to be made of the evidence or of the manner of obtaining it.

Reference was made to s. 86, which provides that no order involving any outlay, loss or depreciation to the proprietor of any public utility or to any municipality or person shall be made without due notice and full opportunity to all parties concerned to make proof to be heard at a public sitting of the Board, except in the case of urgency. A reduction in the rate of return to the company would, in my opinion, come within this section. The Board was, therefore, without jurisdiction to make the reduction unless the company had notice that a reduction was sought and had an opportunity of proving that under the circumstances existing at the time of the hearing the existing rate of return was fair and reasonable. That the company had notice that the city was demanding a reduction is beyond question (par. 23 (*e*)). It had more. It had notice that the city was attacking the methods and principles adopted in fixing the rate of return in 1922. This, in my opinion, put the whole question of a fair return at large and informed the company that it would have to establish to the satisfaction of the Board every element and condition necessary to justify a continuation of the 10% rate. The company does not say that it was refused an opportunity of putting in evidence as to the conditions of the money market. Nowhere does it deny that it could have put in evidence had it so desired. What it does say is that the city did not adduce evidence on the point and that no witnesses were called to testify before the Board in regard thereto. There is nothing before us to justify an inference that the company was not at liberty to call witnesses as to the conditions of the money market had it so desired. Moreover, in the order which the company obtained giving it leave to appeal it did not even suggest that it had no opportunity of submitting evidence as to the existing market conditions. The ground upon which the company relied to meet the city's demand for a reduction, as set out in the answer which it filed, was that as the city had ac-

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cepted the award when it was delivered and had raised no objection thereto, it was now precluded from seeking to set aside the principles upon which the rate of return was based. In its factum it went further and contended that, even if there was no estoppel, the principles then adopted should now be adhered to because it was on the strength of their having been adopted that the shareholders of the company invested their money in the enterprise. This contention cannot be made effective. In the first place, it involves neither a question of jurisdiction nor of law. In the second place, it is the duty of the Board to fix rates which, in its opinion, will be fair and reasonable at the time the order is made and for the period for which they are fixed. If any wrong principle or erroneous view has been adopted it is the duty of the Board at the next revision to correct the error. The argument that it would be unfair to the shareholders now to alter the rate of return is not a matter open for consideration on appeal. Moreover, when these shareholders invested their money they knew that the rates fixed were to be in force for three years only and that it would be the duty of the Board on the next revision to fix rates which at that time would be fair and reasonable under the circumstances then existing.

Our attention was also called to s. 47 (1*a*) as indicating an intention that evidence must be taken on all material points. That subsection reads as follows:—

(1a) On the hearing of any appeal referred to in subsection 1 of this section no evidence other than the evidence which was submitted to the Board upon the making of the order appealed from shall be admitted, and the Court shall proceed either to confirm or vacate the order appealed from, and in the latter event shall refer the matter back to the Board for further consideration and redetermination.

In my opinion this subsection means no more than that no new evidence is to be admitted on appeal.

The appeal of the company should therefore be dismissed with costs.

The appeal of the city should likewise be dismissed with costs. The items which should be included in the rate base cannot, in my opinion, be considered a question of jurisdiction or of law.

SMITH J.—The City of Edmonton had made an agreement with the Northern Alberta Natural Gas Development Company, by which the company obtained a fran-

chise to supply natural gas to the city, and agreed to construct the necessary works. The company failed to construct the works, and the city sued for damages for breach of contract. The actions were settled by an agreement dated 22nd August, 1922, under which the determination of the rates to be charged by the company for gas was referred to the Board of Public Utility Commissioners, and the company was, within six months after the fixing of the rates, to deposit $50,000 with the city, which was to be forfeited to the city as liquidated damages in case the company did not complete the construction of the works as agreed.

A rate hearing was held by the Board after this settlement, at which the company and the city were represented, and the Board made an award, setting out a rate basis and fixing prices for gas on this basis.

The difficulty about proceeding with the works had been the procuring of capital on the basis of prices provided in the original agreement and amendments made. The whole object of fixing a rate base and prices in advance of construction was to facilitate financing by the company. It would necessarily be on the basis of the award that investors would buy bonds and stock of the company. The company had the option of proceeding with the works or abandoning them and forfeiting the $50,000, after seeing the award. In July following the making of the award, the company assigned its franchise and property to the appellant, the Northwestern Utilities, Limited, which, by sale of its bonds and stock, raised the necessary capital, constructed the works, and put them in operation. The rate to be charged for gas was fixed by the award for three years, and at the end of this period the company applied to the Board for continuation of the rates fixed by the award. The rate base fixed by the Board in the award of 1922 contained many items, such as total investment, operating cost, depletion reserve, reserve for repayment of cost of plant, total necessary revenue, amounts of gas to be sold, and the rate of return on capital to be allowed. It is evident that, with the exception of the last of these items, the amounts fixed must have been estimates, liable to be varied by actual results.

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The rate of return to be allowed on capital was fixed in the award at 10%, not based on the ordinary rate of money on the market at the time or on an estimated future rate, but on consideration of the rate that would induce investors to risk their capital in an extremely hazardous and doubtful venture. At the hearing before the Board in 1922, the company had asked a 12% rate of return on capital, and the city had conceded 10%, which the Board fixed, though it stated that under the circumstances a return of more than 10% would not seem to be unjust. The reason set out for not fixing this higher rate was that it might so restrict the market that the higher rate would not compensate for the restriction of the market, and would therefore not be to the advantage of the company. It is, however, stated that in case of future revision, it may be found desirable, under certain circumstances, to increase this rate.

On the revision at the end of three years, this rate was not increased, but was reduced from 10% to 9%, at the instance of the city, and this reduction constitutes the ground of appeal.

In the reasons given by the Board in fixing the new rates, it is pointed out that, where rates have been fixed in advance of construction and financing, the Board is not precluded from subsequently making changes that may appear from subsequent reconsideration to be necessary, and it is then stated that

> those investing in such a case must depend on the fairness of the Board in seeing that the Company is allowed a fair and reasonable return upon its investment, but the Board may, and indeed it should, take into consideration the circumstances under which such investment was made.

In discussing these circumstances in reference to a request by the city for elimination from the rate base of the 1922 award of the item for bond discount, the Board says:

> There is, moreover, an additional factor to be considered in the present case and that is, that in 1922 the inclusion of the allowance for bond discount was practically agreed to by the city in its case and the item was not questioned by the city until at the recent hearing. It is only fair to assume that the fact of the inclusion of the bond discount in the rate base formed part of the inducement for the making of the investment. Under the circumstances, therefore, the Board does not feel justified in adopting the City's contention in this regard.

This lays down a principle with which one heartily agrees, and which applies exactly to the city's application for reduction of the rate of return on capital fixed in the award

of 1922 at 10%. The Board fixed this rate with the assent of the city, and this rate, coupled with the suggestion by the Board that it might be increased, "formed part of the inducement for the making of the investment."

The altered condition of the money market, given as a reason for the reduction of the rate to 9%, seems to me to have no bearing on the matter. The representation to the investor in 1922 was, for the risk you take in placing your capital in a hazardous undertaking, you will be allowed as a basis in fixing rates to be charged for gas a return of 10%. What the regular money market might be three years later could have nothing to do with the decision to invest. The whole question was, viewing the risk, and the chances, as matters then stood, was the chance of 10% on the money worth the risk of a bad investment, with the possibility of the loss of all or part of the capital?

The Board then, in my opinion, laid down a proper principle, and applied it in other instances, but failed to apply it to this item, as to which I think it was particularly applicable. The question is, can this Court set aside the finding of the Board as to this item on the appeal? I agree with my brother Lamont that, whether or not under the Act the Board was entitled to reduce the rate to 9% without evidence, because of a change in money market conditions, is a question of law, and that there is therefore a right of appeal, and it is with some regret that I feel bound to agree with him that the Board had jurisdiction to make the change in rate without evidence, and without giving the company an opportunity to offer evidence. The question of a fair rate of return on a risky investment is largely a matter of opinion, and is hardly capable of being reduced to certainty by evidence, and appears to be one of the things entrusted by the statute to the judgment of the Board.

I am not entirely in accord with the observations of my brother Lamont in reference to the sending out of someone to gather evidence of the state of the money market and acting on that party's report without the knowledge of the company. The objection in such a case would not be the failure to set out in the award the fact of such evidence and its nature, but the failure to disclose it to the company with an opportunity to answer it. If it were a case where, evi-

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dence being necessary, it had been taken in the manner suggested, or otherwise, and a finding based on it without disclosure of it to the company and an opportunity to answer it, I would regard such a proceeding as contrary to elementary principles of justice, and as affording, under the statute, a ground for setting the award as to this item aside and referring it back for reconsideration. It does not, however, appear that any evidence was taken, and as stated, I have concluded that there was power to make the change without evidence.

I therefore concur with my brother Lamont in the disposal of this appeal.

Appeals dismissed with costs.

Solicitors for Northwestern Utilities, Limited: *Milner, Carr, Dafoe & Poirier.*

Solicitor for the City of Edmonton: *John C. F. Bown.*

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

v.

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

and

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

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

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

et

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

INDEXED AS: ATCO GAS AND PIPELINES LTD. *v.* ALBERTA (ENERGY AND UTILITIES BOARD)

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

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

RÉPERTORIÉ : ATCO GAS AND PIPELINES LTD. *c.* ALBERTA (ENERGY AND UTILITIES BOARD)

Référence neutre : 2006 CSC 4.

N^{o} du greffe : 30247.

2005 : 11 mai; 2006 : 9 février.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Citée par le juge Binnie (dissident)

Atco Ltd. c. Calgary Power Ltd., [1982] 2 R.C.S. 557; *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29; *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19; *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353; *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, 1er mars 1991; *Re Natural Resource Gas Ltd.*, C.É.O., RP-2002-0147, EB-2002-0446, 27 juin 2003; *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision nº E84116, 12 octobre 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Décision nº E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision nº E84115, 12 octobre 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984.

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Public Utilities Board Act, R.S.A. 2000, c. P-45, ss. 36, 37, 80, 85(1), 87, 89 to 95, 101(1), (2), 102(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BASTARACHE J. —

1. Introduction

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

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

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

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

LE JUGE BASTARACHE —

1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1.1 *Overview of the Facts*

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

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

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

1.1 *Aperçu des faits*

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

1.2 *Historique judiciaire*

1.2.1 La Commission

1.2.1.1 *Décision 2001-78*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

En ce qui concerne son pouvoir de répartir le produit net de la vente, la Commission a dit : 12

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Analysis

2.1 *Issues*

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

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

2.2 *Standard of Review*

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

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

2. Analyse

2.1 *Questions en litige*

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

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

2.2 *Norme de contrôle*

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

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

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

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

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

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

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

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

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

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

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

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

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

[TRADUCTION]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.1 General Principles of Statutory Interpretation

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

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

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

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

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

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

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

2.3.1 Principes généraux d'interprétation législative

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

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

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

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

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

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

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

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

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

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

2.3.2 Pouvoir explicite : sens grammatical et ordinaire

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

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

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

GUA

26. . . .

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

. . .

(d) without the approval of the Board,

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

. . .

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

AEUBA

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

. . .

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

. . .

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

. . .

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

[TRADUCTION]

GUA

26. . . .

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

. . .

d) sans l'autorisation de la Commission,

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

. . .

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

AEUBA

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

. . .

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

. . .

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

. . .

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PUBA

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

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

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

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

PUBA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.3 Implicit Powers: Entire Context

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

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

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

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

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

2.3.3 Pouvoir implicite : contexte global

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

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

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

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

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

51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

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

Le pouvoir discrétionnaire que le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA confèrent à la Commission n'est donc pas absolu. Comme le dit ATCO, la Commission doit l'exercer en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois (voir Sullivan, p. 154-155). Dans le même ordre d'idées, le passage suivant de l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1756, se révèle pertinent :

> Les pouvoirs d'un tribunal administratif doivent évidemment être énoncés dans sa loi habilitante, mais ils peuvent également découler implicitement du texte de la loi, de son économie et de son objet. Bien que les tribunaux doivent s'abstenir de trop élargir les pouvoirs de ces organismes de réglementation par législation judiciaire, ils doivent également éviter de les rendre stériles en interprétant les lois habilitantes de façon trop formaliste.

Il incombe à notre Cour de déterminer l'intention du législateur et d'y donner effet (*Bell ExpressVu*, par. 62) sans franchir la ligne qui sépare l'interprétation judiciaire de la formulation législative (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 26; *Bristol-Myers Squibb Co.*, par. 174). Cela dit, cette règle permet l'application de « la doctrine de la compétence par déduction nécessaire » : sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l'objectif du régime législatif : voir Brown, p. 2-16.2; *Bell Canada*, p. 1756. Par le passé, les cours de justice canadiennes ont appliqué la doctrine de manière à investir les organismes administratifs de la compétence nécessaire à l'exécution de leur mandat légal :

> [TRADUCTION] Lorsque l'objet de la législation est de créer un vaste cadre réglementaire, le tribunal administratif doit posséder les pouvoirs qui, par nécessité pratique et déduction nécessaire, découlent du pouvoir réglementaire qui lui est expressément conféré.

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Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

I understand the City's arguments to be as follows: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 *Historical Background and Broader Context*

The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

Pursuant to *The Public Utilities Act*, the first public utility board was established as a

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (H.C. Ont.), p. 658-659, conf. par (1983), 42 O.R. (2d) 731 (C.A.) (voir également *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601 (C.A.); *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174).

52 Voici quelles sont selon moi les prétentions de la Ville : (1) en acquittant leurs factures, les clients acquièrent un droit sur les biens du propriétaire du service public et ont donc droit à une partie du profit tiré de leur vente; (2) le pouvoir de la Commission d'autoriser ou non la vente des biens d'un service public emporte, par nécessité, celui d'assujettir l'autorisation à une certaine répartition du produit de la vente. La doctrine de la compétence par déduction nécessaire est au cœur de la deuxième prétention de la Ville. Je ne peux faire droit ni à l'une ni à l'autre de ces prétentions qui, à mon avis, sont diamétralement contraires au droit applicable, comme le révèle ci-après l'examen du contexte global.

53 Après un bref rappel historique, je me pencherai sur la principale fonction de la Commission, l'établissement des tarifs, puis sur les pouvoirs accessoires qui peuvent être déduits du contexte.

2.3.3.1 *Historique et contexte général*

54 Les services publics sont réglementés en Alberta depuis la création en 1915 de l'organisme appelé Board of Public Utility Commissioners en vertu de la loi intitulée *The Public Utilities Act*, S.A. 1915, ch. 6, inspirée d'une loi américaine similaire : H. R. Milner, « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101, p. 101. Bien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question.

55 Suivant *The Public Utilities Act*, la première commission des services publics, composée de

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three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

56 The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

57 In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA, the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b));

2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a); PUBA, s. 101(2)(a));

3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));

4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and

trois membres, surveillait de manière générale tous les services publics (art. 21), enquêtait sur les tarifs (art. 23), rendait des ordonnances concernant l'équipement (art. 24) et exigeait que chacun des services publics lui remette la liste complète de ses tarifs (art. 23). Signalons pour les besoins du présent pourvoi que la loi de 1915 exigeait également d'un service public qu'il obtienne de l'organisme l'autorisation de vendre un bien en dehors du cours normal de ses activités (al. 29g)).

La Commission a été créée en février 1995 par le fusionnement de l'Energy Resources Conservation Board et de la Public Utilities Board (voir Institut canadien du droit des ressources, *Canada Energy Law Service : Alberta* (éd. feuilles mobiles), p. 30-3101). Dès lors, toutes les affaires qui étaient du ressort des organismes fusionnés relevaient de sa compétence exclusive. La Commission a tous les pouvoirs, les droits et les privilèges des organismes auxquels elle a succédé (AEUBA, art. 13, par. 15(1); GUA, art. 59).

Outre les pouvoirs prévus dans la loi de 1915, qui sont pratiquement identiques à ceux que confère actuellement la PUBA, la Commission est aujourd'hui investie des pouvoirs exprès suivants :

1. rendre une ordonnance concernant l'amélioration du service ou du produit (PUBA, al. 80b));

2. autoriser l'entreprise de services publics à émettre des actions, des obligations ou d'autres titres d'emprunt (GUA, al. 26(2)a); PUBA, al. 101(2)a));

3. autoriser l'entreprise de services publics à aliéner ou à grever ses biens, concessions, privilèges ou droits, notamment en les louant ou en les hypothéquant (GUA, sous-al. 26(2)d)(i); PUBA, sous-al. 101(2)d)(i));

4. autoriser la fusion ou le regroupement des biens, concessions, privilèges ou droits de l'entreprise de services publics (GUA, sous-al. 26(2)d)(ii); PUBA, sous-al. 101(2)d)(ii));

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5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50 percent of the outstanding capital stock of the owner of the public utility (GUA, s. 27(1); PUBA, s. 102(1)).

It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the

5. autoriser la vente d'actions de l'entreprise de services publics à une société ou l'inscription dans ses registres de toute cession d'actions à une société lorsque la vente ou la cession ferait en sorte que cette société détienne plus de 50 pour 100 des actions en circulation du propriétaire de l'entreprise de services publics (GUA, par. 27(1); PUBA, par. 102(1)).

58 Il appert donc de cette énumération qu'une entreprise de services publics a une marge de manœuvre très limitée. Il n'est fait mention ni du pouvoir d'attribuer le produit de la vente ni du pouvoir discrétionnaire de porter atteinte au droit de propriété.

59 Même lorsque le législateur a décidé de créer la Commission en 1995, il n'a pas jugé opportun de modifier la PUBA ou la GUA pour donner au nouvel organisme le pouvoir d'attribuer le produit d'une vente. Pourtant, la question suscitait déjà la controverse (voir, p. ex., *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, et *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116). Selon un principe bien établi, le législateur est présumé connaître parfaitement le droit existant, qu'il s'agisse de la common law ou du droit d'origine législative (voir Sullivan, p. 154-155). Il est également censé être au fait de toutes les circonstances entourant l'adoption de la nouvelle loi.

60 Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la GUA que son principal mandat, à l'égard des entreprises de services publics, est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première (voir Milner, p. 102; Brown, p. 2-16.6). S'exprimant au nom des juges majoritaires dans *Atco Ltd.*, le juge Estey a abondé dans ce sens (p. 576) :

Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par

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community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board. [Emphasis added.]

In fact, even the Board itself, on its website (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm), describes its functions as follows:

> We regulate the safe, responsible, and efficient development of Alberta's energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City's first argument.

2.3.3.2 *Rate Setting*

62 Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:

> . . . the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. . . . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".

(R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory

les entreprises de services publics. Un régime de réglementation aussi vaste doit, pour être efficace, comprendre le droit de contrôler les réunions ou, pour reprendre l'expression du législateur, « l'union » des entreprises et installations existantes. Cela a sans aucun doute un rapport direct avec la fonction de fixation des tarifs qui constitue un des pouvoirs les plus importants attribués à la Commission. [Je souligne.]

Voici d'ailleurs comment la Commission décrit elle-même ses fonctions sur son site Internet (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm) :

> [TRADUCTION] La Commission réglemente l'exploitation sûre, responsable et efficiente des ressources énergétiques de l'Alberta — pétrole, gaz naturel, sables bitumineux, charbon et électricité — ainsi que les pipelines et les lignes de transport servant à l'acheminement vers les marchés. En ce qui a trait aux services publics, elle réglemente les tarifs des services de gaz naturel, d'électricité et d'eau appartenant au privé et le niveau de service y afférent, ainsi que les principaux réseaux de transport de gaz en Alberta, afin que les clients obtiennent des services sûrs et fiables à un prix juste et raisonnable. [Je souligne.]

Le processus par lequel la Commission fixe les tarifs est donc fondamental et son examen s'impose pour statuer sur la première prétention de la Ville.

2.3.3.2 *Établissement des tarifs*

La réglementation tarifaire a plusieurs objectifs — viabilité, équité et efficacité — qui expliquent le mode de fixation des tarifs :

> [TRADUCTION] . . . l'entreprise réglementée doit être en mesure de financer ses activités et tout investissement nécessaire à la poursuite de ses activités. [. . .] L'équité est liée à la redistribution de la richesse dans la société. L'objectif de la viabilité suppose déjà que les actionnaires ne doivent pas réaliser un « trop faible » rendement (défini comme la gratification requise pour assurer l'investissement continu dans l'entreprise), alors que celui de l'équité implique qu'ils ne doivent pas obtenir un rendement « trop élevé ».

(R. Green et M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities : A Manual for Regulators* (1999), p. 5)

Ces objectifs sont à l'origine d'un arrangement économique et social appelé « pacte

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compact", which ensures that all customers have access to the utility at a fair price — nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 ("*Northwestern 1929*"), at pp. 192-93).

Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer *and* the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable . . . rates" (PUBA, s. 89(a); GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern 1979*"), at p. 691, adopted the following description of the process:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to

réglementaire » qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus, et qui, je l'explique plus loin, ne transmet aucun droit de propriété aux clients. Le pacte réglementaire accorde en fait aux entreprises réglementées le droit exclusif de vendre leurs services dans une région donnée à des tarifs leur permettant de réaliser un juste rendement au bénéfice de leurs actionnaires. En contrepartie de ce monopole, elles ont l'obligation d'offrir un service adéquat et fiable à tous les clients d'un territoire donné et voient leurs tarifs et certaines de leurs activités assujettis à la réglementation (voir Black, p. 356-357; Milner, p. 101; *Atco Ltd.*, p. 576; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186 (« *Northwestern 1929* »), p. 192-193).

64 Par conséquent, lorsqu'il s'agit d'interpréter les vastes pouvoirs de la Commission, on ne peut faire abstraction de ce subtil compromis servant de toile de fond à l'interprétation contextuelle. L'objet de la législation est de protéger le client *et* l'investisseur (Milner, p. 101). Le pacte ne supprime pas le caractère privé de l'entreprise. La Commission a essentiellement pour mandat d'établir une tarification qui accroît les avantages financiers des consommateurs et des investisseurs.

65 Elle tient son pouvoir de fixer les tarifs à la fois de la GUA (art. 16 et 17 et art. 36 à 45) et de la PUBA (art. 89 à 95). Il lui incombe de fixer des [TRADUCTION] « tarifs [. . .] justes et raisonnables » (PUBA, al. 89a); GUA, al. 36a)). Pour le faire, elle doit [TRADUCTION] « établi[r] une base tarifaire pour les biens du propriétaire » et « fixe[r] un juste rendement par rapport à cette base tarifaire » (GUA, par. 37(1)). Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern 1979* »), p. 691, notre Cour a décrit le processus comme suit :

> La PUB approuve ou fixe pour les services publics des tarifs destinés à couvrir les dépenses et à permettre à l'entreprise d'obtenir un taux de rendement ou profit convenable. Le processus s'accomplit en deux étapes. Dans la première étape, la PUB établit une base de tarification en calculant le montant des fonds investis par la compagnie en terrains, usines et équipements, plus le montant alloué au fonds de roulement, sommes dont

provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-2.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process:

il faut établir la nécessité dans l'exploitation de l'entreprise. C'est également à cette première étape qu'est calculé le revenu nécessaire pour couvrir les dépenses d'exploitation raisonnables et procurer un rendement convenable sur la base de tarification. Le total des dépenses d'exploitation et du rendement donne un montant appelé le revenu nécessaire. Dans une deuxième étape, les tarifs sont établis de façon à pouvoir produire, dans des conditions météorologiques normales, « le revenu nécessaire prévu ». Ces tarifs restent en vigueur tant qu'ils ne sont pas modifiés à la suite d'une nouvelle requête ou d'une plainte, ou sur intervention de la Commission. C'est également à cette seconde étape que les tarifs provisoires sont confirmés ou réduits et, dans ce dernier cas, qu'un remboursement est ordonné.

(Voir également *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n^{o} E84113, 12 octobre 1984, p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (C. div. Ont.), p. 701-702.)

Pour établir la base tarifaire, la Commission tient donc compte (GUA, par. 37(2)) :

[TRADUCTION]

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. L'entreprise n'est d'ailleurs pas non plus à l'abri de la perte pouvant en découler. Il ressort du libellé des dispositions précitées que les biens appartiennent à l'entreprise de services publics. Droit de propriété sur les biens et droit au profit ou à la perte lors de leur réalisation vont de pair. L'investisseur s'attend à toucher le produit net, une fois tous les frais payés, soit l'équivalent de la valeur actualisée de l'investissement initial. Le versement aux clients d'une partie du produit net restant, à l'issue d'une nouvelle répartition, sape le processus d'investissement : MacAvoy et Sidak, p. 244. À vrai dire, les

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MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

Wittmann J.A., at the Court of Appeal, said it best when he stated:

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the

opérations de spéculation seraient encore plus fréquentes si le service public et ses actionnaires ne touchaient pas le profit éventuel, car les investisseurs s'attendraient à obtenir une meilleure prime de la seule manière alors possible, le rendement de la mise de fonds initiale; en outre, ils seraient moins disposés à courir un risque.

68 La Ville a-t-elle raison alors de prétendre que les clients ont un droit de propriété sur le service public? Absolument pas. Sinon, les principes fondamentaux du droit des sociétés seraient dénaturés. En acquittant sa facture, le client paie pour le service réglementé un montant équivalant au coût du service et des ressources nécessaires. Il ne se porte pas implicitement acquéreur des biens des investisseurs. Le paiement n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens. Le client acquitte le prix du service, à l'exclusion du coût de possession des biens eux-mêmes : [TRADUCTION] « Le client d'un service public n'en est pas le propriétaire puisqu'il n'a pas droit au reliquat des biens » : MacAvoy et Sidak, p. 245 (voir également p. 237). Le client n'a rien investi. Les actionnaires, eux, ont investi des fonds et assument tous les risques car ils touchent le profit restant. Le client court seulement le [TRADUCTION] « risque que le prix change par suite de la modification (autorisée) du coût du service, ce qui n'arrive que périodiquement lors de la révision des tarifs par l'organisme de réglementation » (MacAvoy et Sidak, p. 245).

69 Je suis d'accord avec ce qu'affirme ATCO à ce sujet au par. 38 de son mémoire :

> [TRADUCTION] Les biens en cause appartiennent au propriétaire du service public tout comme ses autres biens. Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

Comme l'a si bien dit le juge Wittmann, de la Cour d'appel :

> [TRADUCTION] Le client d'un service public paie un service, mais n'obtient aucun droit de propriété sur les

assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945).

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case,

biens de cette entreprise. Lorsque le tarif établi correspond au prix du service pour la période considérée, le client n'acquiert à l'égard des biens non amortissables aucun droit fondé sur l'equity ou issu de la loi lorsqu'il n'a payé que pour l'utilisation de ces biens. [Je souligne; par. 64.]

Je suis entièrement d'accord. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. Alors que l'entreprise a été rémunérée pour le service fourni, les clients n'ont versé aucune contrepartie en échange du profit tiré de la vente des biens. L'argument voulant que les biens achetés soient pris en compte dans l'établissement de la base tarifaire ne doit pas embrouiller la question de savoir qui est le véritable titulaire du droit de propriété sur les biens et qui supporte les risques y afférents. Les biens comptent effectivement parmi les facteurs considérés pour fixer les tarifs, et un service public ne peut vendre un bien affecté à la prestation du service pour réaliser un profit et, ce faisant, diminuer la qualité du service ou majorer son prix. Même si les biens du service public sont pris en compte dans l'établissement de la base tarifaire, les actionnaires sont les seuls touchés lorsque la vente donne lieu à un profit ou à une perte. L'entreprise absorbe les pertes et les gains, l'appréciation ou la dépréciation des biens, eu égard à la conjoncture économique et aux défaillances techniques imprévues, mais elle continue de fournir un service fiable sur le plan de la qualité et du prix. Le client peut courir le risque que l'entreprise manque à ses obligations, mais cela ne lui donne pas droit au reliquat des biens. Sans m'appuyer indûment sur la jurisprudence américaine, je signale qu'aux États-Unis, l'arrêt de principe en la matière est *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), qui s'appuie sur le même principe que celui appliqué dans l'arrêt *Market St. Ry. Co. c. Railroad Commission of State of California*, 324 U.S. 548 (1945).

De plus, il faut reconnaître qu'une entreprise de services publics n'est pas une société d'État, une association d'assistance mutuelle, une coopérative ou une société mutuelle même si elle sert « l'intérêt public » en fournissant à la collectivité un service

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the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 *The Power to Attach Conditions*

As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It

nécessaire (en l'occurrence, la distribution du gaz naturel). Son capital ne provient pas des pouvoirs publics ou des clients, mais d'investisseurs privés qui escomptent un rendement aussi élevé que celui offert par d'autres placements présentant les mêmes caractéristiques d'attractivité, de stabilité et de certitude (voir *Northwestern 1929*, p. 192). Les actionnaires s'attendent donc nécessairement à toucher le gain ou à subir la perte résultant de l'aliénation d'un élément d'actif de l'entreprise, comme un terrain ou un bâtiment.

71 Il appert de l'analyse qui précède portant sur le droit de propriété que la Commission ne pouvait effectuer un remboursement tacite en attribuant aux clients le profit tiré de la vente des biens au motif que les tarifs avaient été excessifs dans le passé. C'est pourquoi la première prétention de la Ville doit être rejetée. La Commission a tenté de remédier à une supposée rétribution excessive de l'entreprise de services publics par ses clients. Or, aucune des lois applicables ne lui confère le pouvoir d'effectuer un tel remboursement à partir d'une telle perception erronée. La jurisprudence des différentes provinces confirme que les organismes de réglementation n'ont pas le pouvoir de modifier les tarifs rétroactivement (*Northwestern 1979*, p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (C.A. Alb.), p. 715, autorisation d'appel refusée, [1981] 2 R.C.S. vii; *Re Dow Chemical Canada Inc.* (C.A.), p. 734-735). Qui plus est, on ne peut même pas dire qu'il y a eu paiement excessif : la tarification est un processus conjectural où clients et actionnaires assument ensemble leur part du risque lié aux activités de l'entreprise de services publics (voir MacAvoy et Sidak, p. 238-239).

2.3.3.3 *Le pouvoir d'imposer des conditions*

72 La Ville soutient en second lieu que le pouvoir d'attribuer le produit de la vente des biens d'un service public est nécessairement accessoire aux pouvoirs exprès que confèrent à la Commission l'AEUBA, la GUA et la PUBA. Elle fait valoir que la Commission a nécessairement ce pouvoir lorsqu'elle exerce celui — discrétionnaire — d'autoriser ou non la vente d'éléments d'actifs, puisqu'elle

submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

* [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
* [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
* [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
* [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
* [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

(See also Brown, at p. 2-16.3.)

74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the

peut assortir de toute condition l'ordonnance autorisant la vente. Je ne suis pas d'accord.

La Ville semble tenir pour acquis que la doctrine de la compétence par déduction nécessaire s'applique tout autant aux pouvoirs « définis largement » qu'à ceux qui sont « biens circonscrits ». Ce ne saurait être le cas. Dans sa décision *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, 23 mars 1987, par. 4.73, la Commission de l'énergie de l'Ontario a énuméré les situations dans lesquelles s'applique la doctrine de la compétence par déduction nécessaire :

[TRADUCTION]

* la compétence alléguée est nécessaire à la réalisation des objectifs du régime législatif et essentielle à l'exécution du mandat de la Commission;
* la loi habilitante ne confère pas expressément le pouvoir de réaliser l'objectif législatif;
* le mandat de la Commission est suffisamment large pour donner à penser que l'intention du législateur était de lui conférer une compétence tacite;
* la Commission n'a pas à exercer la compétence alléguée en s'appuyant sur des pouvoirs expressément conférés, démontrant ainsi l'absence de nécessité;
* le législateur n'a pas envisagé la question et ne s'est pas prononcé contre l'octroi du pouvoir à la Commission.

(Voir également Brown, p. 2-16.3.)

Il est donc clair que la doctrine de la compétence par déduction nécessaire sera moins utile dans le cas de pouvoirs largement définis que dans celui de pouvoirs bien circonscrits. Les premiers seront nécessairement interprétés de manière à ne s'appliquer qu'à ce qui est rationnellement lié à l'objet de la réglementation. C'est ce qu'explique la professeure Sullivan, à la p. 228 :

[TRADUCTION] En pratique, toutefois, l'analyse téléologique rend les pouvoirs conférés aux organismes administratifs presque infiniment élastiques. Un pouvoir bien circonscrit peut englober, par « déduction nécessaire », tout ce qui est requis pour que le responsable

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purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;

2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and

3. It specifically seeks to prevent favoritism toward investors.

Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in

ou l'organisme puisse accomplir l'objet de son octroi. À l'inverse, on considère qu'un pouvoir largement défini vise uniquement ce qui est rationnellement lié à son objet. Il s'ensuit qu'un pouvoir a une portée qui augmente ou diminue au besoin, en fonction de son objet. [Je souligne.]

75 En l'espèce, l'art. 15 de l'AEUBA, qui permet à la Commission d'imposer des conditions supplémentaires dans le cadre d'une ordonnance, paraît à première vue conférer un pouvoir dont la portée est infiniment élastique. J'estime cependant que la Ville ne saurait y avoir recours pour accroître les pouvoirs que le par. 26(2) de la GUA confère à la Commission. Notre Cour doit interpréter le par. 15(3) de l'AEUBA conformément à l'objet du par. 26(2).

76 Dans leur article, MacAvoy et Sidak avancent trois raisons principales d'exiger qu'une vente soit autorisée par la Commission (p. 234-236) :

1. éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients;

2. garantir que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou d'autres intéressés;

3. éviter précisément que les investisseurs ne soient favorisés.

77 Par conséquent, pour qu'un organisme de réglementation ait le pouvoir d'attribuer le produit d'une vente, la preuve doit établir que ce pouvoir lui est nécessaire dans les faits pour atteindre les objectifs de la loi, ce qui n'est pas le cas en l'espèce (voir l'arrêt *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275 (C.A.)). Pour satisfaire aux trois exigences susmentionnées, il n'est pas nécessaire que la Commission détermine qui touchera le produit de la vente. Le volet intérêt public ne peut à lui seul lui conférer le pouvoir d'attribuer la totalité du profit tiré de la vente de biens. En fait, il n'est pas nécessaire à l'accomplissement de son mandat qu'elle puisse ordonner à l'entreprise de services

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carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the

publics de céder la plus grande partie du produit de la vente en contrepartie de l'autorisation accordée. La Commission dispose, dans les limites de sa compétence, d'autres moyens que l'appropriation du produit de la vente, le plus évident étant le refus d'autoriser une vente qui, à son avis, nuira à la qualité ou à la quantité des services offerts ou occasionnera des frais d'exploitation supplémentaires. Ce qui ne veut pas dire qu'elle ne peut jamais assujettir son autorisation à une condition. Par exemple, elle pourrait autoriser la vente à la condition que l'entreprise prenne des engagements en ce qui concerne le remplacement des biens en cause et leur rentabilité. Elle pourrait aussi exiger le réinvestissement d'une partie du produit de la vente dans l'entreprise afin de préserver un système d'exploitation moderne assurant une croissance optimale.

J'estime que permettre la confiscation du gain net tiré de la vente sous prétexte de protéger les clients et d'agir dans l'« intérêt public » c'est se méprendre grandement sur le pouvoir de la Commission d'autoriser ou non une vente et faire totalement abstraction des fondements économiques de la tarification exposés précédemment. S'approprier ainsi un produit net extraordinaire pour le compte des clients serait d'un opportunisme très poussé qui, en fin de compte, se traduirait par une hausse du coût du capital pour l'entreprise (MacAvoy et Sidak, p. 246). Au risque de me répéter, une entreprise de services publics est avant tout une entreprise privée dont l'objectif est de réaliser des profits. Cela n'est pas contraire au régime législatif, même si le pacte réglementaire modifie les principes économiques habituellement applicables, les lois habilitantes prévoyant explicitement différentes limitations. Aucune des trois lois pertinentes en l'espèce ne confère à la Commission le pouvoir d'attribuer le produit de la vente d'un bien et d'empiéter de la sorte sur le droit de propriété de l'entreprise de services publics.

Il est bien établi qu'une disposition législative susceptible d'avoir un effet confiscatoire doit être interprétée avec prudence afin de ne pas dépouiller les parties intéressées de leurs droits lorsque ce

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legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 *Other Considerations*

Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 *If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?*

In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether

n'est pas l'intention manifeste du législateur (voir Sullivan, p. 400-403; Côté, p. 607-613; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64, par. 26; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349, p. 357; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167, p. 197). Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits, ce qui irait à l'encontre des principes d'interprétation susmentionnés.

80 Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut le prévoir expressément dans la loi, à l'instar de certains États américains (le Connecticut, par exemple).

2.4 *Autres considérations*

81 Dans le cadre du pacte réglementaire, les clients sont protégés par la procédure d'établissement des tarifs à l'issue de laquelle la Commission doit rendre une décision pondérée. Il appert du dossier que la Ville n'a pas saisi la Commission d'une demande d'approbation du tarif général en réponse à celle présentée par ATCO afin d'obtenir l'autorisation de vendre des biens. Néanmoins, si elle l'avait fait, la Commission aurait pu, de son propre chef, convoquer les parties intéressées à une audience afin de fixer de nouveaux tarifs justes et raisonnables tenant dûment compte de la situation financière nouvelle devant résulter de la vente (PUBA, al. 89a); GUA, art. 24, al. 36a), par. 37(3), art. 40) (texte en annexe).

2.5 *À supposer que la Commission ait eu le pouvoir de répartir le produit de la vente, a-t-elle exercé ce pouvoir de manière raisonnable?*

82 Vu ma conclusion touchant à la compétence, il n'est pas nécessaire de déterminer si la Commission

the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to *protect the customers* (i.e., was the order *necessary in the public interest*?); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine *if it should allocate* part of the sale proceeds to ratepayers. Rather, it merely guides the Board on *what to allocate and how to allocate it* (if it should do so in the first place). It is also interesting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed

a exercé son pouvoir discrétionnaire de façon raisonnable en répartissant le produit de la vente comme elle l'a fait. Toutefois, vu les motifs de mon collègue le juge Binnie, je me penche très brièvement sur la question. Le règlement du pourvoi aurait été le même si j'avais conclu que la Commission avait ce pouvoir, car j'estime que la décision qu'elle a rendue sur son fondement ne satisfaisait pas à la norme de la raisonnabilité.

Je ne vois pas très bien comment on pourrait conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs et ayant en outre conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients. À mon avis, une cour de justice appelée à contrôler la décision au fond doit se livrer à une analyse en deux étapes. Premièrement, elle doit déterminer si l'ordonnance était justifiée au vu de l'obligation de la Commission de *protéger les clients* (c.-à-d. l'ordonnance était-elle *nécessaire dans l'intérêt public*?). Deuxièmement, dans l'affirmative, elle doit déterminer si la Commission a bien appliqué la *formule TransAlta* (voir le par. 12 des présents motifs), qui renvoie à la différence entre la valeur comptable nette des biens et leur coût historique, d'une part, et à l'appréciation des biens, d'autre part. Pour les besoins de l'analyse, je ne vois dans la deuxième étape qu'une opération mathématique, rien de plus. Je ne crois pas que la *formule TransAlta* oriente la décision de la Commission *d'attribuer ou non* une partie du produit de la vente aux clients. Elle ne préside qu'à la détermination de *ce qui sera attribué et des modalités d'attribution* (lorsqu'elle a décidé qu'il y avait lieu d'attribuer le produit de la vente). Il importe également de signaler que nul ne conteste que seule la valeur comptable figurant dans les états financiers de l'entreprise de services publics doit être utilisée pour le calcul.

Je le répète, la Commission n'était même pas justifiée, à mon sens, d'exercer le pouvoir d'attribuer le produit de la vente. Suivant son raisonnement même, elle ne doit exercer son pouvoir discrétionnaire d'agir dans l'intérêt public que lorsque les

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or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation:

> With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.

(Decision 2002-037, at para. 54)

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude

clients subiraient ou seraient susceptibles de subir un préjudice. Or sa conclusion à ce sujet est claire : aucun préjudice ou risque de préjudice n'était associé à l'opération projetée :

> [TRADUCTION] Comme les mêmes services seront offerts à partir d'autres installations, et vu l'acceptation de ce transfert par les clients, la Commission est convaincue que la vente ne devrait pas avoir de répercussions sur le niveau de service. Quoi qu'il en soit, elle considère que le niveau de service offert pourra au besoin faire l'objet d'un examen et d'une mesure corrective dans le cadre d'une procédure ultérieure.

(Décision 2002-037, par. 54)

Après avoir déclaré que, tout bien considéré, les clients ne seraient pas lésés, la Commission a statué au vu des éléments de preuve présentés qu'ils réaliseraient apparemment des économies. Aucun droit légitime des clients ne pouvait ni ne devait être protégé par un refus d'autorisation ou un octroi assorti de la condition de répartir le produit de la vente d'une certaine manière. Même si la Commission avait conclu à la possibilité que la vente ait un effet préjudiciable, comment pouvait-elle, à ce stade, attribuer le produit de la vente en fonction d'une perte éventuelle indéterminée? La mauvaise foi présumée d'ATCO qui paraît sous-tendre la détermination de la Commission à protéger le public contre un risque éventuel, en l'absence de tout fondement factuel, me préoccupe également. De toute manière, je l'ai déjà dit, cette détermination à protéger l'intérêt public est également difficile à concilier avec le pouvoir exprès de la Commission de prévenir tout préjudice causé aux clients en refusant d'autoriser la vente des biens d'un service public. Je rappelle que la Commission jouit d'un pouvoir discrétionnaire considérable dans l'établissement des tarifs futurs afin de protéger l'intérêt public.

85

Par conséquent, je suis d'avis que la Commission n'a pas cerné d'intérêt public à protéger et qu'aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Indépendamment de ma conclusion au sujet de la compétence de la Commission, je conclus que sa décision d'exercer son pouvoir discrétionnaire

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that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e., context, legislative intention and objective. Going further than required by reading in *unnecessary* powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

88 BINNIE J. (dissenting) — The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board ("Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the

de protéger l'intérêt public ne satisfaisait pas à la norme de la raisonnabilité.

3. Conclusion

Le rôle de notre Cour dans le présent pourvoi a été d'interpréter les lois habilitantes en tenant compte comme il se doit du contexte, de l'intention du législateur et de l'objectif législatif. Aller plus loin et conclure à l'issue d'une interprétation large que l'organisme administratif jouit de pouvoirs *non nécessaires* n'est pas conforme aux règles d'interprétation législative. Une telle approche est particulièrement dangereuse lorsqu'un droit de propriété est en jeu.

La Commission n'avait pas le pouvoir d'attribuer le produit de la vente d'un bien du service public; sa décision ne satisfaisait pas à la norme de la décision correcte. Par conséquent, je suis d'avis de rejeter le pourvoi de la Ville et d'accueillir le pourvoi incident d'ATCO, avec dépens dans les deux instances. Je suis également d'avis d'annuler la décision de la Commission et de lui renvoyer l'affaire en lui enjoignant d'autoriser la vente des biens d'ATCO et de reconnaître son droit au produit de la vente.

Version française des motifs de la juge en chef McLachlin et des juges Binnie et Fish rendus par

LE JUGE BINNIE (dissident) — L'intimée, ATCO Gas and Pipelines Ltd. (« ATCO »), fait partie d'une grande société qui, directement et par l'entremise de diverses filiales, exploite à la fois des entreprises réglementées et des entreprises non réglementées. L'Alberta Energy and Utilities Board (« Commission ») estime qu'il n'est pas dans l'intérêt public d'encourager les entreprises de services publics à jumeler leurs activités dans les deux secteurs. Plus particulièrement, elle a adopté des politiques afin de dissuader les entreprises de services publics de faire de leur secteur réglementé un lieu de spéculation foncière et d'augmenter ainsi le rendement de leurs investissements indépendamment du cadre réglementaire. En attribuant une partie du profit à l'entreprise de services publics (et à ses actionnaires), la Commission récompense la diligence avec laquelle elle se départit de biens qui ne sont

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profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

I. Analysis

ATCO's argument boils down to the proposition announced at the outset of its factum:

In the absence of any property right or interest and of any harm to the customers arising from the

plus productifs ou qui pourraient l'être davantage s'ils étaient employés autrement. Toutefois, en portant une partie du profit au crédit de la base tarifaire de l'entreprise (c.-à-d. en la déduisant d'autres coûts), la Commission tente d'empêcher les entreprises de services publics de céder à la tentation d'infléchir les décisions afférentes à leurs activités réglementées pour favoriser la réalisation de profits indus. De son point de vue, un tel compromis est nécessaire dans l'intérêt du public, celui-ci conférant à ATCO un monopole dans un secteur d'activité. Dans la recherche de ce compromis, la Commission a autorisé ATCO à vendre un terrain et un entrepôt situés au centre-ville de Calgary, mais refusé qu'elle conserve, au bénéfice de ses actionnaires, la totalité du profit découlant de l'appréciation du terrain dont le coût d'acquisition était pris en compte, depuis 1922, pour la tarification du gaz naturel. La Commission a ordonné que le profit tiré de la vente soit attribué à raison d'un tiers à ATCO et que les deux tiers servent à réduire ses coûts, contribuant à contenir toute hausse des tarifs et favorisant ainsi la clientèle.

89 J'ai lu avec intérêt les motifs de mon collègue le juge Bastarache, mais, en toute déférence, je ne suis pas d'accord avec ses conclusions. Comme nous le verrons, le par. 15(3) de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), confère à la Commission le pouvoir d'assujettir la vente aux [TRADUCTION] « conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Il appartenait à la Commission de décider de la nécessité d'imposer des conditions dans l'intérêt public. La Cour d'appel de l'Alberta a infirmé la décision de la Commission. En toute déférence, j'estime que la Commission était mieux placée que la Cour d'appel ou que notre Cour pour juger de la nécessité de protéger l'intérêt public dans ce domaine. J'accueillerais le pourvoi et rétablirais la décision de la Commission.

I. Analyse

90 La thèse d'ATCO se résume à ce qu'elle affirme au début de son mémoire :

[TRADUCTION] À défaut de tout droit de propriété et de tout préjudice causé à la clientèle par le

withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.

(Respondent's factum, at para. 2)

91 For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "conside[r] necessary in the public interest".

A. *The Board's Statutory Authority*

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA"), provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them . . .". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions):

In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property.

dessaisissement, rien ne justifiait qu'on puise dans les poches de l'entreprise. En fait, le présent pourvoi doit être réglé au regard du droit de propriété.

(Mémoire de l'intimée, par. 2)

Pour les motifs qui suivent, je ne crois pas que le litige ressortisse au droit de propriété. ATCO a choisi d'investir dans un secteur réglementé, celui de la distribution du gaz, où le rendement est établi par la Commission, et non par le marché. À mon avis, la question en litige est essentiellement de savoir si la Cour d'appel de l'Alberta était justifiée de restreindre les conditions que la Commission pouvait « juge[r] nécessaires dans l'intérêt public ».

A. *Les pouvoirs légaux de la Commission*

La première question qui se pose est celle de la compétence. D'où la Commission tient-elle le pouvoir de rendre l'ordonnance que conteste ATCO? La réponse de la Commission comporte trois volets. Le paragraphe 22(1) de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA »), prévoit entre autres que [TRADUCTION] « [l]a Commission assure la surveillance générale des services de gaz et de leurs propriétaires . . . ». Selon la Commission, cette disposition lui confère le vaste pouvoir d'établir des politiques qui débordent le cadre du règlement de demandes au cas par cas (approbation de tarifs, etc.). Élément plus pertinent encore, le sous-al. 26(2)d)(i) de la même loi interdit à l'entreprise réglementée de vendre ses biens, de les louer ou de les grever par ailleurs sans l'autorisation de la Commission. (Voir dans le même sens le sous-al. 101(2)d)(i) de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45.) Tous conviennent que cette limitation s'applique à la vente projetée par ATCO du terrain et de l'entrepôt situés au centre-ville de Calgary et que si les circonstances l'avaient justifié, la Commission aurait pu simplement refuser son autorisation. En l'espèce, la Commission a décidé d'autoriser la vente et de l'assujettir à certaines conditions. Elle a statué que le pouvoir plus large de refuser d'autoriser la vente englobait celui, plus restreint, de l'autoriser en l'assujettissant à certaines conditions :

[TRADUCTION] Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher une

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In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

(Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576, Estey J., for the majority, stated:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what *the Board* considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. ATCO says the Board overstepped even these generous limits. In ATCO's submission:

> Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

(Respondent's factum, at para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate

entreprise de services publics de se départir d'un bien. Il s'ensuit donc qu'elle peut autoriser une aliénation et l'assortir de conditions susceptibles de bien protéger les intérêts du consommateur.

(Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), par. 47)

Il n'est toutefois pas nécessaire qu'elle s'appuie sur un tel pouvoir implicite pour établir des conditions. Je le répète, le par. 15(3) de l'AEUBA confère explicitement à la Commission le pouvoir de [TRADUCTION] « rendre toute autre ordonnance et [d']imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Dans *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576, le juge Estey a dit au nom des juges majoritaires :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par les entreprises de services publics. [Je souligne.]

Le paragraphe 15(3) dispose que les conditions fixées sont celles que *la Commission* juge nécessaires. Évidemment, son pouvoir discrétionnaire n'est pas illimité. Elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré : *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29. ATCO prétend que la Commission a même outrepassé un aussi large pouvoir. Voici un extrait de son mémoire :

> [TRADUCTION] Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

(Mémoire de l'intimée, par. 38)

À mon avis, toutefois, la Commission devait déterminer la hauteur du profit qu'ATCO était admise à tirer de son investissement dans une entreprise réglementée.

Subsidiairement, ATCO soutient que la Commission s'est indûment livrée à une

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making". But Alberta is an "original cost" jurisdiction, and no one suggests that the Board's original cost rate making during the 80-plus years this investment has been reflected in ATCO's ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of "all gas utilities, and the owners of them" were matters squarely within the Board's statutory mandate.

« tarification rétroactive ». Or, l'Alberta a opté pour la tarification selon le « coût historique » et personne ne laisse entendre que, depuis plus de 80 ans, la Commission applique à tort cette méthode qui prend en compte l'investissement d'ATCO pour l'établissement de sa base tarifaire. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale [TRADUCTION] « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission.

B. *The Board's Decision*

B. *La décision de la Commission*

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate-making responsibilities. However, I do not agree that the hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

> the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the Board was not engaged in fixing rates (if that could provide any justification, which is denied).
>
> (Respondent's factum, at para. 98)

ATCO soutient que la décision de la Commission doit être considérée isolément, sans égard aux attributions de l'organisme en matière de tarification. Toutefois, je ne crois pas que l'audience tenue pour l'application de l'art. 26 puisse être ainsi dissociée des attributions générales de la Commission à titre d'organisme de réglementation. Dans son mémoire, ATCO fait valoir ce qui suit :

> [TRADUCTION] . . . la demande d'[ATCO] n'avait rien à voir avec l'approbation de tarifs et la Commission n'était pas engagée dans un processus de tarification (à supposer que cela ait pu la justifier, ce qui est nié).
>
> (Mémoire de l'intimée, par. 98)

95 It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171. That case (which I will refer to as *TransAlta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174:

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve

Il semble que la Commission ait entendu la demande d'autorisation fondée sur l'art. 26 indépendamment d'une demande d'approbation de tarifs en raison, premièrement, de la manière dont ATCO avait engagé l'instance et, deuxièmement, de l'approbation de cette démarche par la Cour d'appel de l'Alberta dans *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171 (« *TransAlta (1986)* »). Il s'agit de l'arrêt de principe albertain en ce qui concerne l'attribution du profit réalisé lors de l'aliénation d'un bien affecté à un service public, et la Cour d'appel y a énoncé la *formule TransAlta* que la Commission a appliquée en l'espèce. Voici ce qu'a dit le juge Kerans à ce sujet (p. 174) :

> [TRADUCTION] Je signale en passant que je comprends maintenant que toutes les parties ont intérêt à ce que

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issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted:

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding.* On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Underlining and italics added.]

(Decision 2002-037, at para. 13)

In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

les questions de cette nature soient, si possible, résolues avant l'audition de la demande générale de majoration tarifaire de manière à ne pas alourdir cette procédure déjà complexe.

96 Fort de ces propos de la Cour d'appel de l'Alberta, j'accorderais peu d'importance à l'argument procédural d'ATCO. Nous le verrons, la décision de la Commission est directement liée à la tarification générale, les deux tiers du profit étant déduits des coûts à partir desquels sont ultimement déterminés les besoins en revenus d'ATCO. Je l'ai déjà dit, le profit tiré de la vente des biens d'ATCO situés à Calgary constituera une rentrée courante (et non historique), et si la décision de la Commission est confirmée, les deux tiers du profit tiré de l'opération seront pris en compte pour la tarification ultérieure (et non de manière rétroactive).

97 L'audience tenue pour l'application de l'art. 26 s'est déroulée en deux étapes. La Commission a d'abord décidé qu'elle ne refusait pas d'autoriser la vente projetée vu l'« absence de préjudice », un critère qu'elle avait élaboré au fil des ans, mais qui n'était pas prévu dans les lois (décision 2001-78). Cependant, elle a lié son autorisation à l'examen subséquent des conséquences financières. Comme elle l'a elle-même fait remarquer :

> [TRADUCTION] Dans la décision 2001-78, la Commission a autorisé la vente parce qu'il avait été établi que les clients ne s'opposaient pas à l'opération, qu'ils ne subiraient pas une diminution de service et que la vente ne risquait pas de leur infliger un préjudice financier *qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure.* Elle a donc conclu à l'absence de préjudice et décidé que la vente pouvait avoir lieu. [Soulignements et italiques ajoutés.]

(Décision 2002-037, par. 13)

98 ATCO fait abstraction de ce qui figure en italique dans cet extrait. Elle soutient que la Commission était *functus officio* après la première étape de l'audience. Or, elle avait elle-même consenti au déroulement de la procédure en deux étapes, et la deuxième partie de l'audience a effectivement été consacrée à sa demande d'attribution du profit tiré de la vente.

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99 In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called "the regulatory compact" (Decision 2002-037, at para. 44). In the Board's view:

(a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;

(b) decisions made about the utility should be driven by both parties' interests;

(c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and

(d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

100 For purposes of this appeal, it is important to set out the Board's policy reasons in its own words:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.
>
> The Board believes that some method of balancing both parties' interests will result in optimization

Au cours de la deuxième étape de l'audition de la demande fondée sur l'art. 26, la Commission a attribué un tiers du profit net à ATCO et deux tiers à la base tarifaire (au bénéfice des clients). Elle a exposé les raisons pour lesquelles elle jugeait cette répartition nécessaire à la protection de l'intérêt public. Elle a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients dans le cadre de ce qu'elle a appelé [TRADUCTION] « le pacte réglementaire » (décision 2002-037, par. 44). Selon la Commission :

a) il faut mettre en balance les intérêts des clients et ceux des propriétaires de l'entreprise de services publics;

b) les décisions visant l'entreprise doivent tenir compte des intérêts des deux parties;

c) attribuer aux clients la totalité du profit tiré de la vente n'inciterait pas l'entreprise à accroître son efficacité et à réduire ses coûts;

d) en attribuer la totalité à l'entreprise pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée.

Pour les besoins du présent pourvoi, il importe de rappeler les considérations de principe invoquées par la Commission :

> [TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.
>
> À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation.
>
> La Commission croit qu'une certaine mise en balance des intérêts des deux parties permettra la

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of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. *Standard of Review*

The Court's modern approach to this vexed question was recently set out by McLachlin C.J. in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that the Board considers necessary in the public interest" (s. 15(3)(d) of the AEUBA).

réalisation optimale des objectifs de l'entreprise dans son propre intérêt et dans celui de ses clients. Par conséquent, elle estime équitable en l'espèce et conforme à ses décisions antérieures de partager selon la formule TransAlta le profit net tiré de la vente du terrain et des bâtiments. [Je souligne; par. 112-114.]

101 On a informé notre Cour que les deux tiers du profit attribués aux clients seraient déduits des coûts considérés pour l'établissement de la base tarifaire d'ATCO, puis amortis sur un certain nombre d'années.

C. *La norme de contrôle*

102 L'approche actuelle de notre Cour à l'égard de cette question épineuse a récemment été précisée par la juge en chef McLachlin dans l'arrêt *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26 :

> Selon l'analyse pragmatique et fonctionnelle, la norme de contrôle est déterminée en fonction de quatre facteurs contextuels — la présence ou l'absence dans la loi d'une clause privative ou d'un droit d'appel; l'expertise du tribunal relativement à celle de la cour de révision sur la question en litige; l'objet de la loi et de la disposition particulière; la nature de la question — de droit, de fait ou mixte de fait et de droit. Les facteurs peuvent se chevaucher. L'objectif global est de cerner l'intention du législateur, sans perdre de vue le rôle constitutionnel des tribunaux judiciaires dans le maintien de la légalité.

103 Je n'entends pas reprendre les propos de mon collègue le juge Bastarache à ce sujet. Nous convenons que la norme applicable en matière de compétence est celle de la décision correcte. Nous convenons également qu'en ce qui a trait à l'*exercice* de sa compétence par la Commission, une déférence accrue s'impose. Il ne peut être interjeté appel d'une décision de la Commission que sur une question de droit ou de compétence. La Commission en sait bien davantage qu'une cour de justice sur les services de gaz et les limites qui doivent leur être imposées « dans l'intérêt public » lorsqu'ils effectuent des opérations relatives à des biens dont le coût est inclus dans la base tarifaire. De plus, il est difficile d'imaginer un pouvoir discrétionnaire plus vaste que celui

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The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, at p. 34:

> The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf ed.), vol. 1, at para. 14:2622: "'*Objective' and 'Subjective' Grants of Discretion*".

105 The expert qualifications of a regulatory Board are of "utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause", as stated by Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335. He continued:

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.
>
> (This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

— conféré à la Commission — d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » (al. 15(3)d) de l'AEUBA). L'élément subjectif de ce pouvoir (« qu'elle juge nécessaires »), l'expertise du décideur et la nature de la décision (« dans l'intérêt public ») appellent à mon avis la plus grande déférence et l'application de la norme de la décision manifestement déraisonnable.

En ce qui a trait à l'élément « qu'elle juge nécessaires », le juge Martland a dit ce qui suit dans l'arrêt *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24, p. 34 :

> [TRADUCTION] En l'espèce, il n'appartient pas à une cour de justice de déterminer si les terrains de l'intimé étaient ou non « nécessaires », mais bien si le ministre a « estimé » qu'ils l'étaient.

Voir également D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (éd. feuilles mobiles), vol. 1, par. 14:2622 : « *"Objective" and "Subjective" Grants of Discretion* ».

Comme l'a dit le juge Sopinka dans l'arrêt *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 335, l'expertise que possède un organisme de réglementation est « de la plus haute importance pour ce qui est de déterminer l'intention du législateur quant au degré de retenue dont il faut faire preuve à l'égard de la décision d'un tribunal en l'absence d'une clause privative intégrale ». Il a ajouté :

> Même lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel, comme c'était le cas dans l'affaire *Bell Canada* [*c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722], on a souligné qu'il y avait lieu pour le tribunal d'appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.
>
> (Cette opinion incidente a été citée avec approbation dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 592.)

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A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In *TransAlta (1986)*, the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, where this Court stated, at p. 357:

> [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest . . . . [Emphasis added.]

This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185, at p. 190:

> It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R. F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)), who wrote in *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

106 L'exercice d'un pouvoir de réglementation « dans l'intérêt public » exige nécessairement la conciliation d'intérêts économiques divergents. Il est depuis longtemps établi que la question de savoir ce qui est « dans l'intérêt public » n'est pas véritablement une question de droit ou de fait, mais relève plutôt de l'opinion. Dans *TransAlta (1986)*, la Cour d'appel de l'Alberta a fait (au par. 24) un parallèle entre la portée des mots « intérêt public » et celle de l'expression bien connue « la commodité et les besoins du public » en citant l'arrêt *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353, où notre Cour avait dit ce qui suit à la p. 357 :

> [TRADUCTION] [L]a question de savoir si la commodité et les besoins du public nécessitent l'accomplissement de certains actes n'est pas une question de fait. C'est avant tout l'expression d'une opinion. Il faut évidemment que la décision de la Commission se fonde sur des faits mis en preuve, mais cette décision ne peut être prise sans que la discrétion administrative y joue un rôle important. En conférant à la Commission ce pouvoir discrétionnaire, la Législature a délégué à cet organisme la responsabilité de décider, dans l'intérêt du public . . . [Je souligne.]

107 Dans cet extrait, notre Cour reprenait l'opinion incidente du juge Rand dans l'arrêt *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185, p. 190 :

> [TRADUCTION] On a prétendu, et la Cour a semblé d'accord, que l'appréciation de la commodité et des besoins du public est elle-même une question de fait, mais je ne puis souscrire à cette opinion : il ne s'agit pas de déterminer si objectivement telle situation existe. La décision consiste à exprimer une opinion, en l'espèce, l'opinion du Comité et du Comité seulement. [Je souligne.]

108 Évidemment, même un pouvoir aussi vaste n'est pas absolu. Mais reconnaître qu'il puisse faire l'objet d'abus n'implique pas qu'il doive être restreint. Je suis d'accord sur ce point avec l'avis exprimé par le juge Reid (coauteur de R. F. Reid et H. David, *Administrative Law and Practice* (2e éd. 1978), et coéditeur de P. Anisman et R. F. Reid, *Administrative Law Issues and Practice* (1995)), dans la décision *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (C. div.), p. 97, au sujet des pouvoirs de la Commission des valeurs mobilières de l'Ontario :

. . . when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 42.)

109 "Patent unreasonableness" is a highly deferential standard:

A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.

(*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my colleague sees it). As will be seen, the Board's response is well within the range of established regulatory opinions. Hence, even if the Board's conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. *Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order "In the Public Interest"?*

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from

[TRADUCTION] . . . lorsque la Commission a agi de bonne foi en se souciant clairement et véritablement de l'intérêt public et en fondant son opinion sur des éléments de preuve, le risque que l'étendue de son pouvoir discrétionnaire puisse un jour l'inciter à l'exercer abusivement et à se placer ainsi au-dessus de la loi ne fait pas de l'existence de ce pouvoir une mauvaise chose en soi et n'exige pas l'annulation de la décision de la Commission.

(Notre Cour a fait mention, apparemment avec approbation, de la décision *C.T.C. Dealer Holdings* dans l'arrêt *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37, par. 42.)

La norme du « manifestement déraisonnable » appelle un degré élevé de déférence judiciaire :

La méthode de la décision correcte signifie qu'il n'y a qu'une seule réponse appropriée. La méthode du caractère manifestement déraisonnable signifie que de nombreuses réponses appropriées étaient possibles, sauf celle donnée par le décideur.

(*S.C.F.P.*, par. 164)

Cela dit, il importe peu à mon sens que la norme applicable soit celle du manifestement déraisonnable (comme je le pense) ou celle du raisonnable *simpliciter* (comme le croit mon collègue). Nous le verrons, la décision de la Commission se situe dans les limites des opinions exprimées par les organismes de réglementation. Même si une norme moins déférente s'appliquait aux conditions imposées par la Commission, je ne verrais aucune raison d'intervenir.

D. *La Commission avait-elle le pouvoir d'assortir son autorisation des conditions en cause « dans l'intérêt public »?*

ATCO prétend que la Commission n'avait pas le pouvoir d'imposer des conditions ayant un effet « confiscatoire ». Or, en s'exprimant ainsi, elle présume de la question en litige. La bonne démarche n'est pas de supposer qu'ATCO avait droit au profit net tiré de la vente, puis de se demander si la Commission pouvait le confisquer. L'investissement de 83 000 $ d'ATCO a graduellement été pris en

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time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

I do not think the legal debate is assisted by talk of "confiscation". ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board's jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

E. *Did the Board Improperly Exercise the Jurisdiction It Possessed to Impose Conditions the Board Considered "Necessary in the Public Interest"?*

There is no doubt that there are many approaches to "the public interest". Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most. ATCO concedes that its "property" claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers

compte dans sa base tarifaire réglementaire puisque l'acquisition du terrain s'est échelonnée de 1922 à 1965. Dans un secteur réglementé, le rendement juste et équitable est déterminé par l'organisme de réglementation compétent et non par le marché spéculatif et aléatoire de l'immobilier.

112 Je ne crois pas que l'allégation d'effet « confiscatoire » apporte quoi que ce soit au débat juridique. La loi interdit à ATCO de se départir de ses biens sans l'autorisation de la Commission et investit cette dernière du pouvoir d'assortir son autorisation de conditions. Ce n'est donc pas l'*existence* de la compétence qui est en litige, mais plutôt la manière dont la Commission l'a *exercée* en imposant des conditions et, plus particulièrement, en répartissant le profit net tiré de la vente.

E. *La Commission a-t-elle exercé sa compétence irrégulièrement en imposant les conditions qu'elle jugeait « nécessaires dans l'intérêt public »?*

113 Il y a évidemment de nombreuses façons de concevoir « l'intérêt public ». Celle de la Commission tient essentiellement (et de manière inhérente) à son opinion et à son pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre et qu'aux États-Unis, la pratique doit être interprétée à la lumière de la protection constitutionnelle du droit de propriété, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. ATCO reconnaît que sa prétention fondée sur le « droit de propriété » ne saurait tenir face à l'intention contraire du législateur, mais elle affirme qu'une telle intention ne ressort pas des lois.

114 La plupart des organismes de réglementation, sinon tous, sont appelés à décider de l'attribution du profit tiré d'un bien dont le coût historique est inclus dans la base tarifaire, mais qui n'est plus nécessaire pour fournir le service. Lorsqu'elle formule ses politiques, la Commission peut tenir compte (et elle tient compte) d'une foule de précédents provenant de nombreux ressorts. Trouver le bon

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and investors is a common preoccupation of comparable boards and agencies:

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favoritism toward investors to the detriment of ratepayers affected by the transaction.

(P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234)

115 The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over $2 million. The Board stated:

> The Station "B" property was not purchased by Consumers' for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital. In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

116 Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), the regulator allocated a gain on the sale of land to ratepayers, stating:

compromis dans la répartition du profit entre les clients et les investisseurs est une préoccupation commune aux organismes apparentés à la Commission :

> [TRADUCTION] D'abord, cela permet d'éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients. Deuxièmement, elle garantit que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou à d'autres intéressés. Troisièmement, elle vise précisément à ce que les investisseurs ne soient pas favorisés au détriment des clients touchés par l'opération.

(P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234)

Ce n'est pas d'hier que les organismes de réglementation canadiens examinent de près les opérations de spéculation foncière auxquelles se livrent les services publics qui leur sont assujettis. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976, la Commission de l'énergie de l'Ontario s'est demandé comment devait être considéré le profit de 2 millions de dollars, après impôt, tiré de la vente d'un terrain par une entreprise de services publics. Elle a dit :

> [TRADUCTION] Consumers' n'a pas acquis le bien-fonds (Station B) à des fins de spéculation, mais bien pour les besoins d'un service public. Même si cet investissement n'était pas amortissable, des intérêts et un risque lié à leur taux devaient être absorbés par les revenus et, jusqu'à ce que l'usine de production de gaz ne devienne obsolescente, l'aliénation du bien-fonds n'était pas possible. Par conséquent, si la commission permettait que seuls les actionnaires bénéficient du profit tiré de la vente d'un terrain, elle encouragerait la spéculation sur les biens des services publics. À son avis, ces gains en capital doivent être partagés entre les actionnaires et les clients. [Je souligne; par. 326.]

Certains organismes de réglementation américains jugent également opportun de déduire le profit, en tout ou en partie, de coûts pris en compte dans la base tarifaire. Dans *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), l'organisme de réglementation a attribué aux clients le profit tiré de la vente d'un terrain :

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The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

[TRADUCTION] La société et ses actionnaires ont touché un rendement sur l'utilisation de ces parcelles de terrain le temps que leur coût a été inclus dans la base tarifaire, et ils n'ont droit à aucun rendement supplémentaire découlant de leur vente. Conclure le contraire équivaudrait à dire qu'une entreprise de services publics peut tirer avantage d'un bien non amortissable et que même si elle a obtenu de ses clients un rendement raisonnable à l'égard de ce bien, elle peut toucher en sus un profit inattendu en le vendant. Nous estimons que, dans le cas d'une installation en service, il s'agirait d'une situation risques/avantages inhabituelle pour une entreprise réglementée. [Je souligne; p. 26.]

Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991, the Ontario Energy Board determined that a $1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

117 Au Canada, d'autres organismes de réglementation que la Commission craignent que la perspective de vendre des terrains à profit n'infléchisse les décisions des entreprises de services publics en ce qui concerne leurs activités réglementées. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 465, 1er mars 1991, la Commission de l'énergie de l'Ontario a statué que le profit de 1,9 million de dollars réalisé lors de la vente d'un terrain devait être réparti également entre les actionnaires et les clients :

the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary. [para. 3.3.8]

[TRADUCTION] . . . attribuer 100 p. 100 du profit tiré de la vente d'un terrain soit aux actionnaires de l'entreprise, soit à ses clients, pourrait diminuer l'attention accordée aux préoccupations légitimes de la partie exclue. Par exemple, le moment de l'acquisition d'un terrain et l'intensité des négociations la précédant pourraient être déterminés de façon à favoriser le bénéficiaire ultime de l'opération, ou à en faire fi. [par. 3.3.8]

The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, June 27, 2003, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

118 Le principe appliqué par la Commission, soit le partage du profit entre les investisseurs et les clients, est également conforme à la décision *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, 27 juin 2003, dans laquelle la Commission de l'énergie de l'Ontario, après s'être penchée sur la question du profit tiré de la vente d'un terrain et de bâtiments, a de nouveau conclu :

The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction. [para. 45]

[TRADUCTION] La Commission juge raisonnable, dans les circonstances, de répartir les gains en capital à parts égales entre l'entreprise et ses clients. Pour arriver à cette conclusion, elle a tenu compte du caractère non récurrent de l'opération. [par. 45]

The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta (1986)*, at pp. 175-76, including *Re Boston Gas Co.*

119 Dans *TransAlta (1986)*, p. 175-176, le juge Kerans a signalé que le sort réservé à de tels gains variait considérablement d'un organisme de

mentioned earlier. In *TransAlta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

> I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58 (Y.C.A.), at para. 85.

120 A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions

réglementation à l'autre, mentionnant à titre d'exemple la décision *Re Boston Gas Co.*, précitée. Dans cette affaire, la Commission avait assimilé à un « revenu » au sens de la *Hydro and Electric Energy Act*, R.S.A. 1980, ch. H-13, le profit réalisé par TransAlta lors de la vente d'un terrain et de bâtiments appartenant à sa « concession » d'Edmonton. (La décision ne portait donc pas sur le pouvoir de la Commission d'imposer les conditions qu'« elle juge nécessaires dans l'intérêt public ».) Le juge Kerans a précisé (p. 176) :

> [TRADUCTION] Pour les motifs exposés ci-après, je ne suis pas d'accord avec la décision de la Commission, mais il serait absurde de ne pas reconnaître que [le mot « revenu »] puisse raisonnablement avoir le sens qu'elle lui prête.

Il a ajouté que [TRADUCTION] « l'indemnisation visait, à toutes fins utiles, à compenser la perte d'une concession » (p. 180), de sorte que, dans « ces circonstances exceptionnelles » (p. 179), le gain ne pouvait en droit être qualifié de revenu suivant la norme de la décision correcte. Dans l'arrêt *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58 (C.A.Y.), par. 85, le juge Goldie a lui aussi relevé la diversité de la pratique réglementaire à l'égard du « gain tiré d'une vente ».

Les décisions récentes d'organismes de réglementation des États-Unis révèlent que le sort réservé au gain réalisé lors de la vente d'un terrain non amorti y est aussi très variable et comprend tant la solution préconisée par ATCO que celle retenue par la Commission :

> [TRADUCTION] Certains ressorts ont conclu que, sur le plan de l'équité, seuls les actionnaires doivent bénéficier du gain tiré d'un terrain qui s'est apprécié, car en général, les clients des entreprises de services publics paient les taxes foncières et non le coût d'acquisition et les charges d'amortissement. Suivant ce raisonnement, les clients n'assument aucun risque de perte et n'acquièrent aucun droit sur le bien, y compris en equity.
>
> D'autres estiment que les clients ont droit à une partie des profits résultant de la vente d'un terrain affecté à un service public. Les ressorts qui ont opté pour une répartition équitable conviennent que l'examen des décisions des organismes de réglementation et des cours de

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on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.

(P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44, at p. 44)

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), at p. 361:

To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility's stockholders are not *automatically* entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility's rates. [Emphasis in original.]

Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders.

The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at

justice sur la question ne permet pas de dégager l'exigence générale que le profit soit attribué aux seuls actionnaires, mais seulement une interdiction générale de le répartir lorsque le coût du terrain n'a jamais été inclus dans la base tarifaire.

(P. S. Cross, « Rate Treatment of Gain on Sale of Land : Ratepayer Indifference, A New Standard? » (1990), 126 *Pub. Util. Fort.* 44, p. 44)

La décision *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), illustre le point de vue américain favorable à la solution retenue par la Commission dans la présente affaire (p. 361) :

[TRADUCTION] Les principes généraux qui peuvent être dégagés des décisions rendues dans d'autres ressorts, s'il en est, sont les suivants : (1) les actionnaires d'une entreprise de services publics n'ont pas *automatiquement* droit au gain réalisé lors de toute vente d'un bien affecté au service public; (2) les clients n'ont pas droit à la totalité ou à une partie du profit tiré lors de la vente d'un bien qui n'a jamais été pris en compte pour l'établissement des tarifs. [En italique dans l'original.]

121 La composition de l'actif dont le coût est pris en compte dans la base tarifaire varie au gré des acquisitions et des aliénations, mais l'entreprise, elle, demeure. La démarche de la Commission en l'espèce est tout à fait compatible avec le principe de la « pérennité de l'entreprise » appliqué notamment dans *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). Dans cette affaire, Southern California Water avait sollicité l'autorisation de vendre un vieil établissement, et la commission devait décider de l'attribution du profit tiré de l'opération. La commission a conclu :

[TRADUCTION] Partant du principe de la « pérennité de l'entreprise », le profit tiré de l'opération doit être affecté à l'exploitation du service public, et non attribué à court terme aux actionnaires ou aux clients directement.

Ce principe n'est ni nouveau ni absolu. Il a clairement été énoncé dans la décision de principe que la commission a rendue en 1989 concernant le gain réalisé lors d'une vente (D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*)). En termes simples, lorsqu'une entreprise de services publics réalise un profit en vendant un bien qu'elle remplace par un autre ou par un titre de créance,

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the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation. [p. 604]

122 In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. *ATCO's Arguments*

123 Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

124 Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount to a confiscation of the corporation's property.

125 Secondly, ATCO says its retention of 100 percent of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

126 Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

sans que son obligation de servir la clientèle ne soit supprimée ou réduite, le profit doit être affecté à l'exploitation de l'entreprise. [p. 604]

À mon avis, ni les lois de l'Alberta ni la pratique réglementaire dans cette province et dans d'autres ressorts ne commandaient une décision en particulier. La Commission aurait pu accueillir la demande d'ATCO et lui attribuer la totalité du profit. Mais la solution qu'elle a retenue n'outrepassait aucunement sa compétence légale et ne justifie pas une intervention judiciaire.

F. *L'argumentation d'ATCO*

Les principaux arguments d'ATCO ont pour la plupart été abordés, mais, par souci de clarté, je les rappellerai. ATCO ne conteste pas vraiment le pouvoir de la Commission d'assortir de conditions la vente d'un terrain. Elle soutient plutôt que la Commission a violé en l'espèce un certain nombre de garanties et nous demande de restreindre sa marge de manœuvre.

Premièrement, ATCO prétend que les clients n'acquièrent aucun droit de propriété sur les biens de l'entreprise. C'est elle, et non ses clients, qui a initialement acheté le bien en question et qui en est devenue propriétaire, ce qui lui donnait droit à tout profit tiré de sa vente. Selon elle, attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise.

Deuxièmement, ATCO prétend que son droit à la totalité du profit n'a rien à voir avec le « pacte réglementaire ». Ses clients ont payé un prix que, d'une année à l'autre, la Commission a jugé raisonnable en contrepartie d'un service sûr et fiable. C'est ce qu'ils ont obtenu et c'est tout ce à quoi ils avaient droit. En leur attribuant une partie du profit, la Commission s'est indûment livrée à une tarification « rétroactive ».

Troisièmement, une entreprise de services publics ne peut *amortir* un terrain dans sa base tarifaire, de sorte que les clients n'ont pas défrayé ATCO de quelque partie du coût historique du terrain en question, encore moins en fonction de sa valeur actuelle. Le traitement réservé au profit tiré de la vente d'un bien amorti ne s'applique donc pas.

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Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

Quatrièmement, ATCO reproche à la solution de la Commission de créer une disparité. Les clients se voient attribuer une partie du profit résultant de l'appréciation d'un terrain sans pour autant être tenus, advenant une contraction du marché, d'assumer une partie des pertes subies lors de son aliénation. 127

In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

À mon avis, ce sont toutes des prétentions qui devaient être dûment formulées devant la Commission (et qui l'ont été). Certaines décisions d'organismes de réglementation étayent la thèse d'ATCO, d'autres appuient celle de ses clients. Il appartenait à la Commission de décider, au vu des circonstances, quelles conditions étaient nécessaires dans l'intérêt public. Comme je vais m'efforcer de le démontrer, la solution adoptée par la Commission en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. 128

1. The Confiscation Issue

1. La question de l'effet confiscatoire

In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, at para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. In *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) ("*SoCalGas*"), the regulator pointed out:

Dans son mémoire, ATCO affirme que [TRADUCTION] « [l]es biens appartenaient au propriétaire du service public et que la répartition projetée par la Commission ne peut avoir qu'un effet confiscatoire » (mémoire de l'intimée, par. 6). Cet argument ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. Dans la décision *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) (« *SoCalGas* »), l'organisme de réglementation a fait remarquer : 129

In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation

[TRADUCTION] Dans le secteur privé, qui exclut donc les services publics, l'investisseur n'est pas assuré d'un rendement raisonnable sur un tel investissement irrécupérable. Bien que les actionnaires et les détenteurs d'obligations fournissent le capital initial, les clients paient au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du bien, de sorte que la personne qui investit dans un service public ne risque pas d'avoir à supporter ces coûts. Les clients paient également un rendement raisonnable pendant que le bien (terrain

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accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

compris) est inclus dans la base tarifaire, ils indemnisent l'entreprise de la dépréciation d'un bien amortissable selon la méthode de la prise en charge par amortissement et ils courent le risque de payer l'amortissement et un rendement pour un bien inclus dans la base tarifaire qui est mis hors service prématurément. [p. 103]

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate-making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

(La Commission ne fait évidemment pas main basse sur le produit de la vente. Pour les besoins de la tarification, un montant *équivalant* aux deux tiers du profit est en fait pris en compte pour établir la base tarifaire actuelle d'ATCO. Le profit est donc réparti de manière abstraite entre les intéressés concurrents.)

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). In that case, the assets at issue were parcels of real estate which had been employed in mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

L'argument d'ATCO est fréquemment invoqué aux États-Unis sur le fondement de la protection constitutionnelle du « droit de propriété », laquelle n'a toutefois pas empêché que tout ou partie du profit en cause soit attribué aux clients de services publics américains. L'un des arrêts de principe aux États-Unis est *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). Dans cette affaire, des parcelles de terrain affectées au transport en commun étaient devenues superflues lorsque l'entreprise avait remplacé ses trolleybus par des autobus. L'organisme de réglementation a attribué aux actionnaires le profit tiré de la vente des terrains dont la valeur s'était appréciée, mais la cour d'appel a infirmé la décision en tenant un raisonnement directement applicable à l'effet « confiscatoire » allégué par ATCO :

We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis — sometimes articulated, sometimes implicit — that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful

[TRADUCTION] Nous ne voyons aucun obstacle, constitutionnel ou autre, à la reconnaissance d'un principe de tarification permettant aux clients de bénéficier de l'appréciation d'un bien survenue pendant son affectation au service public. Nous croyons que la doctrine fondant essentiellement les décisions contraires n'est plus pertinente. Un principe juridique et économique fondamental — parfois formulé en termes exprès, parfois implicite —, sous-tend ces décisions, savoir qu'un bien affecté à un service public demeure la propriété des seuls investisseurs de l'entreprise et que son appréciation est un élément indissociable et inviolable de ce droit de propriété. La notion de propriété privée qui imprègne notre jurisprudence a naturellement mené à l'application de ce principe, lequel a obtenu un certain appui dans les premières décisions en matière de tarification. S'il est encore valable, ce principe étaye la

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exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away. [p. 800]

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. [p. 32]

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Re Arizona Public Service Co.*:

> In *New York Telephone*, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. . . . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay

prétention de l'investisseur. Après mûre réflexion, nous pensons que ses fondements se sont depuis longtemps effrités et que la conclusion qu'il semblait dicter ne vaut plus. [p. 800]

Ces « décisions » qui ne sont « plus pertinente[s] » englobent sans doute *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976), une décision invoquée par ATCO en l'espèce et dans laquelle la Cour suprême des États-Unis a dit :

> [TRADUCTION] Les clients paient un service, et non le bien servant à sa prestation. Leurs paiements ne sont pas affectés à l'amortissement ou aux autres frais d'exploitation, non plus qu'au capital de l'entreprise. En acquittant leurs factures, les clients n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service ou sur les fonds de l'entreprise. Les biens acquis avec les sommes reçues en contrepartie des services appartiennent à l'entreprise, tout comme ceux achetés avec les fonds obtenus par l'émission d'actions et d'obligations. [p. 32]

Dans cette affaire, ayant conclu tardivement que l'amortissement autorisé pour New York Telephone Company les années précédentes était trop élevé, l'organisme de réglementation avait tenté de corriger la situation pendant l'exercice en cours en rajustant rétroactivement la base tarifaire. La cour a statué que l'organisme n'avait pas le pouvoir de réviser une tarification antérieure. Les avantages financiers découlant des erreurs commises par l'organisme étaient désormais acquis à l'entreprise. Le contexte n'est pas le même en l'espèce. Nul ne prétend que la tarification antérieure établie par la Commission en fonction du coût historique était erronée. En 2001, lorsqu'elle a été saisie de l'affaire, la Commission avait le pouvoir d'autoriser ou non la vente projetée. L'opération n'avait pas encore été conclue. La réalisation d'un profit par ATCO n'était qu'une possibilité. Comme on l'a expliqué dans *Re Arizona Public Service Co.* :

> [TRADUCTION] Dans *New York Telephone*, le tribunal devait déterminer si l'organisme de réglementation de l'État en question pouvait affecter à la réduction des tarifs l'excédent accumulé aux fins d'amortissement les années précédentes et ainsi fixer des tarifs qui ne produisaient pas un rendement raisonnable. [. . .] [L]a Cour a simplement repris un truisme en l'expliquant : les

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current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

tarifs doivent être établis de façon que les revenus permettent d'acquitter les charges (raisonnables) d'exploitation courantes et que les investisseurs de l'entreprise obtiennent un rendement raisonnable. Lorsque, pour une raison ou une autre, les tarifs fixés produisent trop de revenus ou pas assez, on ne peut revenir en arrière. On augmente les tarifs ou on les réduit pour tenir compte de la situation actuelle; leur fixation ne vise pas la restitution de profits excessifs antérieurs ou la compensation de pertes d'exploitation antérieures. En l'espèce, il s'agit plutôt de déterminer si, pour l'établissement des tarifs, le revenu provenant de la fourniture d'un service public pendant une année de référence peut comprendre le produit de la vente de biens de l'entreprise de services publics. La décision *New York Telephone* de la Cour suprême des États-Unis ne porte pas sur cette question. [Je souligne; p. 361.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

Plus récemment, dans la décision *SoCalGas*, la commission californienne de surveillance des services publics s'est penchée sur la question de l'attribution du profit tiré d'une aliénation. Comme dans la présente affaire, l'entreprise de services publics (SoCalGas) souhaitait vendre un terrain et des bâtiments situés (dans ce cas) au centre-ville de Los Angeles. La commission a réparti le profit entre les actionnaires et les clients de l'entreprise et a conclu :

We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold. [p. 100]

[TRADUCTION] Nous croyons que la question de savoir à qui appartient le bien affecté au service public est devenue un faux problème en l'espèce et que la propriété ne permet pas à elle seule de déterminer qui a droit au profit lorsque ce bien cesse d'être inclus dans la base tarifaire et est vendu. [p. 100]

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas*, the regulator disposed of this point as follows:

ATCO soutient dans son mémoire que les clients [TRADUCTION] « n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service, non plus que sur les fonds de l'entreprise » (par. 2). À cet égard, voici ce qu'a conclu l'organisme de réglementation dans *SoCalGas* :

No one seriously argues that ratepayers acquire title to the physical property assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service. [p. 100]

[TRADUCTION] Personne ne prétend sérieusement que les clients acquièrent un droit de propriété sur les biens affectés au service public; la DRA [Division of Ratepayer Advocates] soutient que le profit tiré de leur vente doit être retranché des besoins en revenus ultérieurs non pas parce que les clients sont propriétaires de ces biens, mais parce qu'ils en ont payé les coûts et assumé les risques pendant leur affectation au service public et leur inclusion dans la base tarifaire. [p. 100]

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This "risk" theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

Cette considération liée aux « risques » vaut également en Alberta. Pendant les 80 dernières années, le marché albertain de l'immobilier a connu des fluctuations considérables, mais durant toute cette période, que la conjoncture ait été favorable ou non, les clients ont garanti à ATCO un rendement juste et équitable pour le terrain et les bâtiments *considérés en l'espèce*.

The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

133 L'approche suivant laquelle le partage des risques emporte le partage du gain net a également été retenue dans *SoCalGas* :

> Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base. [p. 110]

> [TRADUCTION] Même si les actionnaires et les détenteurs d'obligations ont fourni le capital initial, les clients ont payé au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du terrain et des bâtiments et ils ont assuré à l'entreprise un rendement raisonnable selon la valeur non amortie du terrain et des bâtiments pendant la période où leur coût a été inclus dans la base tarifaire. [p. 110]

In other words, even in the United States, where property rights are constitutionally protected, ATCO's "confiscation" point is rejected as an oversimplification.

Autrement dit, même aux États-Unis où le droit de propriété est protégé par la Constitution, la thèse de l'effet « confiscatoire » avancée par ATCO est rejetée au motif qu'elle est simpliste.

My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply is that the Board's response in this case cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

134 Je ne prétends pas que l'attribution du profit en l'espèce convient nécessairement en toute circonstance. D'autres organismes de réglementation ont jugé que l'intérêt public commande une attribution différente. La Commission tranche au cas par cas. Je dis simplement que la mesure retenue ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et qu'elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. La déférence s'impose en l'espèce et, à mon avis, la décision de la Commission n'aurait pas dû être annulée.

2. The Regulatory Compact

2. Le pacte réglementaire

The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly

135 Dans sa décision, la Commission renvoie au « pacte réglementaire », notion aux contours flous selon laquelle, en contrepartie d'un monopole

and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

> The ratemaking process involves fundamentally "a balancing of the investor and the consumer interests". The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation. [p. 806]

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. stated, at p. 691:

> It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) ratemaking exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years :

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so

conféré par la loi et d'un revenu calculé suivant la méthode du coût d'achat majoré, l'entreprise de services publics accepte de voir son rendement limité de même que sa liberté de se départir des biens dont le coût est pris en compte pour établir sa base tarifaire. C'est ce qui ressort de l'arrêt *Washington Metropolitan Area Transit* de la Cour d'appel des États-Unis (circuit du district de Columbia) :

> [TRADUCTION] Le processus de tarification consiste essentiellement à « mettre en balance l'intérêt de l'investisseur et celui du consommateur ». L'intérêt de l'investisseur est de protéger son investissement et d'avoir une possibilité raisonnable de toucher un rendement acceptable. L'intérêt du consommateur réside dans la protection gouvernementale contre la tarification déraisonnable de services fournis dans un contexte monopolistique. Pour ce qui est de l'appréciation d'un bien, l'équilibre optimal est atteint lorsque les intérêts de l'un et de l'autre sont respectés le plus possible. [p. 806]

ATCO estime que la manière dont la Commission a attribué le profit contrevient au pacte réglementaire non seulement en raison de son effet confiscatoire, mais aussi parce qu'il s'agit d'une « tarification rétroactive ». Dans l'arrêt *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684, le juge Estey a dit ce qui suit à la p. 691 :

> Il ressort clairement de plusieurs dispositions de *The Gas Utilities Act* que la Commission n'agit que pour l'avenir et ne peut fixer des tarifs qui permettraient à l'entreprise de recouvrer des dépenses engagées antérieurement et que les tarifs précédents n'avaient pas suffi à compenser.

Je le répète, la Commission était appelée à se prononcer sur une rentrée projetée et elle a décidé que les deux tiers devraient être pris en compte dans la tarification ultérieure (et non antérieure), ce qui est conforme à la pratique réglementaire. Par exemple, dans la décision *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960), l'organisme de réglementation a statué que le profit réalisé lors de la vente d'un terrain devrait servir à réduire les tarifs pour les 17 années suivantes :

> [TRADUCTION] Lorsqu'un terrain est vendu à profit, le gain doit être ajouté à l'amortissement cumulé, c.-à-d.

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that there is a corresponding reduction of the rate base and resulting return. [p. 864]

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

More recently, in *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), the regulator commented:

. . . we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in rate-base. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the utility to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former property. [p. 529]

The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the Board doing what it did in this case.

3. Land as a Non-Depreciable Asset

The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus, in this case, the land was still carried on ATCO's books at its original price of $83,720 whereas the original $596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of $141,525.

« porté à son crédit », de manière à réduire proportionnellement la base tarifaire et, par conséquent, le rendement. [p. 864]

L'ordonnance a été confirmée par la Cour suprême de l'État de New York (section d'appel).

Plus récemment, dans la décision *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), l'organisme de réglementation a dit : 138

[TRADUCTION] . . . nous avons jugé approprié de déduire la plus grande partie du profit des coûts futurs liés au siège de l'entreprise parce que les clients avaient assumé les risques et les charges pendant l'inclusion du bien dans la base tarifaire. Nous avons également jugé équitable d'attribuer une partie du profit aux actionnaires afin d'inciter raisonnablement l'entreprise à obtenir le meilleur prix de vente possible et d'indemniser les actionnaires des risques inhérents à la possession du bien. [p. 529]

Toutes ces décisions mettent l'accent sur la mise en balance des intérêts des actionnaires et des clients, ce qui est tout à fait compatible avec la théorie du « pacte réglementaire » qui sous-tend la décision de la Commission en l'espèce. 139

3. Le terrain en tant que bien non amortissable

La Cour d'appel de l'Alberta a établi une distinction entre le profit tiré de la vente d'un terrain, dont le coût historique n'est pas amorti (et qui n'est donc pas graduellement remboursé par le truchement de la base tarifaire), et le profit tiré de la vente d'un bien amorti, comme un bâtiment, pour lequel la base tarifaire opère un certain remboursement du capital et qui, en ce sens, « a été payé » par les clients. Elle a conclu que la Commission avait eu raison d'inclure dans la base tarifaire l'équivalent de l'amortissement consenti pour les bâtiments (l'objet du pourvoi incident d'ATCO). Ainsi, en l'espèce, alors que la valeur du terrain était encore reportée dans les comptes d'ATCO au coût historique de 83 720 $, les bâtiments, payés initialement 596 591 $, avaient été amortis dans les tarifs exigés des consommateurs et leur valeur comptable nette s'établissait à 141 525 $. 140

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141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Re Boston Gas Co.* for example (cited in *TransAlta (1986)*, at p. 176), the regulator held:

> . . . the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land. [p. 26]

142 In *SoCalGas*, as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating: "We see little reason why land sales should be treated differently" (p. 107). The decision continued:

> In short, whether an asset is depreciated for rate-making purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets. [Emphasis added; p. 107.]

143 In *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), the regulator commented that:

> Our decisions generally find no reason to treat gain on the sale of nondepreciable property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use]. [p. 105]

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the

Il ressort de la pratique réglementaire que de nombreux organismes de réglementation (et non tous) refusent de faire une distinction (à cette fin) entre les biens amortissables et les biens non amortissables. Dans la décision *Re Boston Gas Co.* (citée dans *TransAlta (1986)*, p. 176), par exemple, l'organisme a conclu :

> [TRADUCTION] . . . les clients de l'entreprise ont versé un rendement et payé tous les autres coûts afférents à l'utilisation du terrain. Le fait qu'il s'agit d'un bien non amortissable — son utilisation ne diminuant habituellement pas sa valeur d'usage — n'a rien à voir avec la question de savoir qui a droit au produit de sa vente. [p. 26]

Dans *SoCalGas*, l'organisme de réglementation a également refusé de faire une distinction entre le profit réalisé lors de la vente d'un bien amortissable et celui issu de la vente d'un bien non amortissable, affirmant à la p. 107, qu'[TRADUCTION] « [i]l ne voyait pas pourquoi des ventes de terrains devraient être traitées différemment » et ajoutant :

> [TRADUCTION] En somme, les clients s'engagent à verser un rendement selon la valeur comptable, que le bien soit amorti ou non pour les besoins de la tarification, et ce, tant que le bien est employé et susceptible de l'être. L'amortissement tient simplement compte du fait que certains biens, contrairement à d'autres, se détériorent durant leur affectation au service public. Fondamentalement, la relation entre l'entreprise et ses clients demeure la même qu'il s'agisse de biens amortissables ou non. [Je souligne; p. 107.]

Dans *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), l'organisme de réglementation a fait la remarque suivante :

> [TRADUCTION] Dans nos décisions, nous concluons généralement qu'il n'y a pas lieu de traiter différemment le profit réalisé lors de la vente d'un bien non amortissable, comme un terrain nu, et celui issu de la vente d'un bien amortissable dont le coût a été inclus dans la base tarifaire ou d'un terrain détenu pour usage ultérieur. [p. 105]

Encore une fois, je ne dis pas que l'organisme de réglementation *doit* systématiquement écarter toute distinction entre un bien amortissable et un bien non amortissable. Je dis simplement que la distinction n'est pas aussi déterminante que le

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Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. La limitation du pouvoir discrétionnaire de la Commission, alléguée par ATCO sur le fondement de différents points de vue doctrinaux, n'est pas compatible avec les termes généraux employés par le législateur albertain et doit être rejetée.

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4. Lack of Reciprocity

4. L'absence de réciprocité

145 ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

ATCO soutient que les clients ne devraient pas tirer avantage d'un marché haussier, car c'est elle, et non eux, qui subirait la perte si la valeur du terrain diminuait. Toutefois, la documentation présentée à notre Cour donne à penser que la Commission tient compte des profits *et* des pertes. Dans les décisions mentionnées ci-après, elle énonce et rappelle, puis rappelle encore, le « principe général » :

the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility. [Emphasis added.]

[TRADUCTION] . . . la Commission estime que les profits ou les pertes (soit la différence entre la valeur comptable nette et le produit de la vente) résultant de la vente de biens affectés à un service public doivent être attribués aux clients de l'entreprise de services publics, et non à son propriétaire. [Je souligne.]

(See *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984, at p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984, at p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23.)

(Voir *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984, p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84115, 12 octobre 1984, p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n^{o} E84113, 12 octobre 1984, p. 23.)

146 In *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984, the Board reviewed a number of regulatory approaches (including *Re Boston Gas Co.*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

Dans *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984, la Commission a examiné un certain nombre de décisions d'organismes de réglementation (y compris *Re Boston Gas Co.*, précitée) portant sur le profit tiré d'une vente et a dit ce qui suit au sujet de ses propres décisions (p. 12) :

The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

[TRADUCTION] La Commission est consciente de n'avoir pas appliqué une formule ou une règle uniforme permettant de déterminer automatiquement la procédure comptable à suivre à l'égard du profit ou de la perte résultant de l'aliénation d'un bien affecté à un service public. Il en est ainsi parce qu'elle décide de ce qui est juste et raisonnable en fonction du fond ou des faits de chaque affaire.

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

> If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property. [p. 107]

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulated in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

III. Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

La prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain *diminue* ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. Comme il a été signalé dans *SoCalGas* :

> [TRADUCTION] Si la valeur du terrain devenait inférieure à son coût historique, on pourrait prétendre que le rendement constant versé au fil des ans [par les clients] pour le terrain a en fait surindemnisé les investisseurs. Le rapport entre les risques et les avantages est tout aussi symétrique pour un terrain que pour un bien amortissable lorsque leur coût est pris en compte pour l'établissement de la base tarifaire. [p. 107]

II. Conclusion

En résumé, le par. 15(3) de l'AEUBA conférait à la Commission le pouvoir d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de la vente du terrain et des bâtiments en cause. Dans l'exercice de ce pouvoir, et vu la [TRADUCTION] « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait (GUA, par. 22(1)), la Commission a attribué le gain comme elle l'a fait pour les considérations d'intérêt public énoncées dans sa décision. Le pouvoir aurait peut-être été exercé différemment par un autre organisme de réglementation ou dans un autre ressort, mais il reste que la Commission était autorisée à répartir le gain tiré de la vente d'un bien qu'ATCO souhaitait soustraire à la base tarifaire. Il ne nous appartient pas de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer notre opinion à celle de la Commission.

III. Dispositif

Je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de l'Alberta et de rétablir la décision de la Commission, avec dépens payables à la ville de Calgary dans toutes les cours. Le pourvoi incident d'ATCO devrait être rejeté avec dépens.

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APPENDIX

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

Jurisdiction

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

Powers of the Board

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

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

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

(a) make any order that the ERCB or the PUB may make under any enactment;

(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

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

(e) make an order granting the whole or part only of the relief applied for;

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in

ANNEXE

Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17

[TRADUCTION]

Compétence

13 La Commission connaît de toute question dont peut connaître l'ERCB ou la PUB suivant un texte législatif ou le droit par ailleurs applicable, et sa compétence est exclusive.

Pouvoirs de la Commission

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

(2) La Commission peut agir d'office à l'égard de tout renvoi, demande, plainte, directive ou requête auquel l'ERCB, la PUB ou la Commission peut donner suite.

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

a) rendre toute ordonnance que l'ERCB ou la PUB peut rendre suivant un texte législatif;

b) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que l'ERCB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

c) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que la PUB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

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

e) rendre une ordonnance accordant en tout ou en partie la réparation demandée;

f) lorsqu'elle l'estime juste et convenable, accorder en partie la réparation demandée ou en accorder

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addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Appeals

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

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

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

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

. . .

Exclusion of prerogative writs

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

Gas Utilities Act, R.S.A. 2000, c. G-5

Supervision

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

une autre en sus ou en lieu et place comme si tel était l'objet de la demande.

Appel

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

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

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

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

. . .

Immunité de contrôle

27 Sous réserve de l'article 26, toute mesure, ordonnance ou décision de la Commission ou de la personne exerçant ses pouvoirs ou ses fonctions est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire.

Gas Utilities Act, R.S.A. 2000, ch. G-5

[TRADUCTION]

Surveillance

22(1) La Commission assure la surveillance générale des services de gaz et de leurs propriétaires et peut, en ce qui concerne notamment le matériel, les appareils, les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne application d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

(2) La Commission mène toute enquête nécessaire à l'obtention de renseignements complets sur la façon dont le propriétaire d'un service de gaz se conforme à la loi ou sur tout ce qui est par ailleurs de son ressort suivant la présente loi.

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Investigation of gas utility

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

. . .

Designated gas utilities

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

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

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

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

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

Enquêtes

24(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à un service de gaz.

. . .

Services de gaz désignés

26(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires de services de gaz assujettis au présent article et à l'article 27.

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

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

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

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

. . .

Prohibited share transactions

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

. . .

Powers of Board

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in

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

. . .

Incessibilité des actions

27(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'un service de gaz désigné en application du paragraphe 26(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire du service de gaz.

. . .

Pouvoirs de la Commission

36 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement et d'autres tarifs spéciaux opposables au propriétaire d'un service de gaz et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'un service de gaz, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'un service de gaz, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) exiger que le propriétaire d'un service de gaz construise, entretienne et exploite,

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compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs, fixes or imposes.

Rate base

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the

conformément à la présente loi et à toute autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire du service de gaz justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension;

e) exiger que le propriétaire d'un service de gaz approvisionne en gaz certaines personnes, à certaines fins, en contrepartie de certains tarifs, prix et charges, et à certaines conditions, selon ce qu'elle détermine.

Base tarifaire

37(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire d'un service de gaz servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'un service de gaz par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qu'elle estime pertinents.

Recettes excédentaires ou insuffisantes

40 Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de

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fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

General powers of Board

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the *Public Utilities Board Act* conferred on the Board in the case of a public utility under that Act.

Public Utilities Board Act, R.S.A. 2000, c. P-45

Jurisdiction and powers

36(1) The Board has all the necessary jurisdiction and power

fixation des tarifs, des taux ou des charges, ou de leurs barèmes,

(ii) un exercice ultérieur,

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa b) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

d) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas b) ou c) et la période, y compris tout exercice ultérieur, au cours de laquelle il convient de le faire.

Pouvoirs généraux

59 Pour l'application de la présente loi, la Commission a, à l'égard des installations, des locaux, du matériel, des services, de l'organisation de la production, de la distribution et de la vente de gaz en Alberta, ainsi que du propriétaire d'un service de gaz et de son entreprise, les pouvoirs que lui confère la *Public Utilities Board Act* à l'égard d'une entreprise de services publics au sens de cette loi.

Public Utilities Board Act, R.S.A. 2000, ch. P-45

[TRADUCTION]

Compétence et pouvoirs

36(1) La Commission a la compétence et les pouvoirs nécessaires

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(a) to deal with public utilities and the owners of them as provided in this Act;

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

General power

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

Investigation of utilities and rates

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature

a) pour agir à l'égard des entreprises de services publics et de leurs propriétaires conformément à la présente loi;

b) pour agir à l'égard des entreprises de services publics et connaître de questions connexes touchant une région adjacente à une ville, conformément à la présente loi.

(2) Outre la compétence et les pouvoirs mentionnés au paragraphe (1), la Commission a la compétence et les pouvoirs nécessaires pour exercer les fonctions qui lui sont légalement dévolues.

(3) La Commission a et est réputée avoir toujours eu compétence pour fixer, sur demande, le prix et les conditions d'une acquisition effectuée par un conseil municipal sous le régime de l'article 47 de la *Municipal Government Act*

a) avant que le conseil n'exerce son droit d'acquisition suivant cet article, et sans qu'il soit tenu de procéder à l'acquisition ou

b) lorsque l'acquisition est soumise à son approbation suivant cet article, avant que la Commission n'entende la demande et ne statue sur elle.

Pouvoirs généraux

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

Enquêtes sur les services publics et les tarifs

80 Lorsqu'il lui est démontré à l'audition d'une demande présentée par le propriétaire d'une entreprise de services publics ou par une municipalité ou une personne ayant un intérêt actuel ou éventuel dans l'objet de la demande, qu'il y a lieu de croire que les taux établis par le propriétaire d'une entreprise de services publics excèdent ce qui est juste et raisonnable eu égard à la nature et à la qualité du service ou du produit en cause, la Commission

a) peut enquêter comme elle le juge utile sur toute question liée à la nature et à la qualité du

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and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

Supervision by Board

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

. . .

Investigation of public utility

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of its owner, the Board shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect of it required by the Board.

service ou du produit en cause, ou à l'exécution du service et aux taux ou charges y afférents;

b) peut, en ce qui concerne l'amélioration du service ou du produit et les taux et charges y afférents, rendre toute ordonnance qu'elle estime juste et raisonnable;

c) peut écarter ou modifier, comme elle l'estime raisonnable, les taux ou les charges qu'elle juge excessifs, injustes ou déraisonnables, ou indûment discriminatoires envers une personne, y compris une municipalité, sous réserve toutefois des dispositions qu'elle considère justes et raisonnables d'un contrat liant le propriétaire de l'entreprise de services publics et une municipalité au moment de la demande.

Surveillance

85(1) La Commission assure la surveillance générale des entreprises de services publics et de leurs propriétaires et peut, en ce qui concerne notamment les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne exécution d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

. . .

Enquêtes

87(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à une entreprise de services publics.

(2) Lorsqu'elle estime nécessaire d'enquêter sur une entreprise de services publics ou sur les activités de son propriétaire, la Commission a accès aux livres, documents et dossiers relatifs à l'entreprise qui sont en la possession du propriétaire, d'une municipalité, d'un organisme public ou d'un ministère, et elle peut les utiliser.

(3) La personne qui exerce un pouvoir direct ou indirect sur l'entreprise d'un propriétaire de services publics en Alberta et toute société dont cette personne est actionnaire majoritaire est tenue de donner à la Commission ou à son représentant l'accès aux livres, documents et dossiers relatifs à l'entreprise du propriétaire ou de communiquer tout renseignement y afférent exigé par la Commission.

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Fixing of rates

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;

(d) repealed;

(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Établissement des tarifs

89 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement, des tarifs au mille ou au kilomètre et d'autres tarifs spéciaux opposables au propriétaire de l'entreprise de services publics et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'une entreprise de services publics, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'une entreprise de services publics, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) abrogé;

e) exiger qu'un propriétaire d'entreprise de services publics construise, entretienne et exploite, conformément à toute autre disposition de la présente loi ou d'une autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire de l'entreprise de services publics justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension.

Determining rate base

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to

Base tarifaire

90(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services public et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire de l'entreprise de services publics servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte :

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur

the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

Revenue and costs considered

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of such a period,

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,

(d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the hearing and determining of the matter, and

d'acquisition pour le propriétaire de l'entreprise de services publics, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'une entreprise de services publics par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qui, selon elle, sont pertinents.

Prise en compte des recettes et des dépenses

91(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services publics et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation des tarifs, des taux ou des charges, ou de leurs barèmes;

(ii) un exercice ultérieur;

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) tient compte de l'incidence de la *Small Power Research and Development Act* sur les recettes et les dépenses du propriétaire relatives à la production, au transport et à la distribution d'électricité;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

d) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa c) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

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(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

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

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

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

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

e) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas c) ou d) et la période (y compris tout exercice ultérieur) au cours de laquelle il convient de le faire.

Services de gaz désignés

101(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires d'entreprises de services publics assujettis au présent article et à l'article 102.

(2) Le propriétaire d'une entreprise de services publics désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

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

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

. . .

Prohibited share transaction

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

. . .

Interpretation Act, R.S.A. 2000, c. I-8

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Appeal dismissed with costs and cross-appeal allowed with costs, McLachlin C.J. *and* Binnie *and* Fish JJ. *dissenting.*

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

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

. . .

Incessibilité des actions

102(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'une entreprise de services publics désignée en application du paragraphe 101(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire de l'entreprise de services publics.

. . .

Interpretation Act, R.S.A. 2000, ch. I-8

[TRADUCTION]

Principe et interprétation

10 Tout texte est réputé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Pourvoi rejeté avec dépens et pourvoi incident accueilli avec dépens, la juge en chef McLachlin *et les juges* Binnie *et* Fish *sont dissidents.*

Procureurs de l'appelante/intimée au pourvoi incident : McLennan Ross, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident : Bennett Jones, Calgary.

Procureur de l'intervenante Alberta Energy and Utilities Board : J. Richard McKee, Calgary.

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Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Procureur de l'intervenante la Commission de l'énergie de l'Ontario : Commission de l'énergie de l'Ontario, Toronto.

Procureurs de l'intervenante Enbridge Gas Distribution Inc. : Fraser Milner Casgrain, Toronto.

Procureurs de l'intervenante Union Gas Limited : Torys, Toronto.

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5

British Columbia Electric Railway Co. v. British Columbia (Utilities Commission)

Supreme Court Reports

Supreme Court of Canada

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

1960: May 4, 5, 6 / 1960: October 4.

[1960] S.C.R. 837

British Columbia Electric Railway Co. Ltd., Appellant; and The Public Utilities Commission of British Columbia, British Columbia Lumber Manufacturers' Association, The Corporation of The City of Victoria, The Corporation of the District of Oak Bay, The Corporation of the District of Saanich, Corporation of the Township of Esquimalt and City of Vancouver, Respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

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).

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

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

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

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

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

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

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

APPEAL from a portion of a judgment of the Court of Appeal for British Columbia [(1959), 29 W.W.R. 533.], 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; J.A. Clark, Q.C., for The Public Utilities Commission of British Columbia, respondent; T.P. O'Grady, for The Corporation of The City of Victoria, The Corporation of The District of Oak Bay, The Corporation of the District of Saanich and Corporation of The Township of Esquimalt, respondents; R.K. Baker, for City of Vancouver, respondent.

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.

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 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.

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, 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 [(1679), 2 Show 81, 89 E.R. 807.], 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 [(1869), L.R. 4 H.L. 226 at 237, 38 L.J. Ex. 177.], 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, 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 [(1923), 262 U.S. 679.] 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 [(1925), 271 U.S. 23 at 31.], 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 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.

In Colonial Sugar Refining Company v. Melbourne Harbour Trust Commissioners [[1927] A.C. 343 at 359, 96 L.J.P.C. 74.], 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.

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 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 the quantities supplied to those to whom the service is rendered.

The second part of Question (1) reads:

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

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

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

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

MARTLAND J.

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.

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: --
>
> (a) The Commission shall consider all matters which it deems proper as affecting the rate:
>
> (b) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:
>
> (c) Where the public utility furnishes more than one class of service, the Commission shall segregate the various kinds of service into distinct classes or categories of service; and for the purpose of fixing the rate to be charged for the service rendered, each distinct class or category of service shall be considered as a self-contained unit, and the rates fixed for each unit shall be such as are considered just and reasonable for that unit without regard to the rates fixed for any other unit. If it is considered by the Lieutenant-Governor in Council that the rates as so determined might be inequitable or contrary to the general public interest, the Lieutenant-Governor in Council may direct that two or more classes or categories of service shall be considered as one unit in fixing the rate:

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

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

The Court of Appeal concurred in this view. The judgment of the Court [(1959), 29 W.W.R. 533 at 538.], 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 to consider "the protection of the public" and the "giving to the public utility a fair and reasonable return". Although clauses (a) and (b) of Sec. 16(1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16(1)(a), namely, "all matters which it deems proper as affecting the rate" and those falling within Sec. 16(1)(b), namely, "the protection of the public" and "a fair and reasonable return" to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance.
>
> From this decision the present appeal is brought.

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

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

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

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

These four sections last mentioned involve a statutory obligation on the part of a public utility to make capital outlays for extensions of its service. A public utility which operates in a rapidly expanding community may be required to make substantial expenditures of that nature in order to keep pace with increasing demands. It must, if it is to fulfil those obligations, be able to obtain the necessary 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 [*[1929] S.C.R. 186* at 193, 2 D.L.R. 4.]:

> 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.
>
> (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

(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.

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Federal Power Com. v. Hope Natural Gas Co.

Supreme Court of the United States

October 20, 21, 1943, Argued ; January 3, 1944, Decided

No. 34

Reporter
320 U.S. 591 *; 64 S. Ct. 281 **; 88 L. Ed. 333 ***; 1944 U.S. LEXIS 1204 ****

FEDERAL POWER COMMISSION ET AL. v. HOPE NATURAL GAS CO.

Prior History: [****1] CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT. *

CERTIORARI, 319 U.S. 735, to review a decree setting aside an order of the Federal Power Commission, 44 P. U. R. (N. S.) 1, under the Natural Gas Act.

Disposition: *134 F.2d 287*, reversed.

Core Terms

natural gas, rates, consumers, regulation, rate base, industrial, domestic, public interest, producing, prudent, interstate, fuels, fair value, depreciation, rate-making, depletion, reduction, earnings, prices, oil, annual, resale, cases, consumption, enterprise, supplied, interstate commerce, facilities, customers, Pipeline

Case Summary

Procedural Posture
Certiorari was granted to review a judgment of the United States Court of Appeals for the Fourth Circuit, which vacated a rate order issued by petitioner Federal Power Commission with regard to rates that respondent gas company was permitted to charge on the basis that the rate order was unreasonable.

Overview
The United States Supreme Court reversed the decision to set aside the rate order issued by petitioner, the Federal Power Commission. The Court found that respondent was a natural gas company that supplied natural gas to companies in Ohio and Pennsylvania and also supplied natural gas directly to consumers. Petitioner brought a complaint against respondent, arguing that respondent's rates were unreasonable. After an extensive factual review, the Court held that the Natural Gas Act gave petitioners the power to adjust respondent's rates and that the rate determined by petitioner was just and reasonable. In so holding, the Court stated that petitioner correctly considered the factors in reaching the rate and did not exceed their authority. Further, the Court held that petitioners properly considered the impact on the state in which respondent operated when petitioner issued the rate order. Additionally, the Court held that the rate was not unfairly discriminatory between domestic and industrial users. Therefore, the Court found that the rate order was permissible and reversed the judgment of the appellate court.

Outcome
The judgment finding that the rate order covering what respondent could charge for natural gas issued by petitioner Federal Power Commission was unreasonable and vacating the order was reversed because petitioner had the power to issue the order and the rate was just and reasonable.

LexisNexis® Headnotes

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General

* Together with No. 35, City of Cleveland v. Hope Natural Gas Co., also on writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit.

Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

HN1[] US Federal Communications Commission, Jurisdiction

Congress provides in § 4(a) of the Natural Gas Act that all natural gas rates subject to the jurisdiction of the Federal Power Commission shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. Section 5(a) of the Natural Gas Act gives the Commission the power, after hearing, to determine the just and reasonable rate to be thereafter observed and to fix the rate by order. Section 5(a) of the Natural Gas Act also empowers the Commission to order a decrease where existing rates are unjust, unlawful, or are not the lowest reasonable rates. And Congress provides in § 19(a) of the Natural Gas Act that on review of these rate orders the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

HN2[] Natural Gas Industry, Natural Gas Act

The Federal Power Commission is not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of pragmatic adjustments. And when the Commission's order is challenged in the courts, the question is whether that order viewed in its entirety meets the requirements of the Natural Gas Act. Under the statutory standard of just and reasonable it is the result reached not the method employed which is controlling.

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

HN3[] Natural Gas Industry, Natural Gas Act

It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Natural Gas Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Railroad Commissions

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

HN4[] Railroads & Rail Transportation, Railroad Commissions

The Federal Power Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Natural Gas Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN5[] Utility Companies, Rates

Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called fair value rate base.

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN6[] **Energy & Utilities Law, Natural Gas Industry**

There is no constitutional requirement that an owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it. The ultimate exhaustion of the supply is inevitable in the case of all natural gas companies. Moreover, the United States Supreme Court recognizes the propriety of basing annual depreciation on cost. By such a procedure the utility is made whole and the integrity of its investment maintained. No more is required.

Lawyers' Edition Display

Headnotes

CONSTITUTIONAL LAW, §730 > due process -- regulation of prices. -- > Headnote:
LEdHN[1][] [1]

The fact that, by the fixing of prices, the value of the property affected is reduced does not mean that the regulation is invalid.

PUBLIC UTILITIES, §10 > fixing rates -- "fair value." -- > Headnote:
LEdHN[2][] [2]

"Fair value" is the end, not the starting point, of the process of ratemaking when the value of the going enterprise depends on earnings under whatever rates may be anticipated.

GAS, §4 > Natural Gas Act -- reasonableness of rates. -- > Headnote:
LEdHN[3][] [3]

The result reached, not the method employed, is controlling in determining what is a "just and reasonable rate" within 5(a) of the Natural Gas Act (*15 USC 717*).

FEDERAL POWER COMMISSION, §1 > review of orders -- Natural Gas Act. -- > Headnote:
LEdHN[4][] [4]

If the total effect of a rate order of the Federal Power Commission under the Natural Gas Act cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end; the fact that the method employed by the Commission to reach that result may contain infirmities is not then important.

EVIDENCE, §251 > presumption -- validity of rate order of Federal Power Commission. -- > Headnote:
LEdHN[5][] [5]

A rate order of the Federal Power Commission issued under the Natural Gas Act (*15 USC 717*) carries a presumption of validity, and one who would upset such order has the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

GAS, §3 > fixing rates -- Natural Gas Act -- considering interests of investors. -- > Headnote:
LEdHN[6][] [6]

The rate-making process to be followed by the Federal Power Commission under the Natural Gas Act (*15 USC 717*) should include consideration of the interests, not only of the consumers, but also of the investors, in order that returns on investments may be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

GAS, §6 > rates -- valuation -- Natural Gas Act -- "actual legitimate cost" as base -- reasonableness of order. -- > Headnote:
LEdHN[7][] [7]

An order of the Federal Power Commission fixing, on the basis of "actual legitimate cost" rather than reproduction cost and trended original cost, a valuation

of $ 33,712,526 on the properties of a natural gas company, allowing it a rate of return of 6 1/2 per cent, in a proceeding under the Natural Gas Act (15 USC 717), issued after full consideration of the financial history and present status of the company and the natural gas industry and of general economic conditions, and stressing the importance of maintaining the financial integrity of the company, cannot be said to be unjust and unreasonable, as against the company's contention that the rate base should be fixed at $ 66,000,000, where the par amount of the outstanding stock is $ 28,000,000 and only about $ 17,000,000 of this war issued for cash or other assets, the company, organized in 1908, had paid over $ 97,000,000 in cash dividends, and up to 1940 had accumulated an earned surplus of $ 8,000,000 and a depletion and depreciation reserve of $ 46,000,000, its average earnings had been twelve per cent on its invested capital and twenty per cent on the capital stock issued for cash or other assets, it had paid dividends of ten per cent in three recent years, and in four years its earned surplus had increased to almost half the value of its outstanding stock.

GAS, §4 > Natural Gas Act -- reasonableness of rates. -- > Headnote:
LEdHN[8] [8]

Rates, fixed by the Federal Power Commission under the Natural Gas Act (15 USC 717), which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed, cannot be condemned as invalid, even though they may produce only a meager return on an alleged "fair value" rate base.

GAS, §6 > Natural Gas Act -- reasonableness of rates -- valuation -- reproduction cost. -- > Headnote:
LEdHN[9] [9]

Where, in a rate proceeding under the Natural Gas Act (15 USC 717), the rate base contended for by the company, computed on reproduction cost new, would, in a recent four-year period, have produced a return of 3.27 per cent, whereas in fact the company in that period earned an average of 9 per cent, the Federal Power Commission is justified in concluding that the 3.27 per cent rate is the result of an inflation of the rate base, and that, accordingly, reproduction cost new is not a suitable measure for fixing the proper base.

GAS, §10 > reasonableness of rates -- Natural Gas Act -- allowances for depletion and depreciation. -- > Headnote:
LEdHN[10] [10]

The use, by the Federal Power Commission in a rate proceeding under the Natural Gas Act (15 USC 717), of "actual legitimate cost" as the basis of both the accrued and annual allowances for depletion and depreciation, rejecting as such basis an excessive reserve accumulated by the company as a result of incorrect depletion and depreciation practices, is proper, as against the view that such allowances should be computed on the basis of "present fair value," where, on the basis adopted, the company, operating a wasting-asset business, is made whole, and the integrity of its investment is maintained.

GAS, §10 > reasonableness of rates -- Natural Gas Act -- allowances for depletion and depreciation. -- > Headnote:
LEdHN[11] [11]

The fact that a natural gas company is a public utility required to continue its services to the public and not scheduled to end its business on a day certain does not, for the purpose of fixing its rates under the Natural Gas Act (15 USC 717), require a different basis of allowance for depletion and depreciation than is used in the case of other companies conducting a wasting-asset business.

CONSTITUTIONAL LAW, §733 > due process -- gas rates -- Natural Gas Act. -- > Headnote:
LEdHN[12] [12]

A rate order which conforms to the requirement of 5(a) of the Natural Gas Act (15 USC 717) that the rate be "just and reasonable," conforms also to constitutional requirements.

GAS, §3 > Natural Gas Act -- fixing rates -- considering interests of producing state. -- > Headnote:
LEdHN[13][] [13]

The interests of the producing state and its citizens in the conservation and development of its natural gas resources, in the protection of reversionary interests in gas leaseholds, and in the maintenance of the tax value of gas properties within the state, are not proper subjects for consideration by the Federal Power Commission in a rate proceeding under the Natural Gas Act (15 USC 717), and cannot be invoked to compel or justify the fixing of a higher rate than would otherwise be warranted, in view of the primary purpose of the Act to protect consumers of gas against exploitation through high rates.

GAS, §11 > Natural Gas Act -- purpose -- relation to state regulation. -- > Headnote:
LEdHN[14][] [14]

The Natural Gas Act (15 USC 717) was designed to complement, not to usurp, state authority, its purpose being to regulate that wholesale distribution of gas in interstate commerce which is not subject to state regulation.

GAS, §4 > reasonableness of rates -- Natural Gas Act. -- > Headnote:
LEdHN[15][] [15]

The standards for the determination of the amount which a private operator should be allowed to earn from the sale of natural gas across state lines through an established distribution system are provided for by 4 and 5, not by 7, of the Natural Gas Act (15 USC 717).

FEDERAL POWER COMMISSION, §1 > review -- rate order -- court's substitution of own judgment. -- > Headnote:
LEdHN[16][] [16]

The court, in reviewing a rate order of the Federal Power Commission under the Natural Gas Act (15 USC 717), will not substitute its judgment for that of the Commission in determining whether the rate allowed is enough to induce private enterprise to perform completely and efficiently its functions for the public, where these matters have received adequate consideration by the Commission.

FEDERAL POWER COMMISSION, §1 > Natural Gas Act -- rate proceeding -- relative rates for industrial and domestic uses. -- > Headnote:
LEdHN[17][] [17]

The issue of the relative rates to be allowed for industrial and domestic uses of gas is not before the Federal Power Commission in a proceeding to fix the rates of an interstate gas company under 4 and 5 of the Natural Gas Act (15 USC 717), where the company merely sells the gas wholesale to distributors, and it is the latter who distribute it among the industrial and domestic consumers.

GAS, §3 > Natural Gas Act -- fixing rates -- higher rates for industrial uses. -- > Headnote:
LEdHN[18][] [18]

The desirability of discouraging the use of gas for industrial uses is not a proper subject of consideration by the Federal Power Commission in a rate proceeding under the Natural Gas Act (15 USC 717), and the Commission is without power, on this ground, to place a rate on industrial uses higher than would otherwise be warranted under the Act.

GAS, §3 > Natural Gas Act -- rate regulation -- conventional standards. -- > Headnote:
LEdHN[19][] [19]

The provisions of 4 and 5 of the Natural Gas Act (15 USC 717) for the fixing of "just and reasonable" rates were not intended to introduce any novel doctrines, but only to embrace the conventional standards, of rate making for natural gas companies.

FEDERAL POWER COMMISSION, §1 > review -- rate order under Natural Gas Act -- considering question not raised. -- > Headnote:
LEdHN[20] [20]

The question of discrimination between industrial and domestic users, in violation of 4(b) of the Natural Gas Act (15 USC 717), is not properly before the courts on a petition to review a rate order of the Federal Power Commission in a proceeding under the Act, where the Commission has failed to make any findings under 4(b), and such failure is not challenged in the petition to review, and is not raised or argued by any party before the courts.

FEDERAL POWER COMMISSION, §1 > review -- functions of courts. -- > Headnote:
LEdHN[21] [21]

Congress having intrusted administration of the Natural Gas Act (15 USC 717) to the Federal Power Commission, rather than to the courts, it is not for the courts, apart from the requirements of judicial review, to advise the Commission how to discharge its functions.

FEDERAL POWER COMMISSION, §1 > review -- unauthorized findings -- lawfulness of past rates. -- > Headnote:
LEdHN[22] [22]

Findings as to the lawfulness of past rates, made by the Federal Power Commission under the Natural Gas Act (15 USC 717) in aid of state regulation, despite the Commission's admitted lack of authority under the Act to fix past rates or to make reparation orders, are not reviewable under 19(b) of the Act giving any party "aggrieved by an order" the right to a review "of such order," since, there being no authority to enforce findings of this kind, the parties are not adversely affected by them.

ADMINISTRATIVE LAW, §191 > reviewability of order -- future adverse effect. -- > Headnote:
LEdHN[23] [23]

An administrative order which does not of itself adversely affect a party, but affects him only through the contingency of possible future action by some other agency, is not reviewable by the courts.

Syllabus

1. The validity of an order of the Federal Power Commission fixing rates under the Natural Gas Act is to be determined on judicial review by whether the impact or total effect of the order is just and reasonable rather than by the method of computing the rate base. P. 602.

2. One who seeks to have set aside an order of the Federal Power Commission fixing rates under the Natural Gas Act has the burden of showing convincingly that it is unjust and unreasonable in its consequences. P. 602.

3. An order of the Federal Power Commission reducing respondent's rates for sales of natural gas in interstate commerce, *held* valid under the Natural Gas Act. P. 603.

[****2] The rate base determined by the Commission was found by it to be the "actual legitimate cost" of the company's interstate property, less depletion and depreciation, plus allowances for unoperated acreage, working capital, and future net capital additions. "Reproduction cost new" and "trended original cost" were given no weight. Accrued depletion and depreciation and the annual allowance for depletion and depreciation were determined by application of the "economic-service-life" method to "actual legitimate cost."

4. Considering the amount of the annual return which the company would be permitted to earn on its property in interstate service, and the various factors which that return reflects, this Court is unable to say that the rates fixed by the Commission are not "just and reasonable" under the Act. P. 604.

5. Rates which enable a natural gas company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed can not be condemned as unjust and unreasonable under the Natural Gas Act, even though

they might produce only a meager return on a rate base computed on the "present fair value" method. P. [****3] 605.

6. The rationale of the decision renders it unnecessary to determine whether the Commission's exclusion from the rate base of well-drilling and other costs, previously charged to operating expenses, was consistent with the "prudent investment" theory as developed and applied in particular cases. P. 605.

7. *United Railways Co. v. West, 280 U.S. 234*, so far as it rejects cost as the basis of depreciation allowances, is disapproved. P. 606.

8. The requirements of the Constitution in respect of rates are not more exacting than the standards of the Act; and a rate order valid under the latter is consistent with the former. P. 607.

9. In fixing "just and reasonable" rates under §§ 4 and 5 of the Natural Gas Act, for natural gas sold in interstate commerce by a private operator through an established distribution system, the Commission was not required to take into consideration the indirect benefits -- affecting the economy, conservation policies, and tax revenues -- which the producing State might derive from higher valuations and rates. P. 609.

10. The suggestion that the Commission did not allow for gas production a return sufficient to induce private [****4] enterprise to perform completely and efficiently its functions for the public is unsupported. P. 615.

11. The Commission is not empowered by the provisions of §§ 4 and 5, which authorize it to fix "just and reasonable" rates, to fix rates calculated to discourage intrastate resales for industrial use. P. 616.

12. The question whether the rates charged by the company discriminate against domestic users and in favor of industrial users is not presented. P. 617.

13. Findings of the Commission as to the lawfulness of past rates, *held* not reviewable under § 19 (b) of the Act. P. 618.

Counsel: Assistant Attorney General Shea, with whom Solicitor General Fahy and Messrs. Paul A. Freund, K. Norman Diamond, Melvin Richter, Charles V. Shannon, Milford Springer, A. F. O'Neil, Clyde B. MacDonald, Harold A. Scragg, and Samuel Graff Miller were on the brief, for petitioners in No. 34; and Mr. Spencer W. Reeder, with whom Messrs. Robert E. May and Robert M. Morgan were on the brief, for petitioner in No. 35.

Mr. William B. Cockley, with whom Messrs. Walter J. Milde and William A. Dougherty were on the brief, for respondent.

By Special leave of Court, Mr. M. M. Neely, Governor of West [****5] Virginia, with whom Messrs. Ira J. Partlow, Assistant Attorney General, and W. W. Goldsmith were on the brief, for the State of West Virginia, as amicus curiae, urging affirmance.

Briefs of amici curiae were filed by Mr. Gay H. Brown, on behalf of the Public Service Commission of New York, and Messrs. John E. Benton and Frederick G. Hamley, on behalf of the National Association of Railroad and Utilities Commissioners, in No. 34, urging reversal; and by Messrs. Donald C. McCreery and Robert D. Garver, on behalf of the Cities Service Gas Co., in Nos. 34 and 35, urging affirmance.

Judges: Stone, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge; Roberts took no part in the consideration or decision of this case.

Opinion by: DOUGLAS

Opinion

[*593] [**283] [***340] MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The primary issue in these cases concerns the validity under the Natural Gas Act of 1938 (52 Stat. 821, *15 U. S. C. § 717*) of a rate order issued by the Federal Power Commission reducing the rates chargeable by Hope Natural Gas Co., 44 P. U. R. (N. S.) 1. On a petition for review of the order made pursuant to § 19 [****6] (b) of the Act, the [*594] Circuit Court of Appeals set it aside, one judge dissenting. *134 F.2d 287*. The cases [**284] are here on petitions for writs of certiorari which we granted because of the public importance of the questions presented.

Hope is a West Virginia corporation organized in 1898. It is a wholly owned subsidiary of Standard Oil Co. (N. J.). Since the date of its organization, it has been in the business of producing, purchasing and marketing natural gas in that state. [1] It sells some of that gas to

[1] Hope produces about one-third of its annual gas requirements and purchases the rest under some 300

local consumers in West Virginia. But the great bulk of it goes to five customer companies which receive it at the West Virginia line and distribute it in Ohio and in Pennsylvania. [2] [***341] In July 1938 the cities of Cleveland and Akron filed complaints with the Commission charging that the rates collected by Hope from East Ohio Gas Co. (an affiliate of Hope which distributes gas in Ohio) were excessive and unreasonable. Later in 1938 the Commission on its own motion instituted an investigation to determine the reasonableness of all of Hope's interstate rates. In March [*595] 1939 the Public Utility Commission of Pennsylvania filed [****7] a complaint with the Commission charging that the rates collected by Hope from Peoples Natural Gas. Co. (an affiliate of Hope distributing gas in Pennsylvania) and two non-affiliated companies were unreasonable. The City of Cleveland asked that the challenged rates be declared unlawful and that just and reasonable rates be determined from June 30, 1939 to the date of the Commission's order. The latter finding was requested in aid of state regulation and to afford the Public Utilities Commission of Ohio a proper basis for disposition of a fund collected by East Ohio under bond from Ohio consumers since June 30, 1939. The cases were consolidated and hearings were held.

[****8] On May 26, 1942, the Commission entered its order and made its findings. Its order required Hope to decrease its future interstate rates so as to reflect a reduction, on an annual basis, of not less than $ 3,609,857 in operating revenues. And it established "just and reasonable" average rates per m. c. f. for each of the five customer companies. [3] In response to the prayer of the City of Cleveland the Commission also made findings as to the lawfulness of past rates, although concededly it had no authority under the Act to fix past rates or to award reparations. 44 P. U. R. (N. S.) p. 34. It found that the rates collected by Hope from East Ohio were unjust, unreasonable, excessive and therefore unlawful, by $ 830,892 during 1939, $ 3,219,551 during 1940, and $ 2,815,789 on an annual basis since 1940. It further found that just, reasonable, and lawful rates for gas sold by Hope to East Ohio for resale for ultimate public consumption were those required [*596] to produce $ 11,528,608 for 1939, $ 11,507,185 for 1940 and $ 11,910,947 annually since 1940.

[****9] The Commission established an interstate rate base of $ 33,712,526 which, it found, represented the "actual legitimate cost" of the company's interstate property less depletion and depreciation and plus unoperated acreage, working capital and future net capital additions. The Commission, beginning with book cost, made [**285] certain adjustments not necessary to relate here and found the "actual legitimate cost" of the plant in interstate service to be $ 51,957,416, as of December 31, 1940. It deducted accrued depletion and depreciation, which it found to be $ 22,328,016 on an "economic-service-life" basis. And it added $ 1,392,021 for future net capital additions, $ 566,105 for useful unoperated acreage, and $ 2,125,000 for working capital. It used 1940 as a test year to estimate future revenues and expenses. It allowed over $ 16,000,000 as annual operating expenses -- about $ 1,300,000 for taxes, $ 1,460,000 for depletion and depreciation, $ 600,000 for exploration and development costs, $

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contracts.

[2] These five companies are the East Ohio Gas Co., the Peoples Natural Gas Co., the River Gas Co., the Fayette County Gas Co., and the Manufacturers Light & Heat Co. The first three of these companies are, like Hope, subsidiaries of Standard Oil Co. (N. J.). East Ohio and River distribute gas in Ohio, the other three in Pennsylvania. Hope's approximate sales in m. c. f. for 1940 may be classified as follows:

Aller au tableau1

Local West Virginia sales	11,000,000
East Ohio	40,000,000
Peoples	10,000,000
River	400,000
Fayette	860,000
Manufacturers	2,000,000

Hope's natural gas is processed by Hope Construction & Refining Co., an affiliate, for the extraction of gasoline and butane. Domestic Coke Corp., another affiliate, sells coke-oven gas to Hope for boiler fuel.

[3] These required minimum reductions of 7 cents per m. c. f. from the 36.5 cents and 35.5 cents rates previously charged East Ohio and Peoples, respectively, and 3 cents per m. c. f. from the 31.5 cents rate previously charged Fayette and Manufacturers.

8,500,000 for gas purchased. The Commission allowed a net increase of $ 421,160 over 1940 operating expenses, which amount was to take care of future increase in wages, in West Virginia [****10] property taxes, and in exploration and development costs. The total amount of deductions allowed [***342] from interstate revenues was $ 13,495,584.

Hope introduced evidence from which it estimated reproduction cost of the property at $ 97,000,000. It also presented a so-called trended "original cost" estimate which exceeded $ 105,000,000. The latter was designed "to indicate what the original cost of the property would have been if 1938 material and labor prices had prevailed throughout the whole period of the piecemeal construction of the company's property since 1898." 44 P. U. R. (N. S.), pp. 8-9. Hope estimated by the "per cent condition" method accrued depreciation at about 35% of [*597] reproduction cost new. On that basis Hope contended for a rate base of $ 66,000,000. The Commission refused to place any reliance on reproduction cost new, saying that it was "not predicated upon facts" and was "too conjectural and illusory to be given any weight in these proceedings." *Id*., p. 8. It likewise refused to give any "probative value" to trended "original cost" since it was "not founded in fact" but was "basically erroneous" and produced [****11] "irrational results." *Id*., p. 9. In determining the amount of accrued depletion and depreciation the Commission, following *Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 167-169*; *Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 592-593*, based its computation on "actual legitimate cost." It found that Hope during the years when its business was not under regulation did not observe "sound depreciation and depletion practices" but "actually accumulated an excessive reserve" [4] of about $ 46,000,000. *Id*., p. 18. One member of the Commission thought that the entire amount of the reserve should be deducted from "actual legitimate cost" in determining the rate base. [5] [****13] The majority of the [*598] Commission concluded, however, that where, as here, a business is brought under regulation for the first time and where incorrect depreciation and depletion practices have prevailed, the deduction of the reserve requirement (actual existing depreciation and depletion) rather than the excessive reserve should be made so as to [**286] lay "a sound basis for future regulation and control of rates." [****12] *Id*., p. 18. As we have pointed out, it determined accrued depletion and depreciation to be $ 22,328,016; and it allowed approximately $ 1,460,000 as the annual operating expense for depletion and depreciation. [6]

[****14] Hope's estimate of original cost [***343] was about $ 69,735,000 -- approximately $ 17,000,000 more than the amount found by the Commission. The item of $ 17,000,000 was made up largely of expenditures which prior to December 31, 1938, were charged to

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[4] The book reserve for interstate plant amounted at the end of 1938 to about $ 18,000,000 more than the amount determined by the Commission as the proper reserve requirement. The Commission also noted that "twice in the past the company has transferred amounts aggregating $ 7,500,000 from the depreciation and depletion reserve to surplus. When these latter adjustments are taken into account, the excess becomes $ 25,500,000, which has been exacted from the ratepayers over and above the amount required to cover the consumption of property in the service rendered and thus to keep the investment unimpaired." 44 P. U. R. (N. S.), p. 22.

[5] That contention was based on the fact that "every single dollar in the depreciation and depletion reserves" was taken "from gross operating revenues whose only source was the amounts charged customers in the past for natural gas. It is, therefore, a fact that the depreciation and depletion reserves have been contributed by the customers and do not represent any investment by Hope." *Id*., p. 40. And see *Railroad Commission v. Cumberland Tel. & T. Co., 212 U.S. 414, 424-425*; 2 Bonbright, Valuation of Property (1937), p. 1139.

[6] The Commission noted that the case was "free from the usual complexities involved in the estimate of gas reserves because the geologists for the company and the Commission presented estimates of the remaining recoverable gas reserves which were about one per cent apart." 44 P. U. R. (N. S.), pp. 19-20.

The Commission utilized the "straight-line-basis" for determining the depreciation and depletion reserve requirements. It used estimates of the average service lives of the property by classes based in part on an inspection of the physical condition of the property. And studies were made of Hope's retirement experience and maintenance policies over the years. The average service lives of the various classes of property were converted into depreciation rates and then applied to the cost of the property to ascertain the portion of the cost which had expired in rendering the service.

The record in the present case shows that Hope is on the lookout for new sources of supply of natural gas and is contemplating an extension of its pipe line into Louisiana for that purpose. The Commission recognized in fixing the rates of depreciation that much material may be used again when various present sources of gas supply are exhausted, thus giving that property more than scrap value at the end of its present use.

operating expenses. Chief among those expenditures was some $ 12,600,000 expended [*599] in well-drilling prior to 1923. Most of that sum was expended by Hope for labor, use of drilling-rigs, hauling, and similar costs of well-drilling. Prior to 1923 Hope followed the general practice of the natural gas industry and charged the cost of drilling wells to operating expenses. Hope continued that practice until the Public Service Commission of West Virginia in 1923 required it to capitalize such expenditures, as does the Commission under its present Uniform System of Accounts. [7] The Commission refused to add such items to the rate base stating that "No greater injustice to consumers could be done than to allow items as operating expenses and at a later date include them in the rate base, thereby placing multiple charges upon the consumers." *Id.*, p. 12. For the same reason the Commission excluded from the rate [****15] base about $ 1,600,000 of expenditures on properties which Hope acquired from other utilities, the latter having charged those payments to operating expenses. The Commission disallowed certain other overhead items amounting to over $ 3,000,000 which also had been previously charged to operating expenses. And it refused to add some $ 632,000 as interest during construction since no interest was in fact paid.

Hope contended that it should be allowed a return of not less than 8%. The Commission found that an 8% return would be unreasonable but that 6 1/2% was a fair rate of return. That rate of return, applied to the rate base of $ 33,712,526, would produce $ 2,191,314 annually, as compared with the present income of not less than $ 5,801,171.

The Circuit Court of Appeals set aside the order of the Commission for the following reasons. (1) It held that the rate base should reflect the "present [****16] fair value" of the [*600] property, that the Commission in determining the "value" should have considered reproduction cost and trended original cost, and that "actual legitimate cost" (prudent investment) was not the proper measure of "fair value" where price levels had changed since the investment. (2) It concluded that the well-drilling costs and overhead items in the amount of some $ 17,000,000 should have been included in the rate base. (3) It held that accrued depletion and depreciation and the annual allowance for that expense should be computed on the basis of "present fair value" of the property, not on the basis of "actual legitimate cost."

[**287] The Circuit Court of Appeals also held that the Commission had no power to make findings as to past rates in aid of state regulation. But it concluded that those findings were proper as a step in the process of fixing future rates. Viewed in [***344] that light, however, the findings were deemed to be invalidated by the same errors which vitiated the findings on which the rate order was based.

Order Reducing Rates. HN1[↑] [****17] Congress has provided in § 4 (a) of the Natural Gas Act that all natural gas rates subject to the jurisdiction of the Commission "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." Sec. 5 (a) gives the Commission the power, after hearing, to determine the "just and reasonable rate" to be thereafter observed and to fix the rate by order. Sec. 5 (a) also empowers the Commission to order a "decrease where existing rates are unjust, . . . unlawful, or are not the lowest reasonable rates." And Congress has provided in § 19 (b) that on review of these rate orders the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Congress, however, has provided no formula by which the "just and reasonable" rate is to be determined. It has not filled in the [*601] details of the general prescription [8] of § 4 (a) and § 5 (a). It has not expressed in a specific rule the fixed principle of "just and reasonable."

[****18] LEdHN[1][↑] [1]LEdHN[2][↑] [2]When we sustained the constitutionality of the Natural Gas Act in the *Natural Gas Pipeline Co.* case, we stated that the "authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States

[7] See Uniform System of Accounts prescribed for Natural Gas Companies effective January 1, 1940, Account No. 332.1.

[8] Sec. 6 of the Act comes the closest to supplying any definite criteria for rate making. It provides in subsection (a) that, "The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property." Subsection (b) provides that every natural-gas company on request shall file with the Commission a statement of the "original cost" of its property and shall keep the Commission informed regarding the "cost" of all additions, etc.

under the Fourteenth to regulate the prices of commodities in intrastate commerce." 315 U.S. p. 582. Rate-making is indeed but one species of price-fixing. *Munn v. Illinois, 94 U.S. 113, 134*.The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. *Block v. Hirsh, 256 U.S. 135, 155-157*; *Nebbia v. New York, 291 U.S. 502, 523-539* and cases cited. It does, however, indicate that "fair value" is the end product of the process of rate-making not the starting point as the Circuit Court of Appeals held. The heart of the [****19] matter is that 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. [9]

[*602] ***LEdHN[3]***[↑] [3]***LEdHN[4]***[↑] [4]***LEdHN[5]***[↑] [5]We held in *Federal Power Commission* v. *Natural Gas Pipeline Co., supra*, [****20] that ***HN2***[↑] the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of "pragmatic adjustments." [***345] p. 586. And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. *Id., p. 586*. Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. Cf. *Los Angeles Gas & Electric Corp*. v. *Railroad* [**288] *Commission, 289 U.S. 287, 304-305, 314*; *West Ohio Gas Co*. v. *Public Utilities Commission* (No. 1), *294 U.S. 63, 70*; *West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662, 692-693* (dissenting opinion). ***HN3***[↑] It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. [****21] Moreover, ***HN4***[↑] the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. *Railroad Commission v. Cumberland Tel. & T. Co., 212 U.S. 414*; *Lindheimer v. Illinois Bell Tel. Co., supra, pp. 164, 169*; *Railroad Commission v. Pacific Gas & Electric Co., 302 U.S. 388, 401*.

[*603] ***LEdHN[6]***[↑] [6]The rate-making process under the Act, i. e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co*. case that "regulation does not insure that the business shall produce net revenues." 315 U.S. p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity [****22] of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & Grand Trunk Ry. Co*. v. *Wellman, 143 U.S. 339, 345-346*. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. See *Missouri ex rel. Southwestern Bell Tel. Co*. v. *Public Service Commission, 262 U.S. 276, 291* (Mr. Justice Brandeis concurring). The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the [****23] investor or company viewpoint.

LEdHN[7][↑] [7]We have already noted that Hope is a wholly owned subsidiary of the Standard Oil Co. (N. J.). It has no securities outstanding except stock. All of that stock has been owned by Standard since 1908. The par amount presently outstanding is approximately $ 28,000,000 as compared with the rate base of $ 33,712,526 established by [*604] the Commission. Of

[9] We recently stated that the meaning of the word "value" is to be gathered "from the purpose for which a valuation is being made. Thus the question in a valuation for rate making is how much a utility will be allowed to earn. The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn." *Institutional Investors v. Chicago, M., St. P. & P. R. Co., 318 U.S. 523, 540*.

the total outstanding stock $ 11,000,000 was issued in stock dividends. [***346] The balance, or about $ 17,000,000, was issued for cash or other assets. During the four decades of its operations Hope has paid over $ 97,000,000 in cash dividends. It had, moreover, accumulated by 1940 an earned surplus of about $ 8,000,000. It had thus earned the total investment in the company nearly seven times. Down to 1940 it earned over 20% per year on the average annual amount of its capital stock issued for cash or other assets. On an average invested capital of some $ 23,000,000 Hope's average earnings have been about 12% a year. And during this period it had accumulated in addition reserves for depletion and depreciation [****24] of about $ 46,000,000. Furthermore, during 1939, 1940 and 1941, Hope paid dividends of 10% on its stock. And in the year 1942, during about half of which the lower rates were in effect, it paid dividends of 7 1/2%. From 1939-1942 its earned surplus increased from $ 5,250,000 to about $ 13,700,000, i. e., to almost half the par value of its outstanding stock.

As we have noted, the Commission fixed a rate of return which permits Hope to earn $ 2,191,314 annually. In determining that amount it stressed the importance of maintaining the financial integrity of the [**289] company. It considered the financial history of Hope and a vast array of data bearing on the natural gas industry, related businesses, and general economic conditions. It noted that the yields on better issues of bonds of natural gas companies sold in the last few years were "close to 3 per cent," 44 P. U. R. (N. S.), p. 33. It stated that the company was a "seasoned enterprise whose risks have been minimized" by adequate provisions for depletion and depreciation (past and present) with "concurrent high profits," by "protected established markets, through affiliated distribution companies, in [****25] populous and industrialized areas," and by a supply of gas locally to meet all requirements, [*605] "except on certain peak days in the winter, which it is feasible to supplement in the future with gas from other sources." *Id*., p. 33. The Commission concluded, "The company's efficient management, established markets, financial record, affiliations, and its prospective business place it in a strong position to attract capital upon favorable terms when it is required." *Id*., p. 33.

LEdHN[8][⬆] [8]**LEdHN[9]**[⬆] [9]In view of these various considerations we cannot say that an annual return of $ 2,191,314 is not "just and reasonable" within the meaning of the Act. **HN5**[⬆] Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called [****26] "fair value" rate base. In that connection it will be recalled that Hope contended for a rate base of $ 66,000,000 computed on reproduction cost new. The Commission points out that if that rate base were accepted, Hope's average rate of return for the four-year period from 1937-1940 would amount to 3.27%. During that period Hope earned an annual average return of about 9% on the average investment. It asked for no rate increases. Its properties were well maintained and operated. As the Commission says, such a modest rate of 3.27% suggests an "inflation of the base on which the rate has been computed." *Dayton Power & Light Co*. v. *Public Utilities Commission, 292 U.S. 290, 312*. Cf. *Lindheimer v. Illinois Bell Tel. Co., supra, p. 164*. The incongruity between the actual operations and the return computed on the basis of reproduction cost suggests that the Commission was wholly justified in rejecting the latter as the measure of the rate base.

In view of this disposition of the controversy we need not stop to inquire whether the failure of the Commission to add the $ 17,000,000 of [***347] well-drilling and other costs to [*606] [****27] the rate base was consistent with the prudent investment theory as developed and applied in particular cases.

LEdHN[10][⬆] [10]**LEdHN[11]**[⬆] [11]**LEdHN[12]**[⬆] [12]Only a word need be added respecting depletion and depreciation. We held in the *Natural Gas Pipeline Co*. case that **HN6**[⬆] there was no constitutional requirement "that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it." 315 U.S. p. 593.The Circuit Court of Appeals did not think that that rule was applicable here because Hope was a utility required to continue its service to the public and not scheduled to end its business on a day certain as was stipulated to be true of the Natural Gas Pipeline Co. But that distinction is quite immaterial. The ultimate exhaustion of the supply is inevitable in the case of all natural gas companies. Moreover, this Court recognized in *Lindheimer v. Illinois Bell Tel. Co., supra*, the propriety of basing [****28] annual depreciation on cost.

[10] [****29] By such a procedure the [**290] utility is made whole and the integrity of its investment maintained. [11] No more is required. [12] We cannot approve the contrary holding [*607] of *United Railways Co*. v. *West, 280 U.S. 234, 253-254*. Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former.

LEdHN[13][] [13]*The Position of West Virginia*. The State of West Virginia, as well as its Public Service Commission, intervened in the proceedings before the Commission and participated in the hearings before it. They have also filed a brief *amicus curiae* here and have participated in the argument at the bar. Their contention is that the result achieved by the rate order "brings consequences which are unjust to West Virginia and its citizens" and which [****30] "unfairly depress the value of gas, gas lands and gas leaseholds, unduly restrict development of their natural resources, and arbitrarily transfer their properties to the residents of other states without just compensation therefor."

West Virginia points out that the Hope Natural Gas Co. holds a large number of leases on both producing and unoperated properties. The owner or grantor receives from the operator or grantee delay rentals as compensation for postponed drilling. When a producing well is successfully brought in, the gas lease customarily continues indefinitely for the life of the field. In that case the [***348] operator pays a stipulated gas-well rental or in some cases a gas royalty equivalent to one-eighth of the gas marketed. [13] [****33] Both the owner and operator have valuable property interests in the gas which are separately taxable under West Virginia law. The contention is that the reversionary interests in the leaseholds should be represented in the rate proceedings since it is their gas which is being sold in interstate [*608] commerce. It is argued, moreover, that the owners of the reversionary interests should have the benefit of the "discovery value" [****31] of the gas leaseholds, not the interstate consumers. Furthermore, West Virginia contends that the Commission in fixing a rate for natural gas produced in that State should consider the effect of the rate order on the economy of West Virginia. It is pointed out that gas is a wasting asset with a rapidly diminishing supply. As a result West Virginia's gas deposits are becoming increasingly valuable. Nevertheless the rate fixed by the Commission reduces that value. And that reduction, it is said, has severe repercussions on the economy of the State. It is argued in the first place that as a result of this rate reduction Hope's West Virginia property taxes may be decreased in view of the relevance which earnings have under West Virginia law in the assessment of property for tax purposes. [14] Secondly, it is pointed out that West Virginia has a production tax [15] on the "value" of the gas exported from the State. And we are told that for purposes of that tax "value" becomes under West Virginia law "practically the substantial equivalent of market value." Thus West Virginia argues that undervaluation of Hope's gas leaseholds will cost the State many thousands of dollars in taxes. [****32] The effect, it is urged, is to impair West Virginia's tax structure for the benefit of Ohio and Pennsylvania consumers. West Virginia emphasizes, moreover, its deep interest in the conservation of its natural resources including its natural gas. It says that a reduction of the value of these leasehold values will jeopardize these conservation policies in three respects: (1) [**291] exploratory development of new fields will be discouraged; (2) abandonment of low-yield high-cost marginal wells will be hastened; and (3) secondary

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[10] Chief Justice Hughes said in that case (292 U.S. pp. 168-169): "If the predictions of service life were entirely accurate and retirements were made when and as these predictions were precisely fulfilled, the depreciation reserve would represent the consumption of capital, on a cost basis, according to the method which spreads that loss over the respective service periods. But if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return."

[11] See Mr. Justice Brandeis (dissenting) in *United Railways Co*. v. *West, 280 U.S. 234, 259-288*, for an extended analysis of the problem.

[12] It should be noted that the Act provides no specific rule governing depletion and depreciation. Sec. 9 (a) merely states that the Commission "may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas."

[13] See Simonton, The Nature of the Interest of the Grantee Under an Oil and Gas Lease (1918), 25 W. Va. L. Quar. 295.

[14] *West Penn Power Co*. v. *Board of Review, 112 W. Va. 442, 164 S. E. 862*.

[15] W. Va. Rev. Code of 1943, ch. 11, Art. 13, §§ 2a, 3a.

recovery of oil will be hampered. [*609] Furthermore, West Virginia contends that the reduced valuation will harm one of the great industries of the State and that harm to that industry must inevitably affect the welfare of the citizens of the State. It is also pointed out that West Virginia has a large interest in coal and oil as well as in gas and that these forms of fuel are competitive. When the price of gas is materially cheapened, consumers turn to that fuel in preference to the others. As a result this lowering of the price of natural gas will have the effect of depreciating the price of West Virginia coal and oil.

West Virginia insists that in neglecting this aspect of the problem the Commission failed to perform the function which Congress entrusted to it and that the case should be remanded to the Commission for a modification of its order. [16]

We have considered these contentions at length in view of the earnestness with which they have been urged upon us. We have searched the legislative history of the Natural Gas Act for any indication that Congress entrusted to the Commission the various considerations [****34] which [***349] West Virginia has advanced here. And our conclusion is that Congress did not.

LEdHN[14][] [14]We pointed out in *Illinois Natural Gas Co*. v. *Public Service Co., 314 U.S. 498, 506*, that the purpose of the Natural Gas Act was to provide, "through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation." As stated in the House Report the "basic purpose" of this legislation was "to occupy" the field in which such cases as *Missouri v. [*610] Kansas Gas Co., 265 U.S. 298*, and *Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83*, had held the States might not act. H. Rep. No. 709, 75th Cong., 1st Sess., p. 2. In accomplishing that purpose the bill was designed to take "no authority from State commissions" [****35] and was "so drawn as to complement and in no manner usurp State regulatory authority." *Id*., p. 2. And the Federal Power Commission was given no authority over the "production or gathering of natural gas." § 1 (b).

The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the *Kansas Gas Co*. case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep. No. 709, *supra*, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. [17] State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations. [18] These were the types of problems with which those participating [****36] in the hearings were preoccupied. [19] Congress addressed itself to those specific evils.

[*611] The Federal Power Commission was given [**292] broad powers of regulation. The fixing of "just and reasonable" rates (§ 4) with the powers attendant thereto [20] was the heart of the new regulatory system. Moreover, the Commission was given certain authority by § 7 (a), on a finding that the action was necessary or desirable "in the public interest," to require natural gas companies to extend or improve their transportation facilities and to sell gas to any authorized local [****37] distributor. By § 7 (b) it was given control over the abandonment of facilities or of service. And by § 7 (c),

[16] West Virginia suggests as a possible solution (1) that a "going concern value" of the company's tangible assets be included in the rate base and (2) that the fair market value of gas delivered to customers be added to the outlay for operating expenses and taxes.

[17] S. Doc. 92, Pt. 84-A, ch. XII, Final Report, Federal Trade Commission to the Senate pursuant to S. Res. No. 83, 70th Cong., 1st Sess.

[18] S. Doc. 92, Pt. 84-A, chs. XII, XIII, *op. cit., supra*, note 17.

[19] See Hearings on H. R. 11662, Subcommittee of House Committee on Interstate & Foreign Commerce, 74th Cong., 2d Sess.; Hearings on H. R. 4008, House Committee on Interstate & Foreign Commerce, 75th Cong., 1st Sess.

[20] The power to investigate and ascertain the "actual legitimate cost" of property (§ 6), the requirement as to books and records (§ 8), control over rates of depreciation (§ 9), the requirements for periodic and special reports (§ 10), the broad powers of investigation (§ 14) are among the chief powers supporting the rate-making function.

as originally enacted, no natural gas company could undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas was already being served by another company, or sell any natural gas in such a market, without obtaining a certificate of public convenience [***350] and necessity from the Commission. In passing on such applications for certificates of convenience and necessity the Commission was told by § 7 (c), as originally enacted, that it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." The latter provision was deleted from § 7 (c) when that subsection was amended by the Act of February 7, 1942, 56 Stat. 83. By that amendment limited grandfather rights were granted companies desiring to extend their facilities and services over the routes or within [****38] the area which they were already serving. Moreover, § 7 (c) was broadened so as to require certificates [*612] of public convenience and necessity not only where the extensions were being made to markets in which natural gas was already being sold by another company but in other situations as well.

LEdHN[15][⬆] [15]These provisions were plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies. When it comes to cases of abandonment or of extensions of facilities or service, we may assume that, apart from the express exemptions [21] contained [****39] in § 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity. But the Commission was not asked here for a certificate of public convenience and necessity under § 7 for any proposed construction or extension. It was faced with a determination of the amount which a private operator should be allowed to earn from the sale of natural gas across state lines through an established distribution system. Secs. 4 and 5, not § 7, provide the standards for that determination. We cannot find in the words of the Act or in its history the slightest intimation or suggestion that the exploitation of consumers by private operators through the maintenance of high rates should be allowed to continue provided the producing states obtain indirect benefits from it. That apparently was the Commission's view of the matter, for the same arguments advanced here were presented to the Commission and not adopted by it.

[****40] We do not mean to suggest that Congress was unmindful of the interests of the producing states in their natural gas supplies when it drafted the Natural Gas Act. As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over [*613] "the production or gathering of natural gas." § 1 (b). In addition, Congress recognized the legitimate interests of the States in the conservation of natural gas. By § 11 Congress instructed the Commission to make reports on compacts between two or more States dealing with the conservation, production and transportation of natural gas. [22] The Commission was also [**293] directed to recommend further legislation appropriate or necessary to carry out any proposed compact and "to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas." § 11 (a). Thus Congress was quite aware of the interests [***351] of the producing states in their natural gas supplies. [23] But it left the protection of

[21] Apart from the grandfather clause contained in § 7 (c), there is the provision of § 7 (f) that a natural gas company may enlarge or extend its facilities within the "service area" determined by the Commission without any further authorization.

[22] See Act of July 7, 1943, c. 194, 57 Stat. 383, containing an "Interstate Compact to Conserve Oil and Gas" between Oklahoma, Texas, New Mexico, Illinois, Colorado, and Kansas.

[23] As we have pointed out, § 7 (c) was amended by the Act of February 7, 1942 (56 Stat. 83) so as to require certificates of public convenience and necessity not only where the extensions were being made to markets in which natural gas was already being sold by another company but to other situations as well. Considerations of conservation entered into the proposal to give the Act that broader scope. H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 2-3. And see Annual Report, Federal Power Commission (1940) pp. 79, 80; Baum, The Federal Power Commission and State Utility Regulation (1942), p. 261.

The bill amending § 7 (c) originally contained a subsection (h) reading as follows: "Nothing contained in this section shall be construed to affect the authority of a State within which natural gas is produced to authorize or require the construction or extension of facilities for the transportation and sale of such gas within such State: Provided, however, That the Commission, after a hearing upon complaint or upon its own motion, may by order forbid any intrastate construction or extension by any natural-gas company which it shall find will

[*614] those interests [****41] to measures other than the maintenance of high rates to private companies. If the Commission is to be compelled to let the stockholders of natural gas companies have a feast so that the producing states may receive crumbs from that table, the present Act must be redesigned. Such a project raises questions of policy which go beyond our province.

[****42] It is hardly necessary to add that a limitation on the net earnings of a natural gas company from its interstate business is not a limitation on the power of the producing state either to safeguard its tax revenues from that industry [24] or to protect the interests of those who sell their gas to the interstate operator. [25] The return which [**294] the Commission [*615] allowed was the net return after all such charges.

[****43] LEdHN[16][↑] [16]It is suggested that the Commission has failed to perform its duty under the Act in that it has not allowed a return for gas production that will be [***352] enough to induce private enterprise to perform completely and efficiently its functions for the public. The Commission, however, was not oblivious of those matters. It considered them. It allowed, for example, delay rentals and exploration and development costs in operating expenses. [26] No serious attempt has been made here to show that they are inadequate. We certainly cannot say that they are, unless we are to substitute our opinions for the expert judgment of the administrators to whom Congress entrusted the decision. Moreover, if in light of experience they turn out to be inadequate for development of new sources of supply, the doors of the Commission are open for increased allowances. This is not an order for all time. The Act contains machinery for obtaining rate adjustments. § 4.

[****44] LEdHN[17][↑] [17]LEdHN[18][↑] [18]LEdHN[19][↑] [19]But it is said that the Commission placed too low a rate on gas for industrial purposes as compared with gas for domestic purposes and that industrial uses should be discouraged. It should be noted in the first place that the rates which the Commission has fixed are Hope's interstate wholesale rates to distributors, not interstate rates to industrial users [27] and domestic consumers. We hardly [*616] can assume, in view of the history of the Act and its provisions, that the resales intrastate by the customer companies which distribute the gas to ultimate consumers in Ohio and Pennsylvania are subject to the rate-making powers of the Commission. [28] But in any

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prevent such company from rendering adequate service to its customers in interstate or foreign commerce in territory already being served." See Hearings on H. R. 5249, House Committee on Interstate & Foreign Commerce, 77th Cong., 1st Sess., pp. 7, 11, 21, 29, 32-33. In explanation of its deletion the House Committee Report stated, pp. 4-5: "The increasingly important problems raised by the desire of several States to regulate the use of the natural gas produced therein in the interest of consumers within such States, as against the Federal power to regulate interstate commerce in the interest of both interstate and intrastate consumers, are deemed by the committee to warrant further intensive study and probably a more detailed and comprehensive plan for the handling thereof than that which would have been provided by the stricken subsection."

[24] We have noted that in the annual operating expenses of some $ 16,000,000 the Commission included West Virginia and federal taxes. And in the net increase of $ 421,160 over 1940 operating expenses allowed by the Commission was some $ 80,000 for increased West Virginia property taxes. The adequacy of these amounts has not been challenged here.

[25] The Commission included in the aggregate annual operating expenses which it allowed some $ 8,500,000 for gas purchased. It also allowed about $ 1,400,000 for natural gas production and about $ 600,000 for exploration and development.

It is suggested, however, that the Commission in ascertaining the cost of Hope's natural gas production plant proceeded contrary to § 1 (b) which provides that the Act shall not apply to "the production or gathering of natural gas." But such valuation, like the provisions for operating expenses, is essential to the rate-making function as customarily performed in this country. Cf. Smith, The Control of Power Rates in the United States and England (1932), 159 The Annals 101. Indeed § 14 (b) of the Act gives the Commission the power to "determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases."

[26] See note 25, *supra*.

[27] The Commission has expressed doubts over its power to fix rates on "direct sales to industries" from interstate pipelines as distinguished from "sales for resale to the industrial customers of distributing companies." Annual Report, Federal Power Commission (1940), p. 11.

[28] Sec. 1 (b) of the Act provides: "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall

event those rates are not in issue here. Moreover, we fail to find in the power to fix "just and reasonable" rates the power to fix rates which will disallow or discourage resales for industrial use. The Committee Report stated that the Act provided "for regulation along recognized [****45] and more or less standardized lines" and that there was "nothing novel in its provisions." H. Rep. No. 709, *supra*, p. 3. Yet if we are now to tell the Commission to fix the rates so as to discourage particular uses, we would indeed be injecting into a rate case a "novel" doctrine which has no express statutory sanction. The same would be true if we were to hold that the wasting-asset nature of the industry required the maintenance of the level of rates so that natural gas companies could make a greater profit on each unit of gas sold. Such theories of rate-making for this industry may or may not be desirable. The difficulty is that § 4 (a) and § 5 (a) contain only the conventional standards of rate-making for natural gas companies. [29] [****47] The [*617] Act of February 7, 1942, by broadening § 7 gave the Commission some additional authority to deal with the conservation aspects [***353] of the problem. [30] But § 4 (a) and § 5 (a) were not changed. If the standard [**295] of "just and reasonable" is to sanction the maintenance of high rates by a natural gas company because they restrict the use of natural gas for certain purposes, the Act must be further amended. [****46]

LEdHN[20] [20] LEdHN[21] [21] It is finally suggested that the rates charged by Hope are discriminatory as against domestic users and in favor of industrial users. That charge is apparently based on § 4 (b) of the Act which forbids natural gas companies from maintaining "any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." The power of the Commission [****48] to eliminate any such unreasonable differences or discriminations is plain. § 5 (a). The Commission, however, made no findings under § 4 (b). Its failure in that regard was not challenged in the petition to review. And it has not been raised or argued here by any party. Hence the problem of discrimination has no proper place in the present decision. It will be time enough to pass on that issue when it is presented to us. Congress has entrusted the administration of the Act to the Commission, not to the courts. Apart from the requirements of judicial review it is not [*618] for us to advise the Commission how to discharge its functions.

LEdHN[22] [22] *Findings as to the Lawfulness of Past Rates*. As we have noted, the Commission made certain findings as to the lawfulness of past rates which Hope had charged its interstate customers. Those findings were made on the complaint of the City of Cleveland and in aid of state regulation. It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those "to be thereafter observed [****49] and in force." § 5 (a). But the Commission maintains that it has the power to make findings as to the lawfulness of past rates even though it has no power to fix those rates. [31] However that may be, we do not think that these findings were reviewable under § 19 (b) of the Act. That section gives any party "aggrieved by an order" of the Commission a review "of

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not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." And see § 2 (6), defining a "natural-gas company," and H. Rep. No. 709, *supra*, pp. 2, 3.

[29] The wasting-asset characteristic of the industry was recognized prior to the Act as requiring the inclusion of a depletion allowance among operating expenses. See *Columbus Gas & Fuel Co*. v. *Public Utilities Commission, 292 U.S. 398, 404-405*. But no such theory of rate-making for natural gas companies as is now suggested emerged from the cases arising during the earlier period of regulation.

[30] The Commission has been alert to the problems of conservation in its administration of the Act. It has indeed suggested that it might be wise to restrict the use of natural gas "by functions rather than by areas." Annual Report (1940) p. 79.

The Commission stated in that connection that natural gas was particularly adapted to certain industrial uses. But it added that the general use of such gas "under boilers for the production of steam" is "under most circumstances of very questionable social economy." *Ibid*.

[31] The argument is that § 4 (a) makes "unlawful" the charging of any rate that is not just and reasonable. And § 14 (a) gives the Commission power to investigate any matter "which it may find necessary or proper in order to determine whether any person has violated" any provision of the Act. Moreover, § 5 (b) gives the Commission power to investigate and determine the cost of production or transportation of natural gas in cases where it has "no authority to establish a rate governing the transportation or sale of such natural gas." And § 17 (c) directs the Commission to "make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies." For a discussion of these points by the Commission see 44 P. U. R. (N. S.) pp. 34-35.

such order" in the circuit court of appeals for the circuit where the natural gas company is located or has its principle place of business or in the United States Court of Appeals for the District of Columbia. We do not think that the findings in question fall within that category.

[****50] **LEdHN[23]**[↑] [23]The Court recently summarized the various types of administrative action or determination reviewable as orders under the Urgent Deficiencies Act of October 22, [*619] 1913, 28 U. S. C. [***354] §§ 45, 47a, and kindred statutory provisions. *Rochester Telephone Corp*. v. United States, 307 U.S. 125. It was there pointed out that where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," it is not reviewable. Id., p. 130. The Court said, "In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province." Id., p. 130. [**296] And see United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 309, 310; Shannahan v. United States, 303 U.S. 596. These considerations are apposite here. The Commission has no authority to enforce these findings. They are "the exercise [****51] solely of the function of investigation." United States v. Los Angeles & Salt Lake R. Co., supra, p. 310. They are only a preliminary, interim step towards possible future action -- action not by the Commission but by wholly independent agencies. The outcome of those proceedings may turn on factors other than these findings. These findings may never result in the respondent feeling the pinch of administrative action.

Reversed.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this case.

Opinion of MR. JUSTICE BLACK and MR. JUSTICE MURPHY:

We agree with the Court's opinion and would add nothing to what has been said but for what is patently a wholly gratuitous assertion as to Constitutional law in the dissent of MR. JUSTICE FRANKFURTER. We refer to the statement that "Congressional acquiescence to date in the doctrine of *Chicago, M. & St. P. Ry. Co*. v. Minnesota, supra, may fairly be claimed." That was the case in which a majority of this Court was finally induced to expand the meaning [*620] of "due process" so as to give courts power to block efforts of the state and national governments to regulate economic [****52] affairs. The present case does not afford a proper occasion to discuss the soundness of that doctrine because, as stated in MR. JUSTICE FRANKFURTER's dissent, "that issue is not here in controversy." The salutary practice whereby courts do not discuss issues in the abstract applies with peculiar force to Constitutional questions. Since, however, the dissent adverts to a highly controversial due process doctrine and implies its acceptance by Congress, we feel compelled to say that we do not understand that Congress voluntarily has acquiesced in a Constitutional principle of government that courts, rather than legislative bodies, possess final authority over regulation of economic affairs. Even this Court has not always fully embraced that principle, and we wish to repeat that we have never acquiesced in it, and do not now. See Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 599-601.

Dissent by: REED; FRANKFURTER

Dissent

MR. JUSTICE REED, dissenting:

This case involves the problem of rate making under the Natural Gas Act. Added importance arises from the obvious fact that the principles stated are generally applicable to all federal agencies [****53] which are entrusted with the determination of rates for utilities. Because my views differ somewhat from those of my brethren, it may be of some value to set them out in a summary form.

The Congress may fix utility rates in situations subject to federal control without regard to any standard except the constitutional standards of due process and for taking private [***355] property for public use without just compensation. Wilson v. New, 243 U.S. 332, 350. A Commission, however, does not have this freedom of action. Its powers are limited not only by the constitutional standards but also by the standards of the delegation. Here the standard added by the Natural Gas Act is that the rate be "just [*621] and reasonable." [1] Section 6 [2] [**297] throws additional

[1] Natural Gas Act, § 4 (a), 52 Stat. 821, 822, 15 U. S. C. § 717 (a).

[2] 52 Stat. 821, 824, 15 U. S. C. § 717e:

light on the meaning of these words.

[****54] When the phrase was used by Congress to describe allowable rates, it had relation to something ascertainable. The rates were not left to the whim of the Commission. The rates fixed would produce an annual return and that annual return was to be compared with a theoretical just and reasonable return, all risks considered, on the fair value of the property used and useful in the public service at the time of the determination.

Such an abstract test is not precise. The agency charged with its determination has a wide range before it could properly be said by a court that the agency had disregarded statutory standards or had confiscated the property of the utility for public use. Cf. *Chicago, M. & St. P. Ry. Co*. v. *Minnesota, 134 U.S. 418, 461-66*, dissent. This is as Congress intends. Rates are left to an experienced agency particularly competent by training to appraise the amount required.

The decision as to a reasonable return had not been a source of great difficulty, for borrowers and lenders reached such agreements daily in a multitude of situations; and although the determination of fair value had been troublesome, its essentials had been worked out [****55] in fairness to investor and consumer by the time of the enactment [*622] of this Act. Cf. *Los Angeles Gas & Electric Corp*. v. *Railroad Commission, 289 U.S. 287, 304 et seq*. The results were well known to Congress and had that body desired to depart from the traditional concepts of fair value and earnings, it would have stated its intention plainly. *Helvering v. Griffiths, 318 U.S. 371*.

It was already clear that when rates are in dispute, "earnings produced by rates do not afford a standard for decision." *289 U.S. at 305*. Historical cost, prudent investment and reproduction cost [3] were all relevant factors in determining fair value. Indeed, disregarding the pioneer investor's risk, if prudent investment and reproduction cost were not distorted by changes in price levels or technology, each of them would produce the same result. The realization from the risk of an investment in a speculative field, such as natural gas utilities, should be reflected [***356] in the present fair value. [4] The amount of evidence to be admitted on any point was of course in the agency's reasonable discretion, and it was free to [****56] give its own weight to these or other factors and to determine from all the evidence its own judgment as to the necessary rates.

[****57] [*623] I agree with the Court in not imposing a rule of prudent investment alone in determining the rate base. This leaves the Commission free, as I understand it, to use any available evidence for its finding of fair value, including both prudent investment and the cost of installing at the present time an efficient system for furnishing the needed utility service.

My disagreement with the Court arises primarily from its view that it makes no [**298] difference how the Commission reached the rate fixed so long as the result is fair and reasonable. For me the statutory command to the Commission is more explicit. Entirely aside from the constitutional problem of whether the Congress could validly delegate its rate-making power to the Commission, *in toto* and without standards, it did legislate in the light of the relation of fair and reasonable to fair value and reasonable return. The Commission must therefore make its findings in observance of that relationship.

The Federal Power Commission did not, as I construe

"(a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

"(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction."

[3] "Reproduction cost" has been variously defined, but for rate-making purposes the most useful sense seems to be, the minimum amount necessary to create at the time of the inquiry a modern plant capable of rendering equivalent service. See I Bonbright, Valuation of Property (1937) 152. Reproduction cost as the cost of building a replica of an obsolescent plant is not of real significance.

"Prudent investment" is not defined by the Court. It may mean the sum originally put in the enterprise, either with or without additional amounts from excess earnings reinvested in the business.

[4] It is of no more than bookkeeping significance whether the Commission allows a rate of return commensurate with the risk of the original investment or the lower rate based on current risk and a capitalization reflecting the established earning power of a successful company and the probable cost of duplicating its services. Cf. *A. T. & T. Co*. v. *United States, 299 U.S. 232*. But the latter is the traditional method.

their action, disregard its statutory duty. They heard the evidence relating to historical and reproduction cost and to the reasonable rate of return, [****58] and they appraised its weight. The evidence of reproduction cost was rejected as unpersuasive, but from the other evidence they found a rate base, which is to me a determination of fair value. On that base the earnings allowed seem fair and reasonable. So far as the Commission went in appraising the property employed in the service, I find nothing in the result which indicates confiscation, unfairness or unreasonableness. Good administration of rate-making agencies under this method would avoid undue delay and render revaluations unnecessary except after violent fluctuations of price levels. Rate making under this method has been subjected to criticism. But until Congress changes the standards for the agencies, these rate-making bodies should continue the conventional theory of rate [*624] making. It will probably be simpler to improve present methods than to devise new ones.

But a major error, I think, was committed in the disregard by the Commission of the investment in exploratory operations and other recognized capital costs. These were not considered by the Commission because they were charged to operating expenses by the company at a time when it was unregulated. [****59] Congress did not direct the Commission in rate making to deduct from the rate base capital investment which had been recovered during the unregulated period through excess earnings. In my view this part of the investment should no more have been disregarded in the rate base than any other capital investment which previously had been recovered and paid out in dividends or placed to surplus. Even if prudent investment throughout the life of the property is accepted as the formula for figuring the rate base, it seems to me [***357] illogical to throw out the admittedly prudent cost of part of the property because the earnings in the unregulated period had been sufficient to return the prudent cost to the investors over and above a reasonable return. What would the answer be under the theory of the Commission and the Court, if the only prudent investment in this utility had been the seventeen million capital charges which are now disallowed?

For the reasons heretofore stated, I should affirm the action of the Circuit Court of Appeals in returning the proceeding to the Commission for further consideration and should direct the Commission to accept the disallowed capital investment [****60] in determining the fair value for rate-making purposes.

MR. JUSTICE FRANKFURTER, dissenting:

My brother JACKSON has analyzed with particularity the economic and social aspects of natural gas as well as [*625] the difficulties which led to the enactment of the Natural Gas Act, especially those arising out of the abortive attempts of States to regulate natural gas utilities. The Natural Gas Act of 1938 should receive application in the light of this analysis, and MR. JUSTICE JACKSON has, I believe, drawn relevant inferences regarding the duty of the Federal Power Commission in fixing natural gas rates. His exposition seems to me unanswered, and I shall say only a few words to emphasize my basic agreement with him.

For our society the needs that are met by public utilities are as truly public services as the traditional governmental functions of police and justice. They are not less so when these services are rendered by private enterprise under governmental regulation. Who ultimately determines the ways of regulation, is the decisive aspect in the public supervision of privately-owned utilities. Foreshadowed nearly sixty years ago, *Railroad Commission Cases, 116 U.S. 307, 331*, [****61] it was decided more than fifty [**299] years ago that the final say under the Constitution lies with the judiciary and not the legislature. *Chicago, M. & St. P. Ry. Co*. v. *Minnesota, 134 U.S. 418*.

While legal issues touching the proper distribution of governmental powers under the Constitution may always be raised, Congressional acquiescence to date in the doctrine of *Chicago, M. & St. P. Ry. Co*. v. *Minnesota, supra*, may fairly be claimed. But in any event that issue is not here in controversy. As pointed out in the opinions of my brethren, Congress has given only limited authority to the Federal Power Commission and made the exercise of that authority subject to judicial review. The Commission is authorized to fix rates chargeable for natural gas. But the rates that it can fix must be "just and reasonable." § 5 of the Natural Gas Act, *15 U. S. C. § 717 (d)*. Instead of making the Commission's rate determinations final, Congress [*626] specifically provided for court review of such orders. To be sure, "the finding of the Commission as to the facts, if supported by substantial evidence" was made "conclusive, [****62] " § 19 of the Act, *15 U. S. C. § 717r*. But obedience of the requirement of Congress that rates be "just and reasonable" is not an issue of fact of which the Commission's own determination is conclusive. Otherwise, there would be nothing for a court to review except questions of compliance with the

procedural provisions of the Natural Gas Act. Congress might have seen fit so to cast its legislation. But it has not done so. It has committed to the administration of the Federal Power Commission the duty of applying standards of fair dealing and of reasonableness relevant to the purposes expressed by the Natural Gas Act. The requirement that rates must be "just and reasonable" means just and reasonable in [***358] relation to appropriate standards. Otherwise Congress would have directed the Commission to fix such rates as in the judgment of the Commission are just and reasonable; it would not have also provided that such determinations by the Commission are subject to court review.

To what sources then are the Commission and the courts to go for ascertaining the standards relevant to the regulation of natural gas rates? It is at this point that MR. JUSTICE [****63] JACKSON's analysis seems to me pertinent. There appear to be two alternatives. Either the fixing of natural gas rates must be left to the unguided discretion of the Commission so long as the rates it fixes do not reveal a glaringly bad prophecy of the ability of a regulated utility to continue its service in the future. Or the Commission's rate orders must be founded on due consideration of all the elements of the public interest which the production and distribution of natural gas involve just because it is natural gas. These elements are reflected in the Natural Gas Act, if that Act be applied as an entirety. See, for [*627] instance, §§ 4 (a) (b) (c) (d), 6, and 11, *15 U. S. C., §§ 717c (a) (b) (c) (d)*, *717c*, and *717j*. Of course the statute is not concerned with abstract theories of rate-making. But its very foundation is the "public interest," and the public interest is a texture of multiple strands. It includes more than contemporary investors and contemporary consumers. The needs to be served are not restricted to immediacy, and social as well as economic costs must be counted.

It will not do to say that it must all be left to the skill of [****64] experts. Expertise is a rational process and a rational process implies expressed reasons for judgment. It will little advance the public interest to substitute for the hodge-podge of the rule in *Smyth v. Ames, 169 U.S. 466*, an encouragement of conscious obscurity or confusion in reaching a result, on the assumption that so long as the result appears harmless its basis is irrelevant. That may be an appropriate attitude when state action is challenged as unconstitutional. Cf. *Driscoll v. Edison Co., 307 U.S. 104*. But it is not to be assumed that it was the design of Congress to make the accommodation of the conflicting interests exposed in MR. JUSTICE JACKSON's opinion the occasion for a blind clash of forces or a partial assessment of relevant factors, either before the Commission or here.

The objection to the Commission's action is not that the rates it granted were too low but that the range of its vision was too narrow. And since the issues before the Commission involved no less than the [**300] total public interest, the proceedings before it should not be judged by narrow conceptions of common law pleading. And so I conclude [****65] that the case should be returned to the Commission. In order to enable this Court to discharge its duty of reviewing the Commission's order, the Commission should set forth with explicitness the criteria by which it is guided [*628] in determining that rates are "just and reasonable," and it should determine the public interest that is in its keeping in the perspective of the considerations set forth by MR. JUSTICE JACKSON.

By MR. JUSTICE JACKSON:

Certainly the theory of the court below that ties rate-making to the fair-value-reproduction-cost formula should be overruled as in conflict with *Federal Power Commission* v. *Natural Gas Pipeline Co*. [1] But the case should, I think, be the occasion for reconsideration of our rate-making doctrine as applied to natural gas and should be returned to the Commission, for further consideration in the light thereof.

The Commission appears to have [***359] understood the effect of the two opinions in the *Pipeline* case to [****66] be at least authority and perhaps direction to fix natural gas rates by exclusive application of the "prudent investment" rate base theory. This has no warrant in the opinion of the Chief Justice for the Court, however, which released the Commission from subservience to "any single formula or combination of formulas" provided its order, "viewed in its entirety, produces no arbitrary result." *315 U.S. at 586*. The minority opinion I understood to advocate the "prudent investment" theory as a sufficient guide in a natural gas case. The view was expressed in the court below that since this opinion was not expressly controverted it must have been approved. [2] I disclaim this imputed [*629]

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[1] *315 U.S. 575*.

[2] Judge Dobie, dissenting below, pointed out that the majority opinion in the *Pipeline* case "contains no express discussion of the Prudent Investment Theory" and that the concurring opinion contained a clear one, and said, "It is difficult for me to

approval with some particularity, because I attach importance at the very beginning of federal regulation of the natural gas industry to approaching it as the performance of economic functions, not as the performance of legalistic rituals.

[****67] I.

Solutions of these cases must consider eccentricities of the industry which gives rise to them and also to the Act of Congress by which they are governed.

The heart of this problem is the elusive, exhaustible, and irreplaceable nature of natural gas itself. Given sufficient money, we can produce any desired amount of railroad, bus, or steamship transportation, or communications facilities, or capacity for generation of electric energy, or for the manufacture of gas of a kind. In the service of such utilities one customer has little concern with the amount taken by another, one's waste will not deprive another, a volume of service can be created equal to demand, and today's demands will not exhaust or lessen capacity to serve tomorrow. But the wealth of Midas and the wit of man cannot produce or reproduce a natural gas field. We cannot even reproduce the gas, for our manufactured product has only about half the heating value per unit of nature's own. [3]

[****68] [**301] Natural gas in some quantity is produced in twenty-four states. It is consumed in only thirty-five states, and is [*630] available only to about 7,600,000 consumers. [4] Its availability has been more localized than that of any other utility service because it has depended more on the caprice of nature.

The supply of the Hope Company is drawn from that old and rich and vanishing field that flanks the Appalachian mountains. Its center of production is Pennsylvania and West Virginia, with a fringe of lesser production in New York, Ohio, Kentucky, Tennessee, and the north end of Alabama. Oil was discovered in commercial quantities at [***360] a depth of only 69 1/2 feet near Titusville, Pennsylvania, in 1859. Its value then was about $ 16 per barrel. [5] The oil branch of the petroleum industry went forward at once, and with unprecedented speed. The area productive of oil and gas was roughed out by the drilling of over 19,000 "wildcat" wells, [****69] estimated to have cost over $ 222,000,000. Of these, over 18,000, or 94.9 per cent, were "dry holes." About five per cent, or 990 wells, made discoveries of commercial importance, 767 of them resulting chiefly in oil and 223 in gas only. [6] Prospecting for many years was a search for oil, and to strike gas was a misfortune. Waste during this period and even later is appalling. Gas was regarded as having no commercial value until about 1882, in which year the total yield was valued only at about $ 75,000. [7] Since then, contrary to oil, which has become cheaper, gas in this field has pretty steadily advanced in price.

While for many years natural gas had been distributed on a small scale for lighting, [8] its acceptance was slow, [*631] facilities for its utilization were primitive, and not until 1885 did it take on the appearance of a substantial industry. [9] Soon monopoly [****70] of production or markets developed. [10] To get gas from the mountain

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believe that the majority of the Supreme Court, believing otherwise, would leave such a statement unchallenged." The fact that two other Justices had as matter of record in our books long opposed the reproduction cost theory of rate bases and had commented favorably on the prudent investment theory may have influenced that conclusion. See opinion of Mr. Justice Frankfurter in *Driscoll v. Edison Light & Power Co., 307 U.S. 104, 122*, and my brief as Solicitor General in that case. It should be noted, however, that these statements were made, not in a natural gas case, but in an electric power case -- a very important distinction, as I shall try to make plain.

[3] Natural gas from the Appalachian field averages about 1,050 to 1,150 B. T. U. content, while by-product manufactured gas is about 530 to 540. Moody's Manual of Public Utilities (1943) 1,350; Youngberg, Natural Gas (1930) 7.

[4] Sen. Rep. No. 1162, 75th Cong., 1st Sess., 2.

[5] Arnold and Kemnitzer, Petroleum in the United States and Possessions (1931) 78.

[6] *Id*. at 62-63.

[7] *Id*., at 61.

[8] At Fredonia, New York, in 1821, natural gas was conveyed from a shallow well to some thirty people. The lighthouse at Barcelona Harbor, near what is now Westfield, New York, was at about that time and for many years afterward lighted by gas that issued from a crevice. Report on Utility Corporations by Federal Trade Commission, Sen. Doc. 92, Pt. 84-A, 70th Cong., 1st Sess., 8-9.

[9] In that year Pennsylvania enacted "An Act to provide for the incorporation and regulation of natural gas companies." Penn. Laws 1885, No. 32.

[10] See Steptoe and Hoffheimer's Memorandum for Governor Cornwell of West Virginia (1917) 25 West Virginia Law Quarterly 257; see also Report on Utility Corporations by Federal Trade Commission, Sen. Doc. No. 92, Pt. 84-A, 70th

country, where it was largely found, to centers of population, where it was in demand, required very large investment. By ownership of such facilities a few corporate systems, each including several companies, controlled access to markets. Their purchases became the dominating factor in giving a market value to gas produced by many small operators. Hope is the market for over 300 such operators. By 1928 natural gas in the Appalachian field commanded an average price of 21.1 cents per m. c. f. at points of production and was bringing 45.7 cents at points of consumption. [11] The companies which controlled markets, however, did not rely on gas purchases alone. They acquired and held in fee or leasehold great acreage in territory proved by "wildcat" drilling. These large marketing system companies as well as many small independent owners and operators have carried on the commercial development of proved territory. The development risks appear from the estimate that up to 1928, 312,318 proved area wells had been sunk in the Appalachian field of which 48,962, or 15.7 per cent, failed to produce oil or gas in commercial [****71] quantity. [12]

[*632] With the source of supply thus tapped to serve centers of large demand, like Pittsburgh, Buffalo, [****72] Cleveland, Youngstown, Akron, and other industrial communities, the distribution of natural gas fast became big business. Its advantages as a [**302] fuel and its price commended it, and the business yielded a handsome return. All was merry and the goose hung high for consumers and gas companies alike until about the [***361] time of the first World War. Almost unnoticed by the consuming public, the whole Appalachian field passed its peak of production and started to decline. Pennsylvania, which to 1928 had given off about 38 per cent of the natural gas from this field, had its peak in 1905; Ohio, which had produced 14 per cent, had its peak in 1915; and West Virginia, greatest producer of all, with 45 per cent to its credit, reached its peak in 1917. [13]

Western New York and Eastern Ohio, on the fringe of the field, had some production but relied heavily on imports from Pennsylvania and West Virginia. Pennsylvania, a producing and exporting state, was a heavy consumer and supplemented [****73] her production with imports from West Virginia. West Virginia was a consuming state, but the lion's share of her production was exported. Thus the interest of the states in the North Appalachian supply was in conflict.

Competition among localities to share in the failing supply and the helplessness of state and local authorities in the presence of state lines and corporate complexities is a part of the background of federal intervention in the industry. [14] West Virginia took the boldest measure. It legislated a priority in its entire production in favor of its own inhabitants. That was frustrated by an injunction [*633] from this Court. [15] Throughout the region clashes in the courts and conflicting decisions evidenced public anxiety and confusion. It was held that the New York Public Service Commission did not have power to classify consumers and restrict their use of gas. [16] That Commission held that a company could not abandon a part of its territory and still serve the rest. [17] Some courts admonished the companies to take action to protect consumers. [18] [****75] Several courts held that companies, regardless of failing supply, must continue to take on customers, but such [****74] compulsory additions were finally held to be within the Public Service Commission's discretion. [19] There were attempts to throw up franchises and quit the service, and municipalities resorted to the courts with conflicting results. [20] Public

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Cong., 1st Sess.

[11] Arnold and Kemnitzer, Petroleum in the United States and Possessions (1931) 73.

[12] *Id*. at 63.

[13] *Id*. at 64.

[14] See Report on Utility Corporations by Federal Trade Commission, Sen. Doc. No. 92, Pt. 84-A, 70th Cong., 1st Sess.

[15] *Pennsylvania v. West Virginia, 262 U.S. 553*. For conditions there which provoked this legislation, see 25 West Virginia Law Quarterly 257.

[16] *People ex rel. Pavilion Gas Co*. v. *Public Service Commission, 188 App. Div. 36, 176 N. Y. S. 163*.

[17] Village of Falconer *v*. Pennsylvania Gas Co., 17 State Department Reports (N. Y.) 407.

[18] See, for example, *Public Service Commission v. Iroquois Natural Gas Co., 108 Misc. 696, 178 N. Y. S. 24*; *Park Abbott Realty Co*. v. *Iroquois Gas Co., 102 Misc. 266, 168 N. Y. S. 673*; *Public Service Commission v. Iroquois Natural Gas Co., 189 App. Div. 545, 179 N. Y. S. 230*.

[19] *People ex rel. Pennsylvania Gas Co*. v. *Public Service Commission, 196 App. Div. 514, 189 N. Y. S. 478*.

[20] *East Ohio Gas Co*. v. *Akron, 81 Ohio St. 33, 90 N. E. 40*;

service commissions of consuming states were handicapped, for they had no control of the supply. [21]

[****76] [*634] Shortages [**303] during World War I occasioned the first intervention in [***362] the natural gas industry by the Federal Government. Under Proclamation of President Wilson the United States Fuel Administrator took control, stopped extensions, classified consumers and established a priority for domestic over industrial use. [22] After the war federal control was abandoned. Some cities once served with natural gas became dependent upon a mixed gas of reduced heating value and relatively higher price. [23]

[****77] Utilization of natural gas of highest social as well as economic return is domestic use for cooking and water [*635] heating, followed closely by use for space heating in homes. This is the true public utility aspect of the enterprise, and its preservation should be the first concern of regulation. Gas does the family cooking cheaper than any other fuel. [24] But its advantages do not end with dollars and cents cost. It is delivered without interruption at the meter as needed and is paid for after it is used. No money is tied up in a supply, and no space is used for storage. It requires no handling, creates no dust, and leaves no ash. It responds to thermostatic control. It ignites easily and immediately develops its maximum heating capacity. These incidental advantages make domestic life more liveable.

[****78] Industrial use is induced less by these qualities than by low cost in competition with other fuels. Of the gas exported from West Virginia by the Hope Company a very substantial part is used by industries. This wholesale use speeds exhaustion of supply and displaces other fuels. Coal miners and the coal industry, a large part of whose costs are wages, have complained of unfair competition from low-priced industrial gas produced with relatively little labor cost. [25]

Gas rate structures generally have favored industrial users. In 1932, in Ohio, the average yield on gas for domestic consumption was 62.1 cents per m. c. f. and on industrial, [*636] 38.7. In Pennsylvania, the figures were 62.9 against 31.7. West Virginia showed the least spread, domestic consumers paying 36.6 cents; and industrial, [***363] 27.7. [26] Although this [****79]

Newcomerstown v. Consolidated Gas Co., 100 Ohio St. 494, 127 N. E. 414; *Gress v. Village of Ft. Loramie, 100 Ohio St. 35, 125 N. E. 112*; *Jamestown v. Pennsylvania Gas Co., 263 F. 437, 264 F. 1009*. See also *United Fuel Gas Co*. v. *Railroad Commission, 278 U.S. 300, 308*.

[21] The New York Public Service Commission said: "While the transportation of natural gas through pipe lines from one state to another state is interstate commerce . . . , Congress has not taken over the regulation of that particular industry. Indeed, it has expressly excepted it from the operation of the Interstate Commerce Commissions Law (Interstate Commerce Commissions Law, section 1). It is quite clear, therefore, that this Commission can not require a Pennsylvania corporation producing gas in Pennsylvania to transport it and deliver it in the State of New York, and that the Interstate Commerce Commission is likewise powerless. If there exists such a power, and it seems that there does, it is a power vested in Congress and by it not yet exercised. There is no available source of supply for the Crystal City Company at present except through purchasing from the Potter Gas Company. It is possible that this Commission might fix a price at which the Potter Gas Company should sell if it sold at all, but as the Commission can not require it to supply gas in the State of New York, the exercise of such a power to fix the price, if such power exists, would merely say, sell at this price or keep out of the State." Lane *v*. Crystal City Gas Co., 8 New York Public Service Comm. Reports, Second District, 210, 212.

[22] Proclamation by the President of September 16, 1918; Rules and Regulations of H. A. Garfield, Fuel Administrator, September 24, 1918.

[23] For example, the Iroquois Gas Corporation which formerly served Buffalo, New York, with natural gas ranging from 1050 to 1150 b. t. u. per cu. ft., now mixes a by-product gas of between 530 and 540 b. t. u. in proportions to provide a mixed gas of about 900 b. t. u. per cu. ft. For space heating or water heating its charges range from 65 cents for the first 10 m. c. f. per month to 55 cents for all above 25 m. c. f. per month. Moody's Manual of Public Utilities (1943) 1350.

[24] The United States Fuel Administration made the following cooking value comparisons, based on tests made in the Department of Home Economics of Ohio State University:

Natural gas at 1.12 per M. is equivalent to coal at $ 6.50 per ton.

Natural gas at 2.00 per M. is equivalent to gasoline at 27 cents per gal.

Natural gas at 2.20 per M. is equivalent to electricity at 3 cents per k. w. h.

Natural gas at 2.40 per M. is equivalent to coal oil at 15 cents per gal.

Use and Conservation of Natural Gas, issued by U.S. Fuel Administration (1918) 5.

[25] See Brief on Behalf of Legislation Imposing an Excise Tax on Natural Gas, submitted to N. R. A. by the United Mine Workers of America and the National Coal Association.

[26] Brief of National Gas Association and United Mine Workers,

spread is less than [**304] in other parts of the United States, [27] it can hardly be said to be self-justifying. It certainly is a very great factor in hastening decline of the natural gas supply.

About the time of World War I there were occasional and short-lived efforts by some hard-pressed companies to reverse this discrimination and adopt graduated rates, giving a low rate to quantities adequate for domestic use and graduating it upward to discourage industrial use. [28] [*637] These rates met opposition from industrial sources, of course, and since diminished revenues from industrial sources tended [****80] to increase the domestic price, they met little popular or commission favor. The fact is that neither the gas companies nor the consumers nor local regulatory bodies can be depended upon to conserve gas. Unless federal regulation will take account of conservation, its efforts seem, as in this case, actually to constitute a new threat to the life of the Appalachian supply.

[****81] II.

Congress in 1938 decided upon federal regulation of the industry. It did so after an exhaustive investigation of all aspects including failing supply and competition for the use of natural gas intensified by growing scarcity. [29] [****82] Pipelines from the Appalachian area to markets were in the control of a handful of holding company systems. [30] This created a highly

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supra note 26, pp. 35, 36, compiled from Bureau of Mines Reports.

[27] From the source quoted in the preceding note the spread elsewhere is shown to be:

Aller au tableau2

State	Industrial	Domestic
Illinois	29.2	1.678
Louisiana	10.4	59.7
Oklahoma	11.2	41.5
Texas	13.1	59.7
Alabama	17.8	1.227
Georgia	22.9	1.043

[28] In Corning, New York, rates were initiated by the Crystal City Gas Company as follows: 70 cents for the first 5,000 cu. ft. per month; 80 cents from 5,000 to 12,000; $ 1.00 for all over 12,000. The Public Service Commission rejected these rates and fixed a flat rate of 58 cents per m. c. f. Lane *v*. Crystal City Gas Co., 8 New York Public Service Comm. Reports, Second District, 210.

The Pennsylvania Gas Company (National Fuel Gas Company group) also attempted a sliding scale rate for New York consumers, net per month as follows: First 5,000 feet, 35 cents; second 5,000 feet, 45 cents; third 5,000 feet, 50 cents; all above 15,000, 55 cents. This was eventually abandoned, however. The company's present scale in Pennsylvania appears to be reversed to the following net monthly rate: first 3 m. c. f., 75 cents; next 4 m. c. f., 60 cents; next 8 m. c. f., 55 cents; over 15 m. c. f., 50 cents. Moody's Manual of Public Utilities (1943) 1350. In New York it now serves a mixed gas.

For a study of effect of sliding scale rates in reducing consumption see 11 Proceedings of Natural Gas Association of America (1919) 287.

[29] See Report on Utility Corporations by Federal Trade Commission, Sen. Doc. 92, Pt. 84-A, 70th Cong., 1st Sess.

[30] Four holding company systems control over 55 per cent of all natural gas transmission lines in the United States. They are Columbia Gas and Electric Corporation, Cities Service Co., Electric Bond and Share Co., and Standard Oil Co. of New Jersey. Columbia alone controls nearly 25 per cent, and fifteen companies account for over 80 per cent of the total. Report on Utility Corporations by Federal Trade Commission, Sen. Doc. 92, Pt. 84-A, 70th Cong., 1st Sess., 28.

In 1915, so it was reported to the Governor of West Virginia, 87 per cent of the total gas production of that state was under control of eight companies. Steptoe and Hoffheimer, Legislative Regulation of Natural Gas Supply in West Virginia, 17 West Virginia Law Quarterly 257, 260. Of these, three were subsidiaries of the Columbia system and others were

concentrated control of the producers' market and of the consumers' supplies. While holding companies dominated both production [***364] and distribution they segregated those activities in separate [*638] subsidiaries, [31] the effect of which, if not the purpose, was to isolate [**305] some end of the business from the reach of any one state commission. The cost of natural gas to consumers moved steadily upwards over the years, out of proportion to prices of oil, which, except for the element of competition, is produced under somewhat comparable conditions. The public came to feel that the companies were exploiting the growing scarcity of local gas. The problems of this region had much to do with creating the demand for federal regulation.

[****83] The Natural Gas Act declared the natural gas business to be "affected with a *public interest*," and its regulation "necessary in the *public interest*." [32] Originally, and at the time this proceeding was commenced and tried, it also declared "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate *consistent with the maintenance of adequate service in the public interest*."[33] While this was later dropped, there is nothing to indicate that it was not and is not still an accurate statement of purpose of the Act. Extension or improvement of facilities may be ordered when "necessary or desirable in the public interest," abandonment of facilities may be ordered when the supply is "depleted to the extent that the continuance of service is unwarranted, or that the *present or future public convenience or necessity* [*639] permit" abandonment and certain extensions can only be made on finding of "the *present or future* convenience and necessity." [34] The Commission is required to take account of the ultimate [****84] use of the gas. Thus it is given power to suspend new schedules as to rates, charges, and classification of services except where the schedules are for the sale of gas "for resale for industrial use only," [35] which gives the companies greater freedom to increase rates on industrial gas than on domestic gas. More particularly, the Act expressly forbids any undue preference or advantage to any person or "*any unreasonable difference in rates* . . . either as between localities *or as between classes of service*." [36] And the power of the Commission expressly includes that to determine the "just and reasonable *rate, charge, classification, rule, regulation, practice, or contract* to be thereafter observed and in force." [37]

In view [****85] of the Court's opinion that the Commission in administering the Act may ignore discrimination, it is interesting that in reporting this Bill both the Senate and the House Committees on Interstate Commerce pointed out that in 1934, on a nation-wide average the price of natural gas per m. c. f. was 74.6 cents for domestic use, 49.6 cents for commercial use, and 16.9 for industrial use. [38] I am not ready to think that supporters of a bill called attention to the striking fact that householders were being charged five times [***365] as much for their gas as industrial users only as a situation which the Bill would do nothing to remedy. On the other hand the Act gave to the Commission what the Court aptly describes as "broad powers of regulation."

[*640] III.

This proceeding was initiated by the Cities of Cleveland and Akron. They alleged that the price charged by Hope for natural gas "for resale to domestic, commercial and small industrial consumers in [****86] Cleveland and elsewhere is excessive, unjust, unreasonable, greatly in excess of the price charged by Hope to nonaffiliated companies at wholesale for resale to domestic, commercial, and small industrial consumers, and *greatly in excess of the price charged by Hope to*

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subsidiaries of larger systems. In view of inter-system sales and interlocking interests it may be doubted whether there is much real competition among these companies.

[31] This pattern with its effects on local regulatory efforts will be observed in our decisions. See *United Fuel Gas Co*. v. *Railroad Commission, 278 U.S. 300*; *United Fuel Gas Co*. v. *Public Service Commission, 278 U.S. 322*; *Dayton Power & Light Co*. v. *Public Utilities Commission, 292 U.S. 290*; *Columbus Gas & Fuel Co*. v. *Public Utilities Commission, 292 U.S. 398*, and the present case.

[32] *15 U. S. C. § 717 (a)*. (Italics supplied throughout this paragraph.)

[33] § 7 (c), 52 Stat. 825.

[34] *15 U. S. C. § 717f*.

[35] *Id*., *§ 717c (e)*.

[36] *Id*., *§ 717c (b)*.

[37] *Id*., § 717d (a).

[38] Sen. Rep. No. 1162, 75th Cong., 1st Sess., 2.

East Ohio for resale to certain favored industrial consumers in Ohio, and therefore is further unduly discriminatory between customers and between classes of service" (italics supplied). The company answered admitting differences in prices to affiliated and nonaffiliated companies and justifying them by differences in conditions of delivery. [**306] As to the allegation that the contract price is "greatly in excess of the price charged by Hope to East Ohio for resale to certain favored industrial consumers in Ohio," Hope did not deny a price differential, but alleged that industrial gas was not sold to "favored consumers" but was sold under contracts and schedules filed with and approved by the Public Utilities Commission of Ohio, and that certain conditions of delivery made it not "unduly discriminatory."

The record shows that in 1940 Hope delivered for industrial consumption 36,523,792 m. c. f. and for domestic [****87] and commercial consumption, 50,343,652 m. c. f. I find no separate figure for domestic consumption. It served 43,767 domestic consumers directly, 511,521 through the East Ohio Gas Company, and 154,043 through the Peoples Natural Gas Company, both affiliates owned by the same parent. Its special contracts for industrial consumption, so far as appear, are confined to about a dozen big industries.

[*641] Hope is responsible for such discrimination as exists in favor of these few industrial consumers. It controls both the resale price and use of industrial gas by virtue of the very interstate sales contracts over which the Commission is exercising its jurisdiction.

Hope's contract with East Ohio Company is an example. Hope agrees to deliver, and the Ohio Company to take, "(a) all natural gas requisite for the supply of the domestic consumers of the Ohio Company; (b) such amounts of natural gas as may be requisite to fulfill contracts made with the consent and approval of the Hope Company by the Ohio Company, or companies which it supplies with natural gas, for the sale of gas upon special terms and conditions for manufacturing purposes." The Ohio Company is required to read [****88] domestic customers' meters once a month and meters of industrial customers daily and to furnish all meter readings to Hope. The Hope Company is to have access to meters of all consumers and to all of the Ohio Company's accounts. The domestic consumers of the Ohio Company are to be fully supplied in preference to consumers purchasing for manufacturing purposes and "Hope Company can be required to supply gas to be used for manufacturing purposes only where the same is sold under special contracts which have first been submitted to and approved in writing by the Hope Company and which expressly provide that natural gas will be supplied thereunder only in so far as the same is not necessary to meet the requirements of domestic consumers supplied through pipe lines of the Ohio Company." This basic contract was supplemented from time to time, chiefly as to price. The last amendment was in a letter from Hope to East Ohio in 1937. It contained a special discount on industrial gas and a schedule of special [***366] industrial contracts, Hope reserving the right to make eliminations therefrom and agreeing that others might be added from time to [*642] time with its approval in writing. [****89] It said, "It is believed that the price concessions contained in this letter, *while not based on our costs*, are, under certain conditions, to our mutual advantage in maintaining and building up the volumes of gas sold by us [italics supplied]." [39]

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[39] The list of East Ohio Gas Company's special industrial contracts thus expressly under Hope's control and their demands are as follows:

Aller au tableau3

Customer	**Ordinary Daily Requirements.**
Republic Steel Corporation	15,000,000 cu. ft.
Otis Steel Company	10,000,000
Timken Roller Bearing Co	7,500,000
Youngstown Sheet & Tube Co	7,000,000
U.S. Steel Corp. -- Subsidiaries	6,500,000
General Electric Company	2,500,000
Pittsburgh Plate Glass Co	2,000,000
Niles Rolling Mill Company	

[**307] The Commission took no note of the charges of discrimination [****90] and made no disposition of the issue tendered on this point. It ordered a flat reduction in the price per m. c. f. of all gas delivered by Hope in interstate commerce. It made no limitation, condition, or provision as to what classes of consumers should get the benefit of the reduction. While the cities have accepted and are defending the reduction, it is my view that the discrimination of which they have complained is perpetuated and increased by the order of the Commission and that it violates the Act in so doing.

The Commission's opinion aptly characterizes its entire objective by saying that "bona fide investment figures now become all-important in the regulation of rates." It should be noted that the all-importance of this theory is not the result of any instruction from Congress. When the Bill to regulate gas was first before Congress it contained [*643] the following: "In determining just and reasonable rates the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question." H. R. 5423, 74th Cong., 1st Sess., Title III, § 312 (c). Congress rejected this language. See [****91] H. R. 5423, § 213 (211 (c)), and H. R. Rep. No. 1318, 74th Cong., 1st Sess., 30.

The Commission contends nevertheless that the "all important" formula for finding a rate base is that of prudent investment. But it excluded from the investment base an amount actually and admittedly invested of some $ 17,000,000. It did so because it says that the Company recouped these expenditures from customers before the days of regulation from earnings above a fair return. But it would not apply all of such "excess earnings" to reduce the rate base as one of the Commissioners suggested. The reason for applying excess earnings to reduce the investment base roughly from $ 69,000,000 to $ 52,000,000 but refusing to apply them to reduce it from that to some $ 18,000,000 is not found in a difference in the character of the earnings or in their reinvestment. The reason assigned is a difference in bookkeeping treatment many years before the Company was subject to regulation. The $ 17,000,000, reinvested chiefly in well drilling, was treated on the books as expense. (The Commission now requires that drilling costs be carried to capital account.) The allowed rate base thus actually was determined [****92] by the Company's bookkeeping, not its investment. [***367] This attributes a significance to formal classification in account keeping that seems inconsistent with rational rate regulation. [40] Of [*644]

1,500,000

Chase Brass & Copper Company

700,000

U.S. Aluminum Company

400,000

Mahoning Valley Steel Company

400,000

Babcock & Wilcox Company

400,000

Canton Stamping & Enameling Co

350,000

[40] To make a fetish of mere accounting is to shield from examination the deeper causes, forces, movements, and conditions which should govern rates. Even as a recording of current transactions, bookkeeping is hardly an exact science. As a representation of the condition and trend of a business, it uses symbols of certainty to express values that actually are in constant flux. It may be said that in commercial or investment banking or any business extending credit success depends on knowing what not to believe in accounting. Few concerns go into bankruptcy or reorganization whose books do not show them solvent and often even profitable. If one cannot rely on accountancy accurately to disclose past or current conditions of a business, the fallacy of using it as a sole guide to future price policy ought to be apparent. However, our quest for certitude is so ardent that we pay an irrational reverence to a technique which uses symbols of certainty, even though experience again and again warns us that they are delusive. Few writers have ventured to challenge this American idolatry, but see Hamilton, Cost as a Standard for Price, 4 Law and Contemporary Problems 321, 323-25. He observes that "As the apostle would put it, accountancy is all things to all men. . . . Its purpose determines the character of a system of accounts." He analyzes the hypothetical character of accounting and says "It was no eternal mold for pecuniary verities handed down from on high. It was -- like logic, or algebra, or the device of analogy in the law -- an ingenious contrivance of the human mind to serve a limited and practical purpose." "Accountancy is far from being a pecuniary expression of all that is industrial reality. It is an instrument, highly selective in its application, in the service of the institution of money making." As to capital account he observes "In an enterprise in lusty competition with others of its kind, survival is the thing and the system of accounts has its focus in solvency. . . . Accordingly depreciation, obsolescence, and other factors which carry no immediate threat are matters of lesser concern and the capital account is likely to be regarded as a secondary phenomenon. . . . But in an enterprise, such as a public utility, where continued survival seems assured, solvency is likely to be taken for granted. . . .

course, the [**308] Commission would not and should not allow a rate base to be inflated by bookkeeping which had improperly capitalized expenses. I have doubts about resting public regulation upon any rule that is to be used or not depending on which side it favors.

[****93] [*645] The Company on the other hand, has not put its gas fields into its calculations on the present-value basis, although that, it contends, is the only lawful rule for finding a rate base. To do so would result in a rate higher than it has charged or proposes as a matter of good business to charge.

The case before us demonstrates the lack of rational relationship between conventional rate-base formulas and natural gas production and the extremities to which regulating bodies are brought by the effort to rationalize them. The Commission and the Company each stands on a different theory, and neither ventures to carry its theory to logical conclusion as applied to gas fields.

IV.

This order is under judicial review not because we interpose constitutional theories between a State and the business it seeks to regulate, but because Congress put upon the federal courts a duty toward administration of a new federal regulatory Act. If we are to hold that a given rate is reasonable just because the Commission has said it was reasonable, review becomes a costly, time-consuming pageant of no practical value to anyone. If on the other hand we are to bring judgment of our own to [****94] the task, we should for the guidance of the regulators and the [***368] regulated reveal something of the philosophy, be it legal or economic or social, which guides us. We need not be slaves to a formula but unless we can point out a rational way of reaching our conclusions they can only be accepted as resting on intuition or predilection. I must admit that I possess no instinct by which to know the "reasonable" from the "unreasonable" in prices and must seek some conscious design for decision.

The Court sustains this order as reasonable, but what makes it so or what could possibly make it otherwise, [*646] I cannot learn. It holds that: "it is the result reached not the method employed which is controlling"; "the fact that the method employed to reach that result may contain infirmities is not then important" and it is not "important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at." The Court does lean somewhat on considerations of capitalization and dividend history and requirements for dividends on outstanding stock. But I can give no real weight to that for it is generally and I think [****95] deservedly in discredit as any guide in rate cases. [41]

Our books already contain so much talk of methods of rationalizing rates that we must appear ambiguous if we announce results without our working methods. We are confronted with regulation of a unique type of enterprise which I think requires considered rejection of much conventional utility doctrine and adoption of concepts of "just and reasonable" rates and practices and of the "public interest" that will take account of the peculiarities of the business.

The Court rejects the suggestions of this opinion. It says that the Committees in reporting the bill which became the Act said it provided "for regulation along recognized and more or less standardized lines" and that there was "nothing novel in its provisions." So saying it sustains a rate calculated on a novel variation of a rate base theory which itself had at the time of enactment of the legislation been recognized only in dissenting opinions. [****96] Our difference seems to be between unconscious innovation, [42] and the purposeful [**309] and deliberate innovation I [*647] would make to meet the necessities of regulating the industry before us.

Hope's business has two components of quite divergent character. One, while not a conventional common-carrier undertaking, is essentially a transportation enterprise consisting of conveying gas from where it is produced to point of delivery to the buyer. This is a relatively routine operation not differing substantially from many other utility operations. The service is produced by an investment in compression and transmission facilities. Its risks are those of investing [****97] in a tested means of conveying a discovered supply of gas to a known market. A rate

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A persistent and ingenious attention is likely to be directed not so much to securing the upkeep of the physical property as to making it certain that capitalization fails in not one whit to give full recognition to every item that should go into the account."

[41] See 2 Bonbright, Valuation of Property (1937) 1112.

[42] Bonbright says, ". . . the vice of traditional law lies, not in its adoption of excessively rigid concepts of value and rules of valuation, but rather in its tendency to permit shifts in meaning that are inept, or else that are ill-defined because the judges that make them will not openly admit that they are doing so." *Id*., 1170.

base calculated on the prudent investment formula would seem a reasonably satisfactory measure for fixing a return from that branch of the business whose service is roughly proportionate to the capital invested. But it has other consequences which must not be overlooked. It gives marketability and hence "value" to gas owned by the company and gives the pipeline company a large power over the marketability and hence "value" of the production of others.

The other part of the business -- to reduce to possession an adequate supply of natural gas -- is of opposite [***369] character, being more erratic and irregular and unpredictable in relation to investment than any phase of any other utility business. A thousand feet of gas captured and severed from real estate for delivery to consumers is recognized under our law as property of much the same nature as a ton of coal, a barrel of oil, or a yard of sand. The value to be allowed for it is the real battleground between the investor and consumer. It is from this part of the business that the chief difference between the parties as to a proper rate [****98] base arises.

Is it necessary to a "reasonable" price for gas that it be anchored to a rate base of any kind? Why did courts in the first place begin valuing "rate bases" in order to "value" something else? The method came into vogue [*648] in fixing rates for transportation service which the public obtained from common carriers. The public received none of the carriers' physical property but did make some use of it. The carriage was often a monopoly so there were no open market criteria as to reasonableness. The "value" or "cost" of what was put to use in the service by the carrier was not a remote or irrelevant consideration in making such rates. Moreover the difficulty of appraising an intangible service was thought to be simplified if it could be related to physical property which was visible and measurable and the items of which might have market value. The court hoped to reason from the known to the unknown. But gas fields turn this method topsy turvy. Gas itself is tangible, possessible, and does have a market and a price in the field. The value of the rate base is more elusive than that of gas. It consists of intangibles -- leaseholds and freeholds -- operated [****99] and unoperated -- of little use in themselves except as rights to reach and capture gas. Their value lies almost wholly in predictions of discovery, and of price of gas when captured, and bears little relation to cost of tools and supplies and labor to develop it. Gas is what Hope sells and it can be directly priced more reasonably and easily and accurately than the components of a rate base can be valued. Hence the reason for resort to a roundabout way of rate base price fixing does not exist in the case of gas in the field.

But if found, and by whatever method found, a rate base is little help in determining reasonableness of the price of gas. Appraisal of present value of these intangible rights to pursue fugitive gas depends on the value assigned to the gas when captured. The "present fair value" rate base, generally in ill repute, [43] is not even [**310] urged by the gas company for valuing its fields.

[****100] [*649] The prudent investment theory has relative merits in fixing rates for a utility which creates its service merely by its investment. The amount and quality of service rendered by the usual utility will, at least roughly, be measured by the amount of capital it puts into the enterprise. But it has no rational application where there is no such relationship between investment and capacity to serve. There is no such relationship between investment and amount of gas produced. Let us assume that Doe and Roe each produces in West Virginia for delivery to Cleveland the same quantity of natural gas per day. Doe, however, through luck or foresight or whatever it takes, gets his gas from investing $ 50,000 in leases and drilling. Roe drilled poorer territory, got smaller wells, and has invested $ 250,000. Does anybody imagine that Roe can get or ought to get for his gas five times as much as Doe because [***370] he has spent five times as much? The service one renders to society in the gas business is measured by what he gets out of the ground, not by what he puts into it, and there is little more relation between the investment and the results than in a game of poker.

[****101] Two-thirds of the gas Hope handles it buys from about 340 independent producers. It is obvious that the principle of rate-making applied to Hope's own gas cannot be applied, and has not been applied, to the bulk of the gas Hope delivers. It is not probable that the investment of any two of these producers will bear the same ratio to their investments. The gas, however, all goes to the same use, has the same utilization value and the same ultimate price.

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[43] "The attempt to regulate rates by reference to a periodic or occasional reappraisal of the properties has now been tested long enough to confirm the worst fears of its critics. Unless its place is taken by some more promising scheme of rate control, the days of private ownership under government regulation may be numbered." 2 Bonbright, Valuation of Property (1937) 1190.

To regulate such an enterprise by undiscriminatingly transplanting any body of rate doctrine conceived and [*650] adapted to the ordinary utility business can serve the "public interest" as the Natural Gas Act requires, if at all, only by accident. Mr. Justice Brandeis, the pioneer juristic advocate of the prudent investment theory for manmade utilities, never, so far as I am able to discover, proposed its application to a natural gas case. On the other hand, dissenting in *Pennsylvania* v. *West Virginia*, he reviewed the problems of gas supply and said, "In no other field of public service regulation is the controlling body confronted with factors so baffling as in the natural gas industry; and in none is continuous [****102] supervision and control required in so high a degree." *262 U.S. 553, 621*. If natural gas rates are intelligently to be regulated we must fit our legal principles to the economy of the industry and not try to fit the industry to our books.

As our decisions stand the Commission was justified in believing that it was required to proceed by the rate base method even as to gas in the field. For this reason the Court may not merely wash its hands of the method and rationale of rate making. The fact is that this Court, with no discussion of its fitness, simply transferred the rate base method to the natural gas industry. It happened in *Newark Natural Gas & Fuel Co*. v. *City of Newark, Ohio, 242 U.S. 405 (1917)*, in which the company wanted 25 cents per m. c. f., and under the *Fourteenth Amendment* challenged the reduction to 18 cents by ordinance. This Court sustained the reduction because the court below "gave careful consideration to the questions of the value of the property at the time of the inquiry," and whether the rate "would be sufficient to provide a fair return on the value of the property." The Court said this method was "based upon principles [****103] thoroughly established by repeated decisions of this court," citing many cases, not one of which involved natural gas or a comparable wasting natural resource. Then came issues as to state power to [*651] regulate as affected by the *commerce clause*. *Public Utilities Commission v. Landon, 249 U.S. 236 (1919)*; *Pennsylvania Gas Co*. v. *Public Service Commission, 252 U.S. 23 (1920)*. These questions settled, the Court again was called upon in natural gas cases to consider state rate-making claimed to be invalid under the *Fourteenth Amendment*. *United Fuel Gas Co*. v. *Railroad Commission of Kentucky, 278 U.S. 300 (1929)*; *United Fuel Gas Co*. v. *Public Service Commission of West Virginia, 278 U.S. 322 (1929)*. Then, as now, the differences were "due [**311] chiefly to the difference in value ascribed by each to the gas rights and leaseholds." *278 U.S. 300, 311*. No one seems to have questioned that the rate base method must be pursued and the controversy was as to what rate base must be used. Later the "value" of gas in the field was [***371] questioned in determining the amount [****104] a regulated company should be allowed to pay an affiliate therefor -- a state determination also reviewed under the *Fourteenth Amendment*. *Dayton Power & Light Co*. v. *Public Utilities Commission of Ohio, 292 U.S. 290 (1934)*; *Columbus Gas & Fuel Co*. v. *Public Utilities Commission of Ohio, 292 U.S. 398 (1934)*. In both cases, one of which sustained and one of which struck down a fixed rate, the Court assumed the rate base method as the legal way of testing reasonableness of natural gas prices fixed by public authority, without examining its real relevancy to the inquiry.

Under the weight of such precedents we cannot expect the Commission to initiate economically intelligent methods of fixing gas prices. But the Court now faces a new plan of federal regulation based on the power to fix the price at which gas shall be allowed to move in interstate commerce. I should now consider whether these rules devised under the *Fourteenth Amendment* are the exclusive tests of a just and reasonable rate under the federal statute, inviting reargument directed to that point [*652] if necessary. As I see it now I would be prepared to hold that these rules [****105] do not apply to a natural gas case arising under the Natural Gas Act.

Such a holding would leave the Commission to fix the price of gas in the field as one would fix maximum prices of oil or milk or coal, or any other commodity. Such a price is not calculated to produce a fair return on the synthetic value of a rate base of any individual producer, and would not undertake to assure a fair return to any producer. The emphasis would shift from the producer to the product, which would be regulated with an eye to average or typical producing conditions in the field.

Such a price fixing process on economic lines would offer little temptation to the judiciary to become back seat drivers of the price fixing machine. The unfortunate effect of judicial intervention in this field is to divert the attention of those engaged in the process from what is economically wise to what is legally permissible. It is probable that price reductions would reach economically unwise and self-defeating limits before they would reach constitutional ones. Any constitutional problems growing out of price fixing are quite different than those that have heretofore been considered to inhere in rate

making. [****106] A producer would have difficulty showing the invalidity of such a fixed price so long as he voluntarily continued to sell his product in interstate commerce. Should he withdraw and other authority be invoked to compel him to part with his property, a different problem would be presented.

Allowance in a rate to compensate for gas removed from gas lands, whether fixed as of point of production or as of point of delivery, probably best can be measured by a functional test applied to the whole industry. For good or ill we depend upon private enterprise to exploit these natural resources for public consumption. The function which an allowance for gas in the field should perform [*653] for society in such circumstances is to be enough and no more than enough to induce private enterprise completely and efficiently to utilize gas resources, to acquire for public service any available gas or gas rights and to deliver gas at a rate and for uses which will be in the future as well as in the present public interest.

The Court fears that "if we are now to tell the Commission to fix the rates so as to discourage particular uses, we would indeed be injecting into a rate case a 'novel' doctrine [****107] . . ." With due deference I suggest that there is nothing novel in the idea that any change in price of a service or commodity reacts to encourage or discourage its use. The question is not whether such consequences [***372] will or will not follow; the question is whether effects must be suffered blindly or may be intelligently selected, whether price control shall have targets at which it deliberately aims or shall be handled like a gun in the hands of one who does not know it is loaded.

We should recognize "price" for what it is -- a tool, a means, an expedient. In public [**312] hands it has much the same economic effects as in private hands. Hope knew that a concession in industrial price would tend to build up its volume of sales. It used price as an expedient to that end. The Commission makes another cut in that same price but the Court thinks we should ignore the effect that it will have on exhaustion of supply. The fact is that in natural gas regulation price must be used to reconcile the private property right society has permitted to vest in an important natural resource with the claims of society upon it -- price must draw a balance between wealth and welfare.

[****108] To carry this into techniques of inquiry is the task of the Commissioner rather than of the judge, and it certainly is no task to be solved by mere bookkeeping but requires the best economic talent available. There would doubtless be inquiry into the price gas is bringing in the [*654] field, how far that price is established by arm's length bargaining and how far it may be influenced by agreements in restraint of trade or monopolistic influences. What must Hope really pay to get and to replace gas it delivers under this order? If it should get more or less than that for its own, how much and why? How far are such prices influenced by pipe line access to markets and if the consumers pay returns on the pipe lines how far should the increment they cause go to gas producers? East Ohio is itself a producer in Ohio. [44] What do Ohio authorities require Ohio consumers to pay for gas in the field? Perhaps these are reasons why the Federal Government should put West Virginia gas at lower or at higher rates. If so what are they? Should East Ohio be required to exploit its half million acres of unoperated reserve in Ohio before West Virginia resources shall be supplied on a devalued [****109] basis of which that State complains and for which she threatens measures of self keep? What is gas worth in terms of other fuels it displaces?

A price cannot be fixed without considering its effect on the production of gas. Is it an incentive to continue to exploit vast unoperated reserves? Is it conducive to deep drilling tests the result of which we may know only after trial? Will it induce bringing gas from afar to supplement or even to substitute for Appalachian gas? [45] Can it be had from distant fields as cheap or cheaper? If so, that competitive potentiality is certainly a relevant consideration. Wise regulation must also consider, as a private buyer would, what alternatives the producer has [*655] if the price is not acceptable. Hope has intrastate business and domestic and industrial customers. What can it do by way [****110] of diverting its supply to intrastate sales? What can it do by way of disposing of its operated or reserve acreage to industrial concerns or other buyers? What can West Virginia do by way of conservation laws, severance or other taxation, if the regulated rate offends? It must be borne in mind that while West Virginia was prohibited from giving her own inhabitants a priority that [***373]

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[44] East Ohio itself owns natural gas rights in 550,600 acres, 518,526 of which are reserved and 32,074 operated, by 375 wells. Moody's Manual of Public Utilities (1943) 5.

[45] Hope has asked a certificate of convenience and necessity to lay 1,140 miles of 22-inch pipeline from Hugoton gas fields in southwest Kansas to West Virginia to carry 285 million cu. ft. of natural gas per day. The cost was estimated at $ 51,000,000. Moody's Manual of Public Utilities (1943) 1760.

discriminated against interstate commerce, we have never yet held that a good faith conservation act, applicable to her own, as well as to others, is not valid. In considering alternatives, it must be noted that federal regulation is very incomplete, expressly excluding regulation of "production or gathering of natural gas," and that the only present way to get the gas seems to be to call it forth by price inducements. It is plain that there is a downward economic limit on a safe and wise price.

[****111] But there is nothing in the law which compels a commission to fix a price at that "value" which a company might give to its product by taking advantage of scarcity, or monopoly of supply. The very purpose of fixing maximum prices is to take away from the seller his opportunity to get all that otherwise the market would award him for his goods. This is a constitutional use of the power to fix maximum prices, *Block v. [**313] Hirsh, 256 U.S. 135*; *Marcus Brown Holding Co*. v. *Feldman, 256 U.S. 170*; *International Harvester Co*. v. *Kentucky, 234 U.S. 216*; *Highland v. Russell Car & Snow Plow Co., 279 U.S. 253*, just as the fixing of minimum prices of goods in interstate commerce is constitutional although it takes away from the buyer the advantage in bargaining which market conditions would give him. *United States v. Darby, 312 U.S. 100*; *Mulford v. Smith, 307 U.S. 38*; *United States v. Rock Royal Cooperative, 307 U.S. 533*; *Sunshine Anthracite Coal Co*. v. *Adkins, 310 U.S. 381*. The Commission has power to fix [*656] [****112] a price that will be both maximum and minimum and it has the incidental right, and I think the duty, to choose the economic consequences it will promote or retard in production and also more importantly in consumption, to which I now turn.

If we assume that the reduction in company revenues is warranted we then come to the question of translating the allowed return into rates for consumers or classes of consumers. Here the Commission fixed a single rate for all gas delivered irrespective of its use despite the fact that Hope has established what amounts to two rates -- a high one for domestic use and a lower one for industrial contracts. [46] The Commission can fix two prices for interstate gas as readily as one -- a price for resale to domestic users and another for resale to industrial users. This is the pattern Hope itself has established in the very contracts over which the Commission is expressly given jurisdiction. Certainly the Act is broad enough to permit two prices to be fixed instead of one, if the concept of the "public interest" is not unduly narrowed.

[****113] The Commission's concept of the public interest in natural gas cases which is carried today into the Court's opinion was first announced in the opinion of the minority in the *Pipeline* case. It enumerated only two "phases of the public interest: (1) the investor interest; (2) the consumer interest," which it emphasized to the exclusion of all others. *315 U.S. 575, 606*. This will do well enough in dealing with railroads or utilities supplying manufactured gas, electric power, a communications service or transportation, where utilization of facilities does not impair their future usefulness. Limitation of supply, however, brings into a natural gas case another phase of the public interest that to my mind overrides both the owner [*657] and the consumer of that interest. Both producers and industrial consumers have served their [***374] immediate private interests at the expense of the long-range public interest. The public interest, of course, requires stopping unjust enrichment of the owner. But it also requires stopping unjust impoverishment of future generations. The public interest in the use by Hope's half million domestic consumers is quite a different [****114] one from the public interest in use by a baker's dozen of industries.

Prudent price fixing it seems to me must at the very threshold determine whether any part of an allowed return shall be permitted to be realized from sales of gas for resale for industrial use. Such use does tend to level out daily and seasonal peaks of domestic demand and to some extent permits a lower charge for domestic service. But is that a wise way of making gas cheaper when, in comparison with any substitute, gas is already a cheap fuel? The interstate sales contracts provide that at times when demand is so great that there is not enough gas to go around domestic users shall first be served. Should the operation of this preference await the day of actual shortage? Since the propriety of a preference seems conceded, should it not operate to prevent the coming of a shortage as well as to mitigate its effects? Should industrial use jeopardize tomorrow's service to householders any more than today's? If, however, it is decided to cheapen domestic use by resort to industrial sales, should they be limited to the few uses [**314] for which gas has special values or extend also to those who use it only [****115] because

[46] I find little information as to the rates for industries in the record and none at all in such usual sources as Moody's Manual.

it is cheaper than competitive fuels? [47] And how much cheaper should industrial [*658] gas sell than domestic gas, and how much advantage should it have over competitive fuels? If industrial gas is to contribute at all to lowering domestic rates, should it not be made to contribute the very maximum of which it is capable, that is, should not its price be the highest at which the desired volume of sales can be realized?

[****116] If I were to answer I should say that the household rate should be the lowest that can be fixed under commercial conditions that will conserve the supply for that use. The lowest probable rate for that purpose is not likely to speed exhaustion much, for it still will be high enough to induce economy, and use for that purpose has more nearly reached the saturation point. On the other hand the demand for industrial gas at present rates already appears to be increasing. To lower [***375] further the industrial rate is merely further to subsidize industrial consumption and speed depletion. The impact of the flat reduction [*659] of rates ordered here admittedly will be to increase the industrial advantages of gas over competing fuels and to increase its use. I think this is not, and there is no finding by the Commission that it is, in the public interest.

There is no justification in this record for the present discrimination against domestic users of gas in favor of industrial users. It is one of the evils against which the Natural Gas Act was aimed by Congress and one of the evils complained of here by Cleveland and Akron. If Hope's revenues should be cut by some $ 3,600,000 [****117] the whole reduction is owing to domestic users. If it be considered wise to raise part of Hope's revenues by industrial purpose sales, the utmost possible revenue should be raised from the least consumption of gas. If competitive relationships to other fuels will permit, the industrial price should be substantially advanced, not for the benefit of the Company, but the increased revenues from the advance should be applied to reduce domestic rates. For in my opinion the "public interest" requires that the great volume of gas now being put to uneconomic industrial use should either be saved for its more important future domestic use or the present domestic user should have the full benefit of its exchange value in reducing his present rates.

Of course the Commission's power directly to regulate does not extend to the fixing of rates at which the local company shall sell to consumers. Nor is such power required to accomplish the purpose. As already pointed out, the very contract the Commission is altering classifies the gas according to the purposes for which it is to be resold and provides differentials between the two classifications. It would only be necessary for the Commission [****118] to order [**315] that all gas supplied under paragraph (a) of Hope's contract with the East Ohio Company shall be [*660] at a stated price fixed to give to domestic service the entire reduction herein and any further reductions that may prove possible by increasing industrial rates. It might further provide that gas delivered under paragraph (b) of the contract for industrial purposes to those industrial customers Hope has approved in writing shall be at such other figure as might be found consistent with the public interest as herein defined. It is too late in the day to contend that the authority of a regulatory commission does not extend to a consideration of public interests which it may not directly regulate and a conditioning of its orders for their protection. *Interstate Commerce Commission v. Railway Labor Executives Assn., 315 U.S. 373*; *United States v. Lowden, 308 U.S. 225*.

Whether the Commission will assert its apparently broad statutory authorization over prices and discriminations

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[47] The Federal Power Commission has touched upon the problem of conservation in connection with an application for a certificate permitting construction of a 1,500-mile pipeline from southern Texas to New York City and says: "The Natural Gas Act as presently drafted does not enable the Commission to treat fully the serious implications of such a problem. The question should be raised as to whether the proposed use of natural gas would not result in displacing a less valuable fuel and create hardships in the industry already supplying the market, while at the same time rapidly depleting the country's natural-gas reserves. Although, for a period of perhaps 20 years, the natural gas could be so priced as to appear to offer an apparent saving in fuel costs, this would mean simply that social costs which must eventually be paid had been ignored.

"Careful study of the entire problem may lead to the conclusion that use of natural gas should be restricted by functions rather than by areas. Thus, it is especially adapted to space and water heating in urban homes and other buildings and to the various industrial heat processes which require concentration of heat, flexibility of control, and uniformity of results. Industrial uses to which it appears particularly adapted include the treating and annealing of metals, the operation of kilns in the ceramic, cement, and lime industries, the manufacture of glass in its various forms, and use as a raw material in the chemical industry. General use of natural gas under boilers for the production of steam is, however, under most circumstances of very questionable social economy." Twentieth Annual Report of the Federal Power Commission (1940) 79.

is, of course, its own affair, not ours. It is entitled to its own notion of the "public interest" and its judgment of policy must prevail. [****119] However, where there is ground for thinking that views of this Court may have constrained the Commission to accept the rate-base method of decision and a particular single formula as "all important" for a rate base, it is appropriate to make clear the reasons why I, at least, would not be so understood. The Commission is free to face up realistically to the nature and peculiarity of the resources in its control, to foster their duration in fixing price, and to consider future interests in addition to those of investors and present consumers. If we return this case it may accept or decline the proffered freedom. This problem presents the Commission an unprecedented opportunity if it will boldly make sound economic considerations, instead of legal and accounting [***376] theories, the foundation of federal policy. I would return the case to the Commission and thereby be clearly quit of what now may appear to be some responsibility for perpetrating a short-sighted pattern of natural gas regulation.

Tableau1 (Retour au texte des documents connexes**)**

Tableau1 (Retour au texte des documents connexes**)**

Tableau2 (Retour au texte des documents connexes**)**

Tableau2 (Retour au texte des documents connexes**)**

Tableau3 (Retour au texte des documents connexes**)**

Tableau3 (Retour au texte des documents connexes**)**

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Sierra Club du Canada c. Canada (Ministre des Finances)

Recueils des arrêts de la Cour suprême du Canada

Cour suprême du Canada

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

2001 : 6 novembre / 2002 : 26 avril.

No du greffe : 28020.

[2002] 2 R.C.S. 522 | *[2002] 2 S.C.R. 522* | *[2002] A.C.S. no 42* | *[2002] S.C.J. No. 42* | *2002 CSC 41*

Énergie atomique du Canada Limitée, appelante; c. Sierra Club du Canada, intimé, et Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada, intimés.

(92 paras.)

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Résumé

Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée ("ÉACL"), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que [page523] l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)b) de la Loi canadienne sur l'évaluation environnementale ("LCÉE") exigeant une évaluation environnementale comme condition de l'aide financière, et que le défaut d'évaluation entraîne l'annulation des ententes financières. ÉACL dépose un affidavit qui résume des documents confidentiels contenant des milliers de pages d'information technique concernant l'évaluation environnementale du site de construction qui est faite par les autorités chinoises. ÉACL s'oppose à la communication des documents demandée par Sierra Club pour la raison notamment qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Les autorités chinoises donnent l'autorisation de les communiquer à la condition qu'ils soient protégés par une ordonnance de confidentialité n'y donnant accès qu'aux parties et à la cour, mais n'imposant aucune restriction à l'accès du public aux débats. La demande d'ordonnance de confidentialité est rejetée par la Section de première instance de la Cour fédérale. La Cour d'appel fédérale confirme cette décision.

Arrêt : L'appel est accueilli et l'ordonnance demandée par ÉACL est accordée.

Vu le lien existant entre la publicité des débats judiciaires et la liberté d'expression, la question fondamentale pour la cour saisie d'une demande d'ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression. La cour doit s'assurer que l'exercice du pouvoir discrétionnaire de l'accorder est conforme aux principes de la Charte parce qu'une ordonnance de confidentialité a des effets préjudiciables sur la liberté d'expression garantie à l'al. 2b). On ne doit l'accorder que (1) lorsqu'elle est nécessaire

pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque, et (2) lorsque ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires. Trois éléments importants sont subsumés sous le premier volet de l'analyse. Premièrement, le risque en cause doit être réel et important, être bien étayé par la preuve et menacer gravement l'intérêt commercial en question. Deuxièmement, l'intérêt doit pouvoir se définir en termes d'intérêt public à la confidentialité, mettant en jeu un principe général. Enfin le juge doit non seulement déterminer s'il existe d'autres options raisonnables, il doit aussi restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

[page524]

En l'espèce, l'intérêt commercial en jeu, la préservation d'obligations contractuelles de confidentialité, est suffisamment important pour satisfaire au premier volet de l'analyse, pourvu que certaines conditions soient remplies : les renseignements ont toujours été traités comme des renseignements confidentiels; il est raisonnable de penser que, selon la prépondérance des probabilités, leur divulgation compromettrait des droits exclusifs, commerciaux et scientifiques; et les renseignements ont été recueillis dans l'expectative raisonnable qu'ils resteraient confidentiels. Ces conditions sont réunies en l'espèce. La divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de ÉACL et il n'existe pas d'options raisonnables autres que l'ordonnance de confidentialité.

À la deuxième étape de l'analyse, l'ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de ÉACL à un procès équitable. Si ÉACL divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Le refus de l'ordonnance obligerait ÉACL à retenir les documents pour protéger ses intérêts commerciaux et comme ils sont pertinents pour l'exercice des moyens de défense prévus par la LCÉE, l'impossibilité de les produire empêcherait ÉACL de présenter une défense pleine et entière. Même si en matière civile cela n'engage pas de droit protégé par la Charte, le droit à un procès équitable est un principe de justice fondamentale. L'ordonnance permettrait aux parties et au tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu, favorisant ainsi la recherche de la vérité, une valeur fondamentale sous-tendant la liberté d'expression. Il peut enfin y avoir un important intérêt de sécurité publique à préserver la confidentialité de ce type de renseignements techniques.

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires et donc sur la liberté d'expression. Plus l'ordonnance porte atteinte aux valeurs fondamentales que sont (1) la recherche de la vérité et du bien commun, (2) l'épanouissement personnel par le libre développement des pensées et des idées et (3) la participation de tous au processus politique, plus il est difficile de justifier l'ordonnance. Dans les mains des parties et de leurs experts, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, et donc pour aider la cour à parvenir à des conclusions de fait exactes. Compte tenu de leur nature hautement technique, la production des documents confidentiels en vertu de l'ordonnance demandée favoriserait mieux l'importante valeur de la recherche de la vérité, qui [page525] sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le refus de l'ordonnance.

Aux termes de l'ordonnance demandée, les seules restrictions ont trait à la distribution publique des documents, une atteinte relativement minime à la règle de la publicité des débats judiciaires. Même si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, la deuxième valeur fondamentale, l'épanouissement personnel, ne serait pas touchée de manière significative. La troisième valeur joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection, de sorte que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés. Toutefois la portée étroite de

l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires. Les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. Ses effets bénéfiques l'emportent sur ses effets préjudiciables, et il y a lieu de l'accorder. Selon la pondération des divers droits et intérêts en jeu, l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de ÉACL à un procès équitable et à la liberté d'expression, et ses effets préjudiciables sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes.

Jurisprudence

Arrêts appliqués : Edmonton Journal c. Alberta (Procureur général), *[1989] 2 R.C.S. 1326*; Société Radio-Canada c. Nouveau-Brunswick (Procureur général), *[1996] 3 R.C.S. 480*; Dagenais c. Société Radio-Canada, *[1994] 3 R.C.S. 835*; R. c. Mentuck, *[2001] 3 R.C.S. 442*, *2001 CSC 76*; M. (A.) c. Ryan, *[1997] 1 R.C.S. 157*; Irwin Toy Ltd. c. Québec (Procureur général), *[1989] 1 R.C.S. 927*; R. c. Keegstra, *[1990] 3 R.C.S. 697*; arrêts mentionnés : AB Hassle c. [page526] Canada (Ministre de la Santé nationale et du Bien-être social), *[2000] 3 C.F. 360*, conf. *[1998] A.C.F. no 1850* (QL); Ethyl Canada Inc. c. Canada (Attorney General) *(1998), 17 C.P.C. (4th) 278*; R. c. Oakes, *[1986] 1 R.C.S. 103*; R. c. O.N.E., *[2001] 3 R.C.S. 478*, *2001 CSC 77*; F.N. (Re), *[2000] 1 R.C.S. 880*, *2000 CSC 35*; Eli Lilly and Co. c. Novopharm Ltd. *(1994), 56 C.P.R. (3d) 437*.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2b). Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37, art. 5(1)b), 8, 54, 54(2) [abr. & rempl. 1993, ch. 34, art. 37]. Règles de la Cour fédérale (1998), *DORS/98-106*, règles 151, 312.

POURVOI contre un arrêt de la Cour d'appel fédérale, *[2000] 4 C.F. 426*, *187 D.L.R. (4th) 231*, *256 N.R. 1*, *24 Admin. L.R. (3d) 1*, *[2000] A.C.F. no 732* (QL), qui a confirmé une décision de la Section de première instance, *[2000] 2 C.F. 400*, *178 F.T.R. 283*, *[1999] A.C.F. no 1633* (QL). Pourvoi accueilli.
J. Brett Ledger et Peter Chapin, pour l'appelante. Timothy J. Howard et Franklin S. Gertler, pour l'intimé Sierra Club du Canada. Graham Garton, c.r., et J. Sanderson Graham, pour les intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada.

[Note de Quicklaw : Voir à la fin du jugement pour la liste complète des procureurs.]

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI

I. Introduction

1 Dans notre pays, les tribunaux sont les institutions généralement choisies pour résoudre au mieux les différends juridiques par l'application de principes juridiques aux faits de chaque espèce. Un des principes sous-jacents au processus judiciaire est la transparence, tant dans la procédure suivie que dans les éléments pertinents à la solution du litige. Certains de ces éléments peuvent toutefois faire l'objet d'une ordonnance de confidentialité. Le [page527] pourvoi soulève les importantes questions de savoir à quel moment et dans quelles circonstances il y a lieu de rendre une ordonnance de confidentialité.

2 Pour les motifs qui suivent, je suis d'avis de rendre l'ordonnance de confidentialité demandée et par conséquent d'accueillir le pourvoi.

II. Les faits

3 L'appelante, Énergie atomique du Canada Limitée ("ÉACL"), société d'État propriétaire et vendeuse de la technologie nucléaire CANDU, est une intervenante ayant reçu les droits de partie dans la demande de contrôle judiciaire présentée par l'intimé, Sierra Club du Canada ("Sierra Club"), un organisme environnemental. Sierra Club demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière, sous forme de garantie d'emprunt de 1,5 milliard de dollars, pour la construction et la vente à la Chine de deux réacteurs nucléaires CANDU par l'appelante. Les réacteurs sont actuellement en construction en Chine, où l'appelante est entrepreneur principal et gestionnaire de projet.

4 L'intimé soutient que l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)b) de la Loi canadienne sur l'évaluation environnementale, *L.C. 1992, ch. 37* ("LCÉE"), qui exige une évaluation environnementale avant qu'une autorité fédérale puisse fournir une aide financière à un projet. Le défaut d'évaluation entraîne l'annulation des ententes financières.

5 Selon l'appelante et les ministres intimés, la LCÉE ne s'applique pas à la convention de prêt et si elle s'y applique, ils peuvent invoquer les défenses prévues aux art. 8 et 54 de cette loi. L'article 8 prévoit les circonstances dans lesquelles les sociétés d'État sont tenues de procéder à des évaluations environnementales. Le paragraphe 54(2) reconnaît la validité des évaluations environnementales effectuées par des autorités étrangères pourvu qu'elles soient compatibles avec les dispositions de la LCÉE.

6 Dans le cadre de la requête de Sierra Club en annulation des ententes financières, l'appelante a [page528] déposé un affidavit de M. Simon Pang, un de ses cadres supérieurs. Dans l'affidavit, M. Pang mentionne et résume certains documents (les "documents confidentiels") qui sont également mentionnés dans un affidavit de M. Feng, un expert d'ÉACL. Avant de contre-interroger M. Pang sur son affidavit, Sierra Club a demandé par requête la production des documents confidentiels, au motif qu'il ne pouvait vérifier la validité de sa déposition sans consulter les documents de base. L'appelante s'oppose pour plusieurs raisons à la production des documents, dont le fait qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Après avoir obtenu des autorités chinoises l'autorisation de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, l'appelante a cherché à les produire en invoquant la règle 312 des Règles de la Cour fédérale (1998), *DORS/98-106*, et a demandé une ordonnance de confidentialité à leur égard.

7 Aux termes de l'ordonnance demandée, seules les parties et la cour auraient accès aux documents confidentiels. Aucune restriction ne serait imposée à l'accès du public aux débats. On demande essentiellement d'empêcher la diffusion des documents confidentiels au public.

8 Les documents confidentiels comprennent deux Rapports d'impact environnemental ("RIE") sur le site et la construction, un Rapport préliminaire d'analyse sur la sécurité ("RPAS") ainsi que l'affidavit supplémentaire de M. Pang qui résume le contenu des RIE et du RPAS. S'ils étaient admis, les rapports seraient joints en annexe de l'affidavit supplémentaire de M. Pang. Les RIE ont été préparés en chinois par les autorités chinoises, et le RPAS a été préparé par l'appelante en collaboration avec les responsables chinois du projet. Les documents contiennent une quantité considérable de renseignements techniques et comprennent des milliers de pages. Ils décrivent l'évaluation environnementale du site de construction qui est faite par les autorités chinoises en vertu des lois chinoises.

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9 Comme je le note plus haut, l'appelante prétend ne pas pouvoir produire les documents confidentiels en preuve sans qu'ils soient protégés par une ordonnance de confidentialité, parce que ce serait un manquement à ses

obligations envers les autorités chinoises. L'intimé soutient pour sa part que son droit de contre-interroger M. Pang et M. Feng sur leurs affidavits serait pratiquement futile en l'absence des documents auxquels ils se réfèrent. Sierra Club entend soutenir que le juge saisi de la demande de contrôle judiciaire devrait donc leur accorder peu de poids.

10 La Section de première instance de la Cour fédérale du Canada a rejeté la demande d'ordonnance de confidentialité et la Cour d'appel fédérale, à la majorité, a rejeté l'appel. Le juge Robertson, dissident, était d'avis d'accorder l'ordonnance.

III. Dispositions législatives

11 Règles de la Cour fédérale (1998), *DORS/98-106*

> 151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.
>
> (2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

IV. Les décisions antérieures

A. Cour fédérale, Section de première instance, *[2000] 2 C.F. 400*

12 Le juge Pelletier examine d'abord s'il y a lieu, en vertu de la règle 312, d'autoriser la production de l'affidavit supplémentaire de M. Pang auquel sont annexés les documents confidentiels. À son avis, il s'agit d'une question de pertinence et il conclut que les documents se rapportent à la question de la réparation. En l'absence de préjudice pour l'intimé, il y a donc lieu d'autoriser la signification et le dépôt de l'affidavit. Il note que des retards seraient préjudiciables à l'intimé mais que, puisque les deux parties ont présenté des requêtes [page530] interlocutoires qui ont entraîné les délais, les avantages de soumettre le dossier au complet à la cour compensent l'inconvénient du retard causé par la présentation de ces documents.

13 Sur la confidentialité, le juge Pelletier conclut qu'il doit être convaincu que la nécessité de protéger la confidentialité l'emporte sur l'intérêt du public à la publicité des débats judiciaires. Il note que les arguments en faveur de la publicité des débats judiciaires en l'espèce sont importants vu l'intérêt du public envers le rôle du Canada comme vendeur de technologie nucléaire. Il fait aussi remarquer que les ordonnances de confidentialité sont une exception au principe de la publicité des débats judiciaires et ne devraient être accordées que dans des cas de nécessité absolue.

14 Le juge Pelletier applique le même critère que pour une ordonnance conservatoire en matière de brevets, qui est essentiellement une ordonnance de confidentialité. Pour obtenir l'ordonnance, le requérant doit démontrer qu'il croit subjectivement que les renseignements sont confidentiels et que leur divulgation nuirait à ses intérêts. De plus, si l'ordonnance est contestée, le requérant doit démontrer objectivement qu'elle est nécessaire. Cet élément objectif l'oblige à démontrer que les renseignements ont toujours été traités comme étant confidentiels et qu'il est raisonnable de croire que leur divulgation risque de compromettre ses droits exclusifs, commerciaux et scientifiques.

15 Ayant conclu qu'il est satisfait à l'élément subjectif et aux deux volets de l'élément objectif du critère, il ajoute : "J'estime toutefois aussi que, dans les affaires de droit public, le critère objectif comporte, ou devrait comporter, un troisième volet, en l'occurrence la question de savoir si l'intérêt du public à l'égard de la divulgation l'emporte sur le préjudice que la divulgation risque de causer à une personne" (par. 23).

16 Il estime très important le fait qu'il ne s'agit pas en l'espèce de production obligatoire de documents. Le fait que la demande vise le dépôt volontaire de documents en vue d'étayer la thèse de l'appelante, [page531] par opposition à une production obligatoire, joue contre l'ordonnance de confidentialité.

17 En soupesant l'intérêt du public dans la divulgation et le préjudice que la divulgation risque de causer à ÉACL,

le juge Pelletier note que les documents que l'appelante veut soumettre à la cour ont été rédigés par d'autres personnes à d'autres fins, et il reconnaît que l'appelante est tenue de protéger la confidentialité des renseignements. À cette étape, il examine de nouveau la question de la pertinence. Si on réussit à démontrer que les documents sont très importants sur une question cruciale, "les exigences de la justice militent en faveur du prononcé d'une ordonnance de confidentialité. Si les documents ne sont pertinents que d'une façon accessoire, le caractère facultatif de la production milite contre le prononcé de l'ordonnance de confidentialité" (par. 29). Il conclut alors que les documents sont importants pour résoudre la question de la réparation à accorder, elle-même un point important si l'appelante échoue sur la question principale.

18 Le juge Pelletier considère aussi le contexte de l'affaire et conclut que, puisque la question du rôle du Canada comme vendeur de technologies nucléaires est une importante question d'intérêt public, la charge de justifier une ordonnance de confidentialité est très onéreuse. Il conclut qu'ÉACL pourrait retrancher les éléments délicats des documents ou soumettre à la cour la même preuve sous une autre forme, et maintenir ainsi son droit à une défense complète tout en préservant la publicité des débats judiciaires.

19 Le juge Pelletier signale qu'il prononce l'ordonnance sans avoir examiné les documents confidentiels puisqu'ils n'ont pas été portés à sa connaissance. Bien qu'il mentionne la jurisprudence indiquant qu'un juge ne devrait pas se prononcer sur une demande d'ordonnance de confidentialité sans avoir examiné les documents eux-mêmes, il estime qu'il n'aurait pas été utile d'examiner les documents, vu leur volume et leur caractère technique, et sans savoir quelle part d'information était déjà dans le domaine public.

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20 Dans son ordonnance, le juge Pelletier autorise l'appelante à déposer les documents sous leur forme actuelle ou sous une version révisée, à son gré. Il autorise aussi l'appelante à déposer des documents concernant le processus réglementaire chinois en général et son application au projet, à condition qu'elle le fasse sous 60 jours.

B. Cour d'appel fédérale, *[2000] 4 C.F. 426*

(1) Le juge Evans (avec l'appui du juge Sharlow)

21 ÉACL fait appel en Cour d'appel fédérale, en vertu de la règle 151 des Règles de la Cour fédérale (1998), et Sierra Club forme un appel incident en vertu de la règle 312.

22 Sur la règle 312, le juge Evans conclut que les documents en cause sont clairement pertinents dans une défense que l'appelante a l'intention d'invoquer en vertu du par. 54(2) si la cour conclut que l'al. 5(1)b) de la LCÉE doit s'appliquer, et pourraient l'être aussi pour l'exercice du pouvoir discrétionnaire de la cour de refuser d'accorder une réparation dans le cas où les ministres auraient enfreint la LCÉE. Comme le juge Pelletier, le juge Evans est d'avis que l'avantage pour l'appelante et pour la cour d'une autorisation de déposer les documents l'emporte sur tout préjudice que le retard pourrait causer à l'intimé, et conclut par conséquent que le juge des requêtes a eu raison d'accorder l'autorisation en vertu de la règle 312.

23 Sur l'ordonnance de confidentialité, le juge Evans examine la règle 151 et tous les facteurs que le juge des requêtes a appréciés, y compris le secret commercial attaché aux documents, le fait que l'appelante les a reçus à titre confidentiel des autorités chinoises, et l'argument de l'appelante selon lequel, sans les documents, elle ne pourrait assurer effectivement sa défense. Ces facteurs doivent être pondérés avec le principe de la publicité des documents soumis aux tribunaux. Le juge Evans convient avec le juge Pelletier que le poids à accorder à l'intérêt du public à la publicité des débats varie selon le contexte, et il conclut que lorsqu'une affaire soulève des questions de grande importance pour le public, le principe de la publicité des débats a plus de poids [page533] comme facteur à prendre en compte dans le processus de pondération. Le juge Evans note l'intérêt du public à l'égard de la question en litige ainsi que la couverture médiatique considérable qu'elle a suscitée.

24 À l'appui de sa conclusion que le poids accordé au principe de la publicité des débats peut varier selon le contexte, le juge Evans invoque les décisions AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être

social), *[2000] 3 C.F. 360* (C.A.), où la cour a tenu compte du peu d'intérêt du public, et Ethyl Canada Inc. c. Canada (Attorney General) *(1998), 17 C.P.C. (4th) 278* (C. Ont. (Div. gén.)), p. 283, où la cour a ordonné la divulgation après avoir déterminé qu'il s'agissait d'une affaire constitutionnelle importante et qu'il importait que le public comprenne ce qui était en cause. Le juge Evans fait remarquer que la transparence du processus d'évaluation et la participation du public ont une importance fondamentale pour la LCÉE, et il conclut qu'on ne peut prétendre que le juge des requêtes a accordé trop de poids au principe de la publicité des débats, même si la confidentialité n'est demandée que pour un nombre relativement restreint de documents hautement techniques.

25 Le juge Evans conclut que le juge des requêtes a donné trop de poids au fait que la production des documents était volontaire mais qu'il ne s'ensuit pas que sa décision au sujet de la confidentialité doive être écartée. Le juge Evans est d'avis que l'erreur n'entâche pas sa conclusion finale, pour trois motifs. Premièrement, comme le juge des requêtes, il attache une grande importance à la publicité du débat judiciaire. Deuxièmement, il conclut que l'inclusion dans les affidavits d'un résumé des rapports peut, dans une large mesure, compenser l'absence des rapports, si l'appelante décide de ne pas les déposer sans ordonnance de confidentialité. Enfin, si ÉACL déposait une version modifiée des documents, la demande de confidentialité reposerait sur un facteur relativement peu important, savoir l'argument que l'appelante perdrait des occasions d'affaires si elle violait son engagement envers les autorités chinoises.

26 Le juge Evans rejette l'argument selon lequel le juge des requêtes a commis une erreur en statuant [page534] sans avoir examiné les documents réels, affirmant que cela n'était pas nécessaire puisqu'il y avait des précis et que la documentation était hautement technique et partiellement traduite. L'appel et l'appel incident sont donc rejetés.

(2) Le juge Robertson (dissident)

27 Le juge Robertson se dissocie de la majorité pour trois raisons. En premier lieu, il estime que le degré d'intérêt du public dans une affaire, l'importance de la couverture médiatique et l'identité des parties ne devraient pas être pris en considération pour statuer sur une demande d'ordonnance de confidentialité. Selon lui, il faut plutôt examiner la nature de la preuve que protégerait l'ordonnance de confidentialité.

28 Il estime aussi qu'à défaut d'ordonnance de confidentialité, l'appelante doit choisir entre deux options inacceptables : subir un préjudice financier irréparable si les renseignements confidentiels sont produits en preuve, ou être privée de son droit à un procès équitable parce qu'elle ne peut se défendre pleinement si la preuve n'est pas produite.

29 Finalement, il dit que le cadre analytique utilisé par les juges majoritaires pour arriver à leur décision est fondamentalement défectueux en ce qu'il est fondé en grande partie sur le point de vue subjectif du juge des requêtes. Il rejette l'approche contextuelle sur la question de l'ordonnance de confidentialité, soulignant la nécessité d'un cadre d'analyse objectif pour combattre la perception que la justice est un concept relatif et pour promouvoir la cohérence et la certitude en droit.

30 Pour établir ce cadre plus objectif appelé à régir la délivrance d'ordonnances de confidentialité en matière de renseignements commerciaux et scientifiques, il examine le fondement juridique du principe de la publicité du processus judiciaire, en citant l'arrêt de notre Cour, Edmonton Journal c. Alberta (Procureur général), *[1989] 2 R.C.S. 1326*, qui conclut que la publicité des débats favorise la recherche de la vérité et témoigne de l'importance de soumettre le travail des tribunaux à l'examen public.

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31 Selon le juge Robertson, même si le principe de la publicité du processus judiciaire reflète la valeur fondamentale que constitue dans une démocratie l'imputabilité dans l'exercice du pouvoir judiciaire, le principe selon lequel il faut que justice soit faite doit, à son avis, l'emporter. Il conclut que la justice vue comme principe universel signifie que les règles ou les principes doivent parfois souffrir des exceptions.

32 Il fait observer qu'en droit commercial, lorsque les renseignements qu'on cherche à protéger ont trait à des "secrets industriels", ils ne sont pas divulgués au procès lorsque cela aurait pour effet d'annihiler les droits du propriétaire et l'exposerait à un préjudice financier irréparable. Il conclut que, même si l'espèce ne porte pas sur des secrets industriels, on peut traiter de la même façon des renseignements commerciaux et scientifiques acquis sur une base confidentielle, et il établit les critères suivants comme conditions à la délivrance d'une ordonnance de confidentialité (au par. 13) :

> 1) les renseignements sont de nature confidentielle et non seulement des faits qu'une personne désire ne pas divulguer; 2) les renseignements qu'on veut protéger ne sont pas du domaine public; 3) selon la prépondérance des probabilités, la partie qui veut obtenir une ordonnance de confidentialité subirait un préjudice irréparable si les renseignements étaient rendus publics; 4) les renseignements sont pertinents dans le cadre de la résolution des questions juridiques soulevées dans le litige; 5) en même temps, les renseignements sont "nécessaires" à la résolution de ces questions; 6) l'octroi d'une ordonnance de confidentialité ne cause pas un préjudice grave à la partie adverse; 7) l'intérêt du public à la publicité des débats judiciaires ne prime pas les intérêts privés de la partie qui sollicite l'ordonnance de confidentialité. Le fardeau de démontrer que les critères un à six sont respectés incombe à la partie qui cherche à obtenir l'ordonnance de confidentialité. Pour le septième critère, c'est la partie adverse qui doit démontrer que le droit prima facie à une ordonnance de non-divulgation doit céder le pas au besoin de maintenir la publicité des débats judiciaires. En utilisant ces critères, il y a lieu de tenir compte de deux des fils conducteurs qui sous-tendent le principe de la publicité des débats judiciaires : la recherche de la vérité et la sauvegarde de la primauté du droit. Comme je l'ai dit au tout début, je ne crois pas que le degré d'importance qu'on croit que le public accorde à une affaire soit une considération pertinente.

[page536]

33 Appliquant ces critères aux circonstances de l'espèce, le juge Robertson conclut qu'il y a lieu de rendre l'ordonnance de confidentialité. Selon lui, l'intérêt du public dans la publicité des débats judiciaires ne prime pas l'intérêt de ÉACL à préserver le caractère confidentiel de ces documents hautement techniques.

34 Le juge Robertson traite aussi de l'intérêt du public à ce qu'il soit garanti que les plans de site d'installations nucléaires ne seront pas, par exemple, affichés sur un site Web. Il conclut qu'une ordonnance de confidentialité n'aurait aucun impact négatif sur les deux objectifs primordiaux du principe de la publicité des débats judiciaires, savoir la vérité et la primauté du droit. Il aurait par conséquent accueilli l'appel et rejeté l'appel incident.

V. Questions en litige

35 A. Quelle méthode d'analyse faut-il appliquer à l'exercice du pouvoir judiciaire discrétionnaire lorsqu'une partie demande une ordonnance de confidentialité en vertu de la règle 151 des Règles de la Cour fédérale (1998)?

B. Y a-t-il lieu d'accorder l'ordonnance de confidentialité en l'espèce?

VI. Analyse

A. Méthode d'analyse applicable aux ordonnances de confidentialité

(1) Le cadre général : les principes de l'arrêt Dagenais

36 Le lien entre la publicité des procédures judiciaires et la liberté d'expression est solidement établi dans Société Radio-Canada c. Nouveau-Brunswick (Procureur général), *[1996] 3 R.C.S. 480*. Le juge La Forest l'exprime en ces termes au par. 23 :

> Le principe de la publicité des débats en justice est inextricablement lié aux droits garantis à l'al. 2b). Grâce à ce principe, le public a accès à l'information concernant les tribunaux, ce qui lui permet ensuite de discuter des pratiques des tribunaux et des procédures qui s'y déroulent, et d'émettre des opinions et des critiques à cet égard. La liberté d'exprimer des idées et des opinions sur [page537] le fonctionnement des

> tribunaux relève clairement de la liberté garantie à l'al. 2b), mais en relève également le droit du public d'obtenir au préalable de l'information sur les tribunaux.

L'ordonnance sollicitée aurait pour effet de limiter l'accès du public aux documents confidentiels et leur examen public; cela porterait clairement atteinte à la garantie de la liberté d'expression du public.

37 L'examen de la méthode générale à suivre dans l'exercice du pouvoir discrétionnaire d'accorder une ordonnance de confidentialité devrait commencer par les principes établis par la Cour dans Dagenais c. Société Radio-Canada, *[1994] 3 R.C.S. 835*. Cette affaire portait sur le pouvoir discrétionnaire judiciaire, issu de la common law, de rendre des ordonnances de non-publication dans le cadre de procédures criminelles, mais il y a de fortes ressemblances entre les interdictions de publication et les ordonnances de confidentialité dans le contexte des procédures judiciaires. Dans les deux cas, on cherche à restreindre la liberté d'expression afin de préserver ou de promouvoir un intérêt en jeu dans les procédures. En ce sens, la question fondamentale que doit résoudre le tribunal auquel on demande une interdiction de publication ou une ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression.

38 Même si, dans chaque cas, la liberté d'expression entre en jeu dans un contexte différent, le cadre établi dans Dagenais fait appel aux principes déterminants de la Charte canadienne des droits et libertés afin de pondérer la liberté d'expression avec d'autres droits et intérêts, et peut donc être adapté et appliqué à diverses circonstances. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la règle 151 devrait par conséquent refléter les principes sous-jacents établis par Dagenais, même s'il faut pour cela l'ajuster aux droits et intérêts précis qui sont en jeu en l'espèce.

39 L'affaire Dagenais porte sur une requête par laquelle quatre accusés demandaient à la cour de rendre, en vertu de sa compétence de common law, une ordonnance interdisant la diffusion d'une émission de télévision décrivant des abus physiques et [page538] sexuels infligés à de jeunes garçons dans des établissements religieux. Les requérants soutenaient que l'interdiction était nécessaire pour préserver leur droit à un procès équitable, parce que les faits racontés dans l'émission ressemblaient beaucoup aux faits en cause dans leurs procès.

40 Le juge en chef Lamer conclut que le pouvoir discrétionnaire de common law d'ordonner l'interdiction de publication doit être exercé dans les limites prescrites par les principes de la Charte. Puisque les ordonnances de non-publication restreignent nécessairement la liberté d'expression de tiers, il adapte la règle de common law qui s'appliquait avant l'entrée en vigueur de la Charte de façon à établir un juste équilibre entre le droit à la liberté d'expression et le droit de l'accusé à un procès équitable, d'une façon qui reflète l'essence du critère énoncé dans R. c. Oakes, *[1986] 1 R.C.S. 103*. À la page 878 de Dagenais, le juge en chef Lamer énonce le critère reformulé :

> Une ordonnance de non-publication ne doit être rendue que si :
>
> a) elle est nécessaire pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;
>
> b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

41 Dans Nouveau-Brunswick, précité, la Cour modifie le critère de l'arrêt Dagenais dans le contexte de la question voisine de l'exercice du pouvoir discrétionnaire d'ordonner l'exclusion du public d'un procès en vertu du par. 486(1) du Code criminel, *L.R.C. 1985, ch. C-46*. Il s'agissait d'un appel d'une décision du juge du procès d'ordonner l'exclusion du public de la partie des procédures de détermination de la peine pour agression sexuelle et contacts sexuels portant sur les actes précis commis par l'accusé, au motif que cela éviterait un "préjudice indu" aux victimes et à l'accusé.

42 Le juge La Forest conclut que le par. 486(1) limite la liberté d'expression garantie à l'al. 2b) en créant un "pouvoir discrétionnaire permettant d'interdire au public et aux médias l'accès aux [page539] tribunaux" (Nouveau-Brunswick, par. 33). Il considère toutefois que l'atteinte peut être justifiée en vertu de l'article premier pourvu que le pouvoir discrétionnaire soit exercé conformément à la Charte. Donc l'analyse de l'exercice du pouvoir

discrétionnaire en vertu du par. 486(1) du Code criminel, décrite par le juge La Forest au par. 69, concorde étroitement avec le critère de common law établi par Dagenais :

a) le juge doit envisager les solutions disponibles et se demander s'il existe d'autres mesures de rechange raisonnables et efficaces;

b) il doit se demander si l'ordonnance a une portée aussi limitée que possible; et

c) il doit comparer l'importance des objectifs de l'ordonnance et de ses effets probables avec l'importance de la publicité des procédures et l'activité d'expression qui sera restreinte, afin de veiller à ce que les effets positifs et négatifs de l'ordonnance soient proportionnels.

Appliquant cette analyse aux faits de l'espèce, le juge La Forest conclut que la preuve du risque de préjudice indu consiste principalement en la prétention de l'avocat du ministère public quant à la "nature délicate" des faits relatifs aux infractions et que cela ne suffit pas pour justifier l'atteinte à la liberté d'expression.

43 La Cour a récemment réexaminé la question des interdictions de publication prononcées par un tribunal en vertu de sa compétence de common law dans R. c. Mentuck, *[2001] 3 R.C.S. 442*, *2001 CSC 76*, et l'arrêt connexe R. c. O.N.E., *[2001] 3 R.C.S. 478*, *2001 CSC 77*. Dans Mentuck, le ministère public demandait l'interdiction de publication en vue de protéger l'identité de policiers banalisés et leurs méthodes d'enquête. L'accusé s'opposait à la demande en soutenant que l'interdiction porterait atteinte à son droit à un procès public et équitable protégé par l'al. 11d) de la Charte. Deux journaux intervenants s'opposaient aussi à la requête, en faisant valoir qu'elle porterait atteinte à leur droit à la liberté d'expression.

44 La Cour fait remarquer que Dagenais traite de la pondération de la liberté d'expression, d'une part, et du droit de l'accusé à un procès équitable, d'autre part, tandis que dans l'affaire dont elle est saisie, le [page540] droit de l'accusé à un procès public et équitable tout autant que la liberté d'expression militent en faveur du rejet de la requête en interdiction de publication. Ces droits ont été soupesés avec l'intérêt de la bonne administration de la justice, en particulier la protection de la sécurité des policiers et le maintien de l'efficacité des opérations policières secrètes.

45 Malgré cette distinction, la Cour note que la méthode retenue dans Dagenais et Nouveau-Brunswick a pour objectif de garantir que le pouvoir discrétionnaire des tribunaux d'ordonner des interdictions de publication n'est pas assujetti à une norme de conformité à la Charte moins exigeante que la norme applicable aux dispositions législatives. Elle vise cet objectif en incorporant l'essence de l'article premier de la Charte et le critère Oakes dans l'analyse applicable aux interdictions de publication. Comme le même objectif s'applique à l'affaire dont elle est saisie, la Cour adopte une méthode semblable à celle de Dagenais, mais en élargissant le critère énoncé dans cet arrêt (qui portait spécifiquement sur le droit de l'accusé à un procès équitable) de manière à fournir un guide à l'exercice du pouvoir discrétionnaire des tribunaux dans les requêtes en interdiction de publication, afin de protéger tout aspect important de la bonne administration de la justice. La Cour reformule le critère en ces termes (au par. 32) :

Une ordonnance de non-publication ne doit être rendue que si :

a) elle est nécessaire pour écarter le risque sérieux pour la bonne administration de la justice, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur les droits et les intérêts des parties et du public, notamment ses effets sur le droit à la libre expression, sur le droit de l'accusé à un procès public et équitable, et sur l'efficacité de l'administration de la justice.

46 La Cour souligne que dans le premier volet de l'analyse, trois éléments importants sont subsumés sous la notion de "nécessité". En premier lieu, le risque en question doit être sérieux et bien étayé par la preuve. En deuxième lieu, l'expression "bonne administration de la justice" doit être interprétée [page541] judicieusement de façon à ne pas empêcher la divulgation d'un nombre excessif de renseignements. En troisième lieu, le critère exige non seulement que le juge qui prononce l'ordonnance détermine s'il existe des mesures de rechange raisonnables, mais aussi qu'il limite l'ordonnance autant que possible sans pour autant sacrifier la prévention du risque.

47 Au paragraphe 31, la Cour fait aussi l'importante observation que la bonne administration de la justice n'implique pas nécessairement des droits protégés par la Charte, et que la possibilité d'invoquer la Charte n'est pas une condition nécessaire à l'obtention d'une interdiction de publication :

> Elle [la règle de common law] peut s'appliquer aux ordonnances qui doivent parfois être rendues dans l'intérêt de l'administration de la justice, qui englobe davantage que le droit à un procès équitable. Comme on veut que le critère "reflète [...] l'essence du critère énoncé dans l'arrêt Oakes", nous ne pouvons pas exiger que ces ordonnances aient pour seul objectif légitime les droits garantis par la Charte, pas plus que nous exigeons que les actes gouvernementaux et les dispositions législatives contrevenant à la Charte soient justifiés exclusivement par la recherche d'un autre droit garanti par la Charte. [Je souligne.]

La Cour prévoit aussi que, dans les cas voulus, le critère de Dagenais pourrait être élargi encore davantage pour régir des requêtes en interdiction de publication mettant en jeu des questions autres que l'administration de la justice.

48 Mentuck illustre bien la souplesse de la méthode Dagenais. Comme elle a pour objet fondamental de garantir que le pouvoir discrétionnaire d'interdire l'accès du public aux tribunaux est exercé conformément aux principes de la Charte, à mon avis, le modèle Dagenais peut et devrait être adapté à la situation de la présente espèce, où la question centrale est l'exercice du pouvoir discrétionnaire du tribunal d'exclure des renseignements confidentiels au cours d'une procédure publique. Comme dans Dagenais, Nouveau-Brunswick et Mentuck, une ordonnance de confidentialité aura un effet négatif sur le droit à la liberté d'expression garanti par la Charte, de même que sur le principe de la publicité des débats judiciaires et, comme dans ces affaires, les tribunaux doivent veiller à ce que le [page542] pouvoir discrétionnaire d'accorder l'ordonnance soit exercé conformément aux principes de la Charte. Toutefois, pour adapter le critère au contexte de la présente espèce, il faut d'abord définir les droits et intérêts particuliers qui entrent en jeu.

(2) Les droits et les intérêts des parties

49 L'objet immédiat de la demande d'ordonnance de confidentialité d'ÉACL a trait à ses intérêts commerciaux. Les renseignements en question appartiennent aux autorités chinoises. Si l'appelante divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Il ressort clairement des conclusions de fait du juge des requêtes qu'ÉACL est tenue, par ses intérêts commerciaux et par les droits de propriété de son client, de ne pas divulguer ces renseignements (par. 27), et que leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23).

50 Indépendamment de cet intérêt commercial direct, en cas de refus de l'ordonnance de confidentialité, l'appelante devra, pour protéger ses intérêts commerciaux, s'abstenir de produire les documents. Cela soulève l'importante question du contexte de la présentation de la demande. Comme le juge des requêtes et la Cour d'appel fédérale concluent tous deux que l'information contenue dans les documents confidentiels est pertinente pour les moyens de défense prévus par la LCÉE, le fait de ne pouvoir la produire nuit à la capacité de l'appelante de présenter une défense pleine et entière ou, plus généralement, au droit de l'appelante, en sa qualité de justiciable civile, de défendre sa cause. En ce sens, empêcher l'appelante de divulguer ces documents pour des raisons de confidentialité porte atteinte à son droit à un procès équitable. Même si en matière civile cela n'engage pas de droit protégé par la Charte, le droit à un procès équitable peut généralement être considéré comme un principe de justice fondamentale : M. (A.) c. Ryan, *[1997] 1 R.C.S. 157*, par. 84, le juge L'Heureux-Dubé (dissidente, mais non sur ce point). Le droit à un procès équitable intéresse directement l'appelante, mais le public a aussi un intérêt général à la protection du droit à un procès équitable. À vrai dire, le principe [page543] général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

51 Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales

et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

52 Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2b) de la Charte : Nouveau-Brunswick, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le "souffle même de la justice", la garantie de l'absence d'arbitraire dans l'administration de la justice : Nouveau-Brunswick, par. 22.

(3) Adaptation de l'analyse de Dagenais aux droits et intérêts des parties

53 Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de Dagenais et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

[page544]

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

54 Comme dans Mentuck, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

55 De plus, l'expression "intérêt commercial important" exige une clarification. Pour être qualifié d'"intérêt commercial important", l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'" intérêt commercial important" pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans F.N. (Re), *[2000] 1 R.C.S. 880*, *2000 CSC 35*, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que "dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité" (je souligne).

56 Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un "intérêt commercial important". Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape [page545] de l'analyse, les tribunaux doivent avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement Eli Lilly and Co. c. Novopharm Ltd. *(1994), 56 C.P.R. (3d) 437* (C.F. 1re inst.), p. 439, le juge Muldoon.

57 Enfin, l'expression "autres options raisonnables" oblige le juge non seulement à se demander s'il existe des mesures raisonnables autres que l'ordonnance de confidentialité, mais aussi à restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

B. Application de l'analyse en l'espèce

(1) Nécessité

58 À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et s'il existe d'autres solutions raisonnables que l'ordonnance elle-même, ou ses modalités.

59 L'intérêt commercial en jeu en l'espèce a trait à la préservation d'obligations contractuelles de confidentialité. L'appelante fait valoir qu'un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l'analyse dès lors que certaines conditions relatives aux renseignements sont réunies.

60 Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social), *[1998] A.C.F. no 1850* (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela [page546] l'exigence proposée par le juge Robertson que les renseignements soient "de nature confidentielle" en ce qu'ils ont été "recueillis dans l'expectative raisonnable qu'ils resteront confidentiels", par opposition à "des faits qu'une partie à un litige voudrait garder confidentiels en obtenant le huis clos" (par. 14).

61 Le juge Pelletier constate que le critère établi dans AB Hassle est respecté puisque tant l'appelante que les autorités chinoises ont toujours considéré les renseignements comme confidentiels et que, selon la prépondérance des probabilités, leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23). Le juge Robertson conclut lui aussi que les renseignements en question sont clairement confidentiels puisqu'il s'agit de renseignements commerciaux, uniformément reconnus comme étant confidentiels, qui présentent un intérêt pour les concurrents d'ÉACL (par. 16). Par conséquent, l'ordonnance est demandée afin de prévenir un risque sérieux de préjudice à un intérêt commercial important.

62 Le premier volet de l'analyse exige aussi l'examen d'options raisonnables autres que l'ordonnance de confidentialité, et de la portée de l'ordonnance pour s'assurer qu'elle n'est pas trop vaste. Les deux jugements antérieurs en l'espèce concluent que les renseignements figurant dans les documents confidentiels sont pertinents pour les moyens de défense offerts à l'appelante en vertu de la LCÉE, et cette conclusion n'est pas portée en appel devant notre Cour. De plus, je suis d'accord avec la Cour d'appel lorsqu'elle affirme (au par. 99) que vu l'importance des documents pour le droit de présenter une défense pleine et entière, l'appelante est pratiquement forcée de les produire. Comme les renseignements sont nécessaires à la cause de l'appelante, il ne reste qu'à déterminer s'il existe d'autres options raisonnables pour communiquer les renseignements nécessaires sans divulguer de renseignements confidentiels.

63 Deux options autres que l'ordonnance de confidentialité sont mentionnées dans les décisions antérieures. Le juge des requêtes suggère de retrancher des documents les passages commercialement délicats et de produire les versions ainsi modifiées. [page547] La majorité en Cour d'appel estime que, outre cette possibilité d'épuration des documents, l'inclusion dans les affidavits d'un résumé des documents confidentiels pourrait, dans une large mesure, compenser l'absence des originaux. Si l'une ou l'autre de ces deux options peut raisonnablement se substituer au dépôt des documents confidentiels aux termes d'une ordonnance de confidentialité, alors l'ordonnance n'est pas nécessaire et la requête ne franchit pas la première étape de l'analyse.

64 Il existe deux possibilités pour l'épuration des documents et, selon moi, elles comportent toutes deux des problèmes. La première serait que ÉACL retranche les renseignements confidentiels sans divulguer les éléments retranchés ni aux parties ni au tribunal. Toutefois, dans cette situation, la documentation déposée serait encore

différente de celle utilisée pour les affidavits. Il ne faut pas perdre de vue que la requête découle de l'argument de Sierra Club selon lequel le tribunal ne devrait accorder que peu ou pas de poids aux résumés sans la présence des documents de base. Même si on pouvait totalement séparer les renseignements pertinents et les renseignements confidentiels, ce qui permettrait la divulgation de tous les renseignements sur lesquels se fondent les affidavits, l'appréciation de leur pertinence ne pourrait pas être mise à l'épreuve en contre-interrogatoire puisque la documentation retranchée ne serait pas disponible. Par conséquent, même dans le meilleur cas de figure, où l'on n'aurait qu'à retrancher les renseignements non pertinents, les parties se retrouveraient essentiellement dans la même situation que celle qui a donné lieu au pourvoi, en ce sens qu'au moins une partie des documents ayant servi à la préparation des affidavits en question ne serait pas mise à la disposition de Sierra Club.

65 De plus, je partage l'opinion du juge Robertson que ce meilleur cas de figure, où les renseignements pertinents et les renseignements confidentiels ne se recoupent pas, est une hypothèse non confirmée (par. 28). Même si les documents eux-mêmes n'ont pas été produits devant les tribunaux dans le cadre de la présente requête, parce qu'ils comprennent des milliers de pages de renseignements détaillés, cette hypothèse est au mieux optimiste. L'option de [page548] l'épuration serait en outre compliquée par le fait que les autorités chinoises exigent l'approbation préalable de toute demande de divulgation de renseignements de la part d'ÉACL.

66 La deuxième possibilité serait de mettre les documents supprimés à la disposition du tribunal et des parties en vertu d'une ordonnance de confidentialité plus restreinte. Bien que cela permettrait un accès public un peu plus large que ne le ferait l'ordonnance de confidentialité sollicitée, selon moi, cette restriction mineure à la requête n'est pas une option viable étant donné les difficultés liées à l'épuration dans les circonstances. Il s'agit de savoir s'il y a d'autres options raisonnables et non d'adopter l'option qui soit absolument la moins restrictive. Avec égards, j'estime que l'épuration des documents confidentiels serait une solution virtuellement impraticable et inefficace qui n'est pas raisonnable dans les circonstances.

67 Une deuxième option autre que l'ordonnance de confidentialité serait, selon le juge Evans, l'inclusion dans les affidavits d'un résumé des documents confidentiels pour "dans une large mesure, compenser [leur] absence" (par. 103). Il ne semble toutefois envisager ce fait qu'à titre de facteur à considérer dans la pondération des divers intérêts en cause. Je conviens qu'à cette étape liminaire, se fonder uniquement sur les résumés en connaissant l'intention de Sierra Club de plaider leur faiblesse ou l'absence de valeur probante, ne semble pas être une "autre option raisonnable" à la communication aux parties des documents de base.

68 Vu les facteurs susmentionnés, je conclus que l'ordonnance de confidentialité est nécessaire en ce que la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et qu'il n'existe pas d'autres options raisonnables.

(2) L'étape de la proportionnalité

69 Comme on le mentionne plus haut, à cette étape, les effets bénéfiques de l'ordonnance de confidentialité, y compris ses effets sur le droit de l'appelante à un procès équitable, doivent être pondérés avec ses effets préjudiciables, y compris ses effets sur le droit [page549] à la liberté d'expression, qui à son tour est lié au principe de la publicité des débats judiciaires. Cette pondération déterminera finalement s'il y a lieu d'accorder l'ordonnance de confidentialité.

a) Les effets bénéfiques de l'ordonnance de confidentialité

70 Comme nous l'avons vu, le principal intérêt qui serait promu par l'ordonnance de confidentialité est l'intérêt du public à la protection du droit du justiciable civil de faire valoir sa cause ou, de façon plus générale, du droit à un procès équitable. Puisque l'appelante l'invoque en l'espèce pour protéger ses intérêts commerciaux et non son droit à la liberté, le droit à un procès équitable dans ce contexte n'est pas un droit visé par la Charte; toutefois, le droit à un procès équitable pour tous les justiciables a été reconnu comme un principe de justice fondamentale : Ryan, précité, par. 84. Il y a lieu de rappeler qu'il y a des circonstances où, en l'absence de violation d'un droit garanti par la Charte, la bonne administration de la justice exige une ordonnance de confidentialité : Mentuck, précité, par. 31.

En l'espèce, les effets bénéfiques d'une telle ordonnance sur l'administration de la justice tiennent à la capacité de l'appelante de soutenir sa cause, dans le cadre du droit plus large à un procès équitable.

71 Les documents confidentiels ont été jugés pertinents en ce qui a trait aux moyens de défense que l'appelante pourrait invoquer s'il est jugé que la LCÉE s'applique à l'opération attaquée et, comme nous l'avons vu, l'appelante ne peut communiquer les documents sans risque sérieux pour ses intérêts commerciaux. De ce fait, il existe un risque bien réel que, sans l'ordonnance de confidentialité, la capacité de l'appelante à mener à bien sa défense soit gravement réduite. Je conclus par conséquent que l'ordonnance de confidentialité aurait d'importants effets bénéfiques pour le droit de l'appelante à un procès équitable.

72 En plus des effets bénéfiques pour le droit à un procès équitable, l'ordonnance de confidentialité aurait aussi des incidences favorables sur d'autres droits et intérêts importants. En premier lieu, comme je l'exposerai plus en détail ci-après, l'ordonnance de confidentialité permettrait aux parties ainsi qu'au [page550] tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu. En facilitant l'accès aux documents pertinents dans une procédure judiciaire, l'ordonnance sollicitée favoriserait la recherche de la vérité, qui est une valeur fondamentale sous-tendant la liberté d'expression.

73 En deuxième lieu, je suis d'accord avec l'observation du juge Robertson selon laquelle puisque les documents confidentiels contiennent des renseignements techniques détaillés touchant la construction et la conception d'une installation nucléaire, il peut être nécessaire, dans l'intérêt public, d'empêcher que ces renseignements tombent dans le domaine public (par. 44). Même si le contenu exact des documents demeure un mystère, il est évident qu'ils comprennent des détails techniques d'une installation nucléaire et il peut bien y avoir un important intérêt de sécurité publique à préserver la confidentialité de ces renseignements.

b) Les effets préjudiciables de l'ordonnance de confidentialité

74 Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires, puisqu'elle priverait le public de l'accès au contenu des documents confidentiels. Comme on le dit plus haut, le principe de la publicité des débats judiciaires est inextricablement lié au droit à la liberté d'expression protégé par l'al. 2b) de la Charte, et la vigilance du public envers les tribunaux est un aspect fondamental de l'administration de la justice : Nouveau-Brunswick, précité, par. 22-23. Même si, à titre de principe général, l'importance de la publicité des débats judiciaires ne peut être sous-estimée, il faut examiner, dans le contexte de l'espèce, les effets préjudiciables particuliers que l'ordonnance de confidentialité aurait sur la liberté d'expression.

75 Les valeurs fondamentales qui sous-tendent la liberté d'expression sont (1) la recherche de la vérité et du bien commun; (2) l'épanouissement personnel par le libre développement des pensées et des idées; et (3) la participation de tous au processus politique : Irwin Toy Ltd. c. Québec (Procureur général), *[1989] 1 R.C.S. 927*, p. 976; R. c. Keegstra, *[1990] 3 R.C.S. 697*, [page551] p. 762-764, le juge en chef Dickson. La jurisprudence de la Charte établit que plus l'expression en cause est au coeur de ces valeurs fondamentales, plus il est difficile de justifier, en vertu de l'article premier de la Charte, une atteinte à l'al. 2b) à son égard : Keegstra, p. 760-761. Comme l'objectif principal en l'espèce est d'exercer un pouvoir discrétionnaire dans le respect des principes de la Charte, l'examen des effets préjudiciables de l'ordonnance de confidentialité sur la liberté d'expression devrait comprendre une appréciation des effets qu'elle aurait sur les trois valeurs fondamentales. Plus l'ordonnance de confidentialité porte préjudice à ces valeurs, plus il est difficile de la justifier. Inversement, des effets mineurs sur les valeurs fondamentales rendent l'ordonnance de confidentialité plus facile à justifier.

76 La recherche de la vérité est non seulement au coeur de la liberté d'expression, elle est aussi reconnue comme un objectif fondamental de la règle de la publicité des débats judiciaires, puisque l'examen public des témoins favorise l'efficacité du processus de présentation de la preuve : Edmonton Journal, précité, p. 1357-1358, le juge Wilson. À l'évidence, en enlevant au public et aux médias l'accès aux documents invoqués dans les procédures, l'ordonnance de confidentialité nuirait jusqu'à un certain point à la recherche de la vérité. L'ordonnance n'exclurait pas le public de la salle d'audience, mais le public et les médias n'auraient pas accès aux documents pertinents quant à la présentation de la preuve.

77 Toutefois, comme nous l'avons vu plus haut, la recherche de la vérité peut jusqu'à un certain point être favorisée par l'ordonnance de confidentialité. La présente requête résulte de l'argument de Sierra Club selon lequel il doit avoir accès aux documents confidentiels pour vérifier l'exactitude de la déposition de M. Pang. Si l'ordonnance est refusée, le scénario le plus probable est que l'appelante s'abstiendra de déposer les documents, avec la conséquence fâcheuse que des preuves qui peuvent être pertinentes ne seront pas portées à la connaissance de Sierra Club ou du tribunal. Par conséquent, Sierra Club ne sera pas en mesure de vérifier complètement l'exactitude de la preuve de M. Pang en contre-interrogatoire. [page552] De plus, le tribunal ne bénéficiera pas du contre-interrogatoire ou de cette preuve documentaire, et il lui faudra tirer des conclusions fondées sur un dossier de preuve incomplet. Cela nuira manifestement à la recherche de la vérité en l'espèce.

78 De plus, il importe de rappeler que l'ordonnance de confidentialité ne restreindrait l'accès qu'à un nombre relativement peu élevé de documents hautement techniques. La nature de ces documents est telle que le public en général est peu susceptible d'en comprendre le contenu, de sorte qu'ils contribueraient peu à l'intérêt du public à la recherche de la vérité en l'espèce. Toutefois, dans les mains des parties et de leurs experts respectifs, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, ce qui devrait aussi aider le tribunal à tirer des conclusions de fait exactes. À mon avis, compte tenu de leur nature, la production des documents confidentiels en vertu de l'ordonnance de confidentialité sollicitée favoriserait mieux l'importante valeur de la recherche de la vérité, qui sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le rejet de la demande qui aurait pour effet d'empêcher les parties et le tribunal de se fonder sur les documents au cours de l'instance.

79 De plus, aux termes de l'ordonnance demandée, les seules restrictions imposées à l'égard de ces documents ont trait à leur distribution publique. Les documents confidentiels seraient mis à la disposition du tribunal et des parties, et il n'y aurait pas d'entrave à l'accès du public aux procédures. À ce titre, l'ordonnance représente une atteinte relativement minime à la règle de la publicité des débats judiciaires et elle n'aurait donc pas d'effets préjudiciables importants sur ce principe.

80 La deuxième valeur fondamentale sous-jacente à la liberté d'expression, la promotion de l'épanouissement personnel par le libre développement de la pensée et des idées, est centrée sur l'expression individuelle et n'est donc pas étroitement liée au principe de la publicité des débats judiciaires qui concerne l'expression institutionnelle. Même [page553] si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, j'estime que cette valeur ne serait pas touchée de manière significative.

81 La troisième valeur fondamentale, la libre participation au processus politique, joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Ce lien est souligné par le juge Cory dans Edmonton Journal, précité, p. 1339 :

> On voit que la liberté d'expression est d'une importance fondamentale dans une société démocratique. Il est également essentiel dans une démocratie et fondamental pour la primauté du droit que la transparence du fonctionnement des tribunaux soit perçue comme telle. La presse doit être libre de commenter les procédures judiciaires pour que, dans les faits, chacun puisse constater que les tribunaux fonctionnent publiquement sous les regards pénétrants du public.

Même si on ne peut douter de l'importance de la publicité des débats judiciaires dans une société démocratique, les décisions antérieures divergent sur la question de savoir si le poids à accorder au principe de la publicité des débats judiciaires devrait varier en fonction de la nature de la procédure.

82 Sur ce point, le juge Robertson estime que la nature de l'affaire et le degré d'intérêt des médias sont des considérations dénuées de pertinence. Le juge Evans estime quant à lui que le juge des requêtes a eu raison de tenir compte du fait que la demande de contrôle judiciaire suscite beaucoup d'intérêt de la part du public et des médias. À mon avis, même si la nature publique de l'affaire peut être un facteur susceptible de renforcer l'importance de la publicité des débats judiciaires dans une espèce particulière, le degré d'intérêt des médias ne devrait pas être considéré comme facteur indépendant.

83 Puisque les affaires concernant des institutions publiques ont généralement un lien plus étroit avec la valeur fondamentale de la participation du public au processus politique, la nature publique d'une instance devrait être prise en considération dans l'évaluation du bien-fondé d'une ordonnance de confidentialité. Il importe de noter que cette valeur [page554] fondamentale sera toujours engagée lorsque sera mis en cause le principe de la publicité des débats judiciaires, vu l'importance de la transparence judiciaire dans une société démocratique. Toutefois, le lien entre la publicité des débats judiciaires et la participation du public dans le processus politique s'accentue lorsque le processus politique est également engagé par la substance de la procédure. Sous ce rapport, je suis d'accord avec ce que dit le juge Evans (au par. 87) :

> Bien que tous les litiges soient importants pour les parties, et qu'il en va de l'intérêt du public que les affaires soumises aux tribunaux soient traitées de façon équitable et appropriée, certaines affaires soulèvent des questions qui transcendent les intérêts immédiats des parties ainsi que l'intérêt du public en général dans la bonne administration de la justice, et qui ont une signification beaucoup plus grande pour le public.

84 La requête est liée à une demande de contrôle judiciaire d'une décision du gouvernement de financer un projet d'énergie nucléaire. La demande est clairement de nature publique, puisqu'elle a trait à la distribution de fonds publics en rapport avec une question dont l'intérêt public a été démontré. De plus, comme le souligne le juge Evans, la transparence du processus et la participation du public ont une importance fondamentale sous le régime de la LCÉE. En effet, par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection. À cet égard, je suis d'accord avec le juge Evans pour conclure que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés.

85 J'estime toutefois avec égards que, dans la mesure où il se fonde sur l'intérêt des médias comme indice de l'intérêt du public, le juge Evans fait erreur. À mon avis, il est important d'établir une distinction entre l'intérêt du public et l'intérêt des médias et, comme le juge Robertson, je note que la couverture médiatique ne peut être considérée comme une mesure impartiale de l'intérêt public. C'est la nature publique de l'instance qui accentue le besoin de transparence, et cette nature publique ne se reflète [page555] pas nécessairement dans le désir des médias d'examiner les faits de l'affaire. Je réitère l'avertissement donné par le juge en chef Dickson dans Keegstra, précité, p. 760, où il dit que même si l'expression en cause doit être examinée dans ses rapports avec les valeurs fondamentales, "nous devons veiller à ne pas juger l'expression en fonction de sa popularité".

86 Même si l'intérêt du public à la publicité de la demande de contrôle judiciaire dans son ensemble est important, à mon avis, il importe tout autant de prendre en compte la nature et la portée des renseignements visés par l'ordonnance demandée, lorsqu'il s'agit d'apprécier le poids de l'intérêt public. Avec égards, le juge des requêtes a commis une erreur en ne tenant pas compte de la portée limitée de l'ordonnance dans son appréciation de l'intérêt du public à la communication et en accordant donc un poids excessif à ce facteur. Sous ce rapport, je ne partage pas la conclusion suivante du juge Evans (au par. 97) :

> Par conséquent, on ne peut dire qu'après que le juge des requêtes eut examiné la nature de ce litige et évalué l'importance de l'intérêt du public à la publicité des procédures, il aurait dans les circonstances accordé trop d'importance à ce facteur, même si la confidentialité n'est demandée que pour trois documents parmi la montagne de documents déposés en l'instance et que leur contenu dépasse probablement les connaissances de ceux qui n'ont pas l'expertise technique nécessaire.

La publicité des débats judiciaires est un principe fondamentalement important, surtout lorsque la substance de la procédure est de nature publique. Cela ne libère toutefois aucunement de l'obligation d'apprécier le poids à accorder à ce principe en fonction des limites particulières qu'imposerait l'ordonnance de confidentialité à la publicité des débats. Comme le dit le juge Wilson dans Edmonton Journal, précité, p. 1353-1354 :

> Une chose semble claire et c'est qu'il ne faut pas évaluer une valeur selon la méthode générale et l'autre valeur en conflit avec elle selon la méthode contextuelle. Agir ainsi pourrait fort bien revenir à préjuger de l'issue du litige en donnant à la valeur examinée de manière générale plus d'importance que ne l'exige le contexte de l'affaire.

[page556]

87 À mon avis, il importe de reconnaître que, malgré l'intérêt significatif que porte le public à ces procédures, l'ordonnance demandée n'entraverait que légèrement la publicité de la demande de contrôle judiciaire. La portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires.

88 Pour traiter des effets qu'aurait l'ordonnance de confidentialité sur la liberté d'expression, il faut aussi se rappeler qu'il se peut que l'appelante n'ait pas à soulever de moyens de défense visés par la LCÉE, auquel cas les documents confidentiels perdraient leur pertinence et la liberté d'expression ne serait pas touchée par l'ordonnance. Toutefois, puisque l'utilité des documents confidentiels ne sera pas déterminée avant un certain temps, l'appelante n'aurait plus, en l'absence d'ordonnance de confidentialité, que le choix entre soit produire les documents en violation de ses obligations, soit les retenir dans l'espoir de ne pas avoir à présenter de défense en vertu de la LCÉE ou de pouvoir assurer effectivement sa défense sans les documents pertinents. Si elle opte pour le premier choix et que le tribunal conclut par la suite que les moyens de défense visés par la LCÉE ne sont pas applicables, l'appelante aura subi le préjudice de voir ses renseignements confidentiels et délicats tomber dans le domaine public sans que le public n'en tire d'avantage correspondant. Même si sa réalisation est loin d'être certaine, la possibilité d'un tel scénario milite également en faveur de l'ordonnance sollicitée.

89 En arrivant à cette conclusion, je note que si l'appelante n'a pas à invoquer les moyens de défense pertinents en vertu de la LCÉE, il est également vrai que son droit à un procès équitable ne sera pas entravé même en cas de refus de l'ordonnance de confidentialité. Je ne retiens toutefois pas cela comme facteur militant contre l'ordonnance parce que, si elle est accordée et que les documents confidentiels ne sont pas nécessaires, il n'y aura alors aucun effet préjudiciable ni sur l'intérêt du public à la liberté d'expression ni sur les droits commerciaux ou le droit de l'appelante à un procès [page557] équitable. Cette issue neutre contraste avec le scénario susmentionné où il y a refus de l'ordonnance et possibilité d'atteinte aux droits commerciaux de l'appelante sans avantage correspondant pour le public. Par conséquent, le fait que les documents confidentiels puissent ne pas être nécessaires est un facteur en faveur de l'ordonnance de confidentialité.

90 En résumé, les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, dans le contexte en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. À ce titre, l'ordonnance n'aurait pas d'effets préjudiciables importants sur la liberté d'expression.

VII. Conclusion

91 Dans la pondération des divers droits et intérêts en jeu, je note que l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de l'appelante à un procès équitable et sur la liberté d'expression. D'autre part, les effets préjudiciables de l'ordonnance de confidentialité sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes. En outre, si l'ordonnance est refusée et qu'au cours du contrôle judiciaire l'appelante n'est pas amenée à invoquer les moyens de défense prévus dans la LCÉE, il se peut qu'elle subisse le préjudice d'avoir communiqué des renseignements confidentiels en violation de ses obligations sans avantage correspondant pour le droit du public à la liberté d'expression. Je conclus donc que les effets bénéfiques de l'ordonnance l'emportent sur ses effets préjudiciables, et qu'il y a lieu d'accorder l'ordonnance.

92 Je suis donc d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'annuler l'arrêt de la Cour d'appel fédérale, et d'accorder l'ordonnance de confidentialité selon les modalités demandées par l'appelante en vertu de la règle 151 des Règles de la Cour fédérale (1998).

[page558]

Procureurs de l'appelante : Osler, Hoskin & Harcourt, Toronto. Procureurs de l'intimé Sierra Club du Canada : Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal. Procureur des intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada : Le sous-procureur général du Canada, Ottawa.

Fin du document

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEST VIRGINIA ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20–1530. Argued February 28, 2022—Decided June 30, 2022*

In 2015, the Environmental Protection Agency (EPA) promulgated the Clean Power Plan rule, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. For authority, the Agency cited Section 111 of the Clean Air Act, which, although known as the *New* Source Performance Standards program, also authorizes regulation of certain pollutants from *existing* sources under Section 111(d). 42 U. S. C. §7411(d). Prior to the Clean Power Plan, EPA had used Section 111(d) only a handful of times since its enactment in 1970. Under that provision, although the States set the actual enforceable rules governing existing sources (such as power plants), EPA determines the emissions limit with which they will have to comply. The Agency derives that limit by determining the "best system of emission reduction . . . that has been adequately demonstrated," or the BSER, for the kind of existing source at issue. §7411(a)(1). The limit then reflects the amount of pollution reduction "achievable through the application of" that system. *Ibid.*

In the Clean Power Plan, EPA determined that the BSER for existing coal and natural gas plants included three types of measures, which the Agency called "building blocks." 80 Fed. Reg. 64667. The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal

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*Together with No. 20–1531, *North American Coal Corp.* v. *Environmental Protection Agency et al.,* No. 20–1778, *Westmoreland Mining Holdings LLC* v. *Environmental Protection Agency et al.*, and No. 20–1780, *North Dakota* v. *Environmental Protection Agency et al.*, also on certiorari to the same court.

Syllabus

more cleanly. *Id.,* at 64727. This sort of source-specific, efficiency-improving measure was similar in kind to those that EPA had previously identified as the BSER in other Section 111 rules.

Building blocks two and three were quite different, as both involved what EPA called "generation shifting" at the grid level—*i.e.,* a shift in electricity production from higher-emitting to lower-emitting producers. Building block two was a shift in generation from existing coal-fired power plants, which would make less power, to natural-gas-fired plants, which would make more. *Ibid.* This would reduce carbon dioxide emissions because natural gas plants produce less carbon dioxide per unit of electricity generated than coal plants. Building block three worked like building block two, except that the shift was from both coal and gas plants to renewables, mostly wind and solar. *Id.,* at 64729, 64748. The Agency explained that, to implement the needed shift in generation to cleaner sources, an operator could reduce the regulated plant's own production of electricity, build or invest in a new or existing natural gas plant, wind farm, or solar installation, or purchase emission allowances or credits as part of a cap-and-trade regime. *Id.,* at 64731–64732. Taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. *Id.,* at 64731.

Having decided that the BSER was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. §7411(a)(1). The Agency recognized that, in translating the BSER into an operational emissions limit, it could choose whether to require anything from a little generation shifting to a great deal. It settled on what it regarded as a "reasonable" amount of shift, which it based on modeling how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. *Id.,* at 64797–64811. The Agency ultimately projected, for instance, that it would be feasible to have coal provide 27% of national electricity generation by 2030, down from 38% in 2014. From these projected changes, EPA determined the applicable emissions performance rates, which were so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of generation shifting. The Government projected that the rule would impose billions in compliance costs, raise retail electricity prices, require the retirement of dozens of coal plants, and eliminate tens of thousands of jobs.

This Court stayed the Clean Power Plan in 2016, preventing the rule from taking effect. It was later repealed after a change in Presidential administrations. Specifically, in 2019, EPA found that the Clean

Power Plan had exceeded the Agency's statutory authority under Section 111(d), which it interpreted to "limit[ ] the BSER to those systems that can be put into operation *at* a building, structure, facility, or installation." 84 Fed. Reg. 32524. EPA explained that the Clean Power Plan, rather than setting the standard "based on the application of equipment and practices at the level of an individual facility," had instead based it on "a shift in the energy generation mix at the grid level," *id.,* at 32523. The Agency determined that the interpretive question raised by the Clean Power Plan fell under the major questions doctrine. Under that doctrine, it determined, a clear statement is necessary for a court to conclude that Congress intended to delegate authority "of this breadth to regulate a fundamental sector of the economy." *Id.,* at 32529. It found none. The Agency replaced the Clean Power Plan by promulgating a different Section 111(d) regulation, known as the Affordable Clean Energy (ACE) rule. *Id*., at 32532. In that rule, EPA determined that the BSER would be akin to building block one of the Clean Power Plan: a combination of equipment upgrades and operating practices that would improve facilities' heat rates. *Id.,* at 32522, 32537.

A number of States and private parties filed petitions for review in the D. C. Circuit, challenging EPA's repeal of the Clean Power Plan and its enactment of the replacement ACE rule. The Court of Appeals consolidated the cases and held that EPA's "repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act"—namely, that generation shifting cannot be a "system of emission reduction" under Section 111. 985 F. 3d 914, 995. The court vacated the Agency's repeal of the Clean Power Plan and remanded to the Agency for further consideration. It also vacated and remanded the ACE rule for the same reason. The court's decision was followed by another change in Presidential administrations, and EPA moved the court to partially stay its mandate as to the Clean Power Plan while the Agency considered whether to promulgate a new Section 111(d) rule. No party opposed the motion, and the Court of Appeals agreed to stay its vacatur of the Agency's repeal of the Clean Power Plan.

Held:

1. This case remains justiciable notwithstanding the Government's contention that no petitioner has Article III standing, given EPA's stated intention not to enforce the Clean Power Plan and to instead engage in new rulemaking. In considering standing to appeal, the question is whether the appellant has experienced an injury "fairly traceable to the judgment below." *Food Marketing Institute* v. *Argus Leader Media*, 588 U. S. ___, ___. If so, and a "favorable ruling" from the appellate court "would redress [that] injury," then the appellant has a cognizable Article III stake. *Ibid.* Here, the judgment below

vacated the ACE rule and its embedded repeal of the Clean Power Plan, and accordingly purports to bring the Clean Power Plan back into legal effect. There is little question that the petitioner States are injured, since the rule requires them to more stringently regulate power plant emissions within their borders. The Government counters that EPA's current posture has mooted the prior dispute. The distinction between mootness and standing matters, however, because the Government bears the burden to establish that a once-live case has become moot. The Government's argument in this case boils down to its representation that EPA does not intend to enforce the Clean Power Plan prior to promulgating a new Section 111(d) rule. But "voluntary cessation does not moot a case" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1,* 551 U. S. 701, 719. Here, the Government "nowhere suggests that if this litigation is resolved in its favor it will not" reimpose emissions limits predicated on generation shifting. *Ibid.* Pp. 14–16.

2. Congress did not grant EPA in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan. Pp. 16–31.

(a) In devising emissions limits for power plants, EPA "determines" the BSER that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated," and then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. §7411(a)(1). The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% to 27% coal by 2030, can be the BSER within the meaning of Section 111.

Precedent teaches that there are "extraordinary cases" in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U. S. 120, 159–160. See, *e.g., Alabama Assn. of Realtors* v. *Department of Health and Human Servs.,* 594 U. S. ___, ___; *Utility Air Regulatory Group* v. *EPA,* 573 U. S. 302, 324; *Gonzales* v. *Oregon*, 546 U. S. 243, 267; *National Federation of Independent Business* v. *OSHA*, 595 U. S. ___, ___. Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to "clear congressional authorization" for the authority it claims. *Utility Air*, 573 U. S., at 324. Pp. 16–20.

(b) This is a major questions case. EPA claimed to discover an

unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler. That discovery allowed it to adopt a regulatory program that Congress had conspicuously declined to enact itself. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U. S., at 160.

Prior to 2015, EPA had always set Section 111 emissions limits based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly, see, *e.g.*, 41 Fed. Reg. 48706—never by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." 80 Fed. Reg. 64726. The Government quibbles with this history, pointing to the 2005 Mercury Rule as one Section 111 rule that it says relied upon a cap-and-trade mechanism to reduce emissions. See 70 Fed. Reg. 28616. But in that regulation, EPA set the emissions limit—the "cap"—based on the use of "technologies [that could be] installed and operational on a nationwide basis" in the relevant timeframe. *Id.,* at 28620–28621. By contrast, and by design, there are no particular controls a coal plant operator can install and operate to attain the emissions limits established by the Clean Power Plan. Indeed, the Agency nodded to the novelty of its approach when it explained that it was pursuing a "broader, forward-thinking approach to the design" of Section 111 regulations that would "improve the *overall power system*," rather than the emissions performance of individual sources, by forcing a shift throughout the power grid from one type of energy source to another. 80 Fed. Reg. 64703 (emphasis added). This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.,* 512 U. S. 218, 231.

The Government attempts to downplay matters, noting that the Agency must limit the magnitude of generation shift it demands to a level that will not be "exorbitantly costly" or "threaten the reliability of the grid." Brief for Federal Respondents 42. This argument does not limit the breadth of EPA's claimed authority so much as reveal it: On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in the basic regulation of how Americans get their energy. There is little reason to think Congress did so. EPA has admitted that issues of electricity transmission, distribution, and storage are not within its traditional expertise. And this Court doubts that "Congress

Syllabus

. . . intended to delegate . . . decision[s] of such economic and political significance," *i.e.,* how much coal-based generation there should be over the coming decades, to any administrative agency. *Brown & Williamson*, 529 U. S., at 160. Nor can the Court ignore that the regulatory writ EPA newly uncovered in Section 111(d) conveniently enabled it to enact a program, namely, cap-and-trade for carbon, that Congress had already considered and rejected numerous times. The importance of the policy issue and ongoing debate over its merits "makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U. S., at 267–268. Pp. 20–28.

(c) Given that precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach, the Government must point to "clear congressional authorization" to regulate in that manner. *Utility Air*, 573 U. S., at 324. The Government can offer only EPA's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated." §7411(a)(1). The word "system" shorn of all context, however, is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required. The Government points to other provisions of the Clean Air Act—specifically the Acid Rain and National Ambient Air Quality Standards (NAAQS) programs—that use the word "system" or "similar words" to describe sector-wide mechanisms for reducing pollution. But just because a cap-and-trade "system" can be used to reduce emissions does not mean that it is the kind of "system of emission reduction" referred to in Section 111.

Finally, the Court has no occasion to decide whether the statutory phrase "system of emission reduction" refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. It is pertinent to the Court's analysis that EPA has acted consistent with such a limitation for four decades. But the only question before the Court is more narrow: whether the "best system of emission reduction" identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no. Pp. 28–31.

985 F. 3d 914, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. KAGAN, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 20–1530, 20–1531, 20–1778 and 20–1780

WEST VIRGINIA, ET AL., PETITIONERS
20–1530 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

THE NORTH AMERICAN COAL CORPORATION, PETITIONER
20–1531 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

WESTMORELAND MINING HOLDINGS LLC, PETITIONER
20–1778 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NORTH DAKOTA, PETITIONER
20–1780 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 30, 2022]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into

the air. 84 Stat. 1683, 42 U. S. C. §7411(a)(1). That standard may be different for new and existing plants, but in each case it must reflect the "best system of emission reduction" that the Agency has determined to be "adequately demonstrated" for the particular category. §§7411(a)(1), (b)(1), (d). For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders.

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

I

A

The Clean Air Act establishes three main regulatory programs to control air pollution from stationary sources such as power plants. Clean Air Amendments of 1970, 84 Stat. 1676, 42 U. S. C. §7401 *et seq.* One program is the New Source Performance Standards program of Section 111, at issue here. The other two are the National Ambient Air Quality Standards (NAAQS) program, set out in Sections 108 through 110 of the Act, 42 U. S. C. §§7408–7410, and the Hazardous Air Pollutants (HAP) program, set out in Section 112, §7412. To understand the place and function of Section 111 in the statutory scheme, some background on the other two programs is in order.

The NAAQS program addresses air pollutants that "may

reasonably be anticipated to endanger public health or welfare," and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." §7408(a)(1). After identifying such pollutants, EPA establishes a NAAQS for each. The NAAQS represents "the maximum airborne concentration of [the] pollutant that the public health can tolerate." *Whitman* v. *American Trucking Assns.*, *Inc.*, 531 U. S. 457, 465 (2001); see §7409(b). EPA, though, does not choose which sources must reduce their pollution and by how much to meet the ambient pollution target. Instead, Section 110 of the Act leaves that task in the first instance to the States, requiring each "to submit to [EPA] a plan designed to implement and maintain such standards within its boundaries." *Train* v. *Natural Resources Defense Council*, *Inc.*, 421 U. S. 60, 65 (1975); §7410.

The second major program governing stationary sources is the HAP program. The HAP program primarily targets pollutants, other than those already covered by a NAAQS, that present "a threat of adverse human health effects," including substances known or anticipated to be "carcinogenic, mutagenic, teratogenic, neurotoxic," or otherwise "acutely or chronically toxic." §7412(b)(2).

EPA's regulatory role with respect to these toxic pollutants is different in kind from its role in administering the NAAQS program. There, EPA is generally limited to determining the maximum safe amount of covered pollutants in the air. As to each hazardous pollutant, by contrast, the Agency must promulgate emissions standards for both new and existing major sources. §7412(d)(1). Those standards must "require the maximum degree of reduction in emissions . . . that the [EPA] Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . . through application of measures, processes, methods, systems or techniques" of emission reduction. §7412(d)(2). In other

words, EPA must directly require all covered sources to reduce their emissions to a certain level. And it chooses that level by determining the "maximum degree of reduction" it considers "achievable" in practice by using the best existing technologies and methods. §7412(d)(3).

Thus, in the parlance of environmental law, Section 112 directs the Agency to impose "*technology-based* standard[s] for hazardous emissions," *Alaska Dept. of Environmental Conservation* v. *EPA*, 540 U. S. 461, 485, n. 12 (2004) (emphasis added). This sort of "'technology-based' approach focuses upon the control technologies that are available to industrial entities and requires the agency to . . . ensur[e] that regulated firms adopt the appropriate cleanup technology." T. McGarity, Media-Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation, 46 Law & Contemp. Prob. 159, 160 (Summer 1983) (McGarity). (Such "technologies" are not limited to literal technology, such as scrubbers; "changes in the design and operation" of the facility, or "in the way that employees perform their tasks," are also available options. *Id.*, at 163, n. 18.)

The third air pollution control scheme is the New Source Performance Standards program of Section 111. §7411. That section directs EPA to list "categories of stationary sources" that it determines "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." §7411(b)(1)(A). Under Section 111(b), the Agency must then promulgate for each category "Federal standards of performance for new sources," §7411(b)(1)(B). A "standard of performance" is one that

> "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and

> environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." §7411(a)(1).

Thus, the statute directs EPA to (1) "determine[]," taking into account various factors, the "best system of emission reduction which . . . has been adequately demonstrated," (2) ascertain the "degree of emission limitation achievable through the application" of that system, and (3) impose an emissions limit on new stationary sources that "reflects" that amount. *Ibid.*; see also 80 Fed. Reg. 64538 (2015). Generally speaking, a source may achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount "achievable through the application of the best system of emission reduction . . . adequately demonstrated," or the BSER. §7411(a)(1); see §7411(b)(5). EPA undertakes this analysis on a pollutant-by-pollutant basis, establishing different standards of performance with respect to different pollutants emitted from the same source category. See, *e.g.*, 73 Fed. Reg. 35838 (2008); 42 Fed. Reg. 22510 (1977).

Although the thrust of Section 111 focuses on emissions limits for *new* and *modified* sources—as its title indicates—the statute also authorizes regulation of certain pollutants from *existing* sources. Under Section 111(d), once EPA "has set *new* source standards addressing emissions of a particular pollutant under . . . section 111(b)," 80 Fed. Reg. 64711, it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under the NAAQS or HAP programs. §7411(d)(1). Existing power plants, for example, emit many pollutants covered by a NAAQS or HAP standard. Section 111(d) thus "operates as a gap-filler," empowering EPA to regulate harmful emissions not already controlled under the Agency's other authorities. *American Lung Assn.* v. *EPA*, 985 F. 3d 914, 932 (CADC 2021).

Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, "the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities." 40 CFR §60.22(b)(5) (2021); see also 80 Fed. Reg. 64664, and n. 1. The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA. See §§60.23, 60.24; 42 U. S. C. §7411(d)(1).

Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970. See 80 Fed. Reg. 64703, and n. 275 (past regulations pertained to "four pollutants from five source categories"). For instance, the Agency has established emissions limits on acid mist from sulfuric acid production, 41 Fed. Reg. 48706 (1976) (identifying "fiber mist eliminator" technology as BSER); sulfide gases released by kraft pulp mills, 44 Fed. Reg. 29829 (1979) (determining BSER to be a combination of scrubbers, incineration, filtration systems, and temperature control); and emissions of various harmful gases from municipal landfills, 61 Fed. Reg. 9907 (1996) (setting BSER as use of a flare to combust the gases). It was thus only a slight overstatement for one of the architects of the 1990 amendments to the Clean Air Act to refer to Section 111(d) as an "obscure, never-used section of the law." Hearings on S. 300 et al. before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works, 100th Cong., 1st Sess., 13 (1987) (remarks of Sen. Durenberger).

B

Things changed in October 2015, when EPA promulgated

two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d). Both were premised on the Agency's earlier finding that carbon dioxide is an "air pollutant" that "may reasonably be anticipated to endanger public health or welfare" by causing climate change. 80 Fed. Reg. 64530. Carbon dioxide is not subject to a NAAQS and has not been listed as a toxic pollutant.

The first rule announced by EPA established federal carbon emissions limits for new power plants of two varieties: fossil-fuel-fired electric steam generating units (mostly coal fired) and natural-gas-fired stationary combustion turbines. *Id.*, at 64512. Following the statutory process set out above, the Agency determined the BSER for the two categories of sources. For steam generating units, for instance, EPA determined that the BSER was a combination of high-efficiency production processes and carbon capture technology. See 80 Fed. Reg. 64512. EPA then set the emissions limit based on the amount of carbon dioxide that a plant would emit with these technologies in place. *Id.*, at 64513.

The second rule was triggered by the first: Because EPA was now regulating carbon dioxide from *new* coal and gas plants, Section 111(d) required EPA to also address carbon emissions from *existing* coal and gas plants. See §7411(d)(1). It did so through what it called the Clean Power Plan rule.

In that rule, EPA established "final emission guidelines for states to follow in developing plans" to regulate existing power plants within their borders. *Id.*, at 64662. To arrive at the guideline limits, EPA did the same thing it does when imposing federal regulations on new sources: It identified the BSER.

The BSER that the Agency selected for existing coal-fired power plants, however, was quite different from the BSER it had chosen for new sources. The BSER for existing plants included three types of measures, which the Agency called

"building blocks." *Id.*, at 64667. The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal more efficiently. *Id.*, at 64727. But such improvements, EPA stated, would "lead to only small emission reductions," because coal-fired power plants were already operating near optimum efficiency. *Ibid.* On the Agency's view, "much larger emission reductions [were] needed from [coal-fired plants] to address climate change." *Ibid.*

So the Agency included two additional building blocks in its BSER, both of which involve what it called "generation shifting from higher-emitting to lower-emitting" producers of electricity. *Id.*, at 64728. Building block two was a shift in electricity production from existing coal-fired power plants to natural-gas-fired plants. *Ibid.* Because natural gas plants produce "typically less than half as much" carbon dioxide per unit of electricity created as coal-fired plants, the Agency explained, "this generation shift [would] reduce[ ] CO_2 emissions." *Ibid.* Building block three worked the same way, except that the shift was from both coal- and gas-fired plants to "new low- or zero-carbon generating capacity," mainly wind and solar. *Id.*, at 64729, 64748. "Most of the CO_2 controls" in the rule came from the application of building blocks two and three. *Id.*, at 64728.

The Agency identified three ways in which a regulated plant operator could implement a shift in generation to cleaner sources. *Id.*, at 64731. First, an operator could simply reduce the regulated plant's own production of electricity. Second, it could build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there. *Ibid.* Finally, operators could purchase emission allowances or credits as part of a cap-and-trade regime. *Id.*, at 64731–64732. Under such a scheme, sources that achieve a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it

toward their own applicable emissions caps.

EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. *Id.*, at 64731. Given the integrated nature of the power grid, "adding electricity to the grid from one generator will result in the instantaneous reduction in generation from other generators," and "reductions in generation from one generator lead to the instantaneous increase in generation" by others. *Id.*, at 64769. So coal plants, whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas.

Having decided that the "best system of emission reduction . . . adequately demonstrated" was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. 42 U. S. C. §7411(a)(1). The Agency recognized that—given the nature of generation shifting—it could choose from "a wide range of potential stringencies for the BSER." 80 Fed. Reg. 64730. Put differently, in translating the BSER into an operational emissions limit, EPA could choose whether to require anything from a little generation shifting to a great deal. The Agency settled on what it regarded as a "reasonable" amount of shift, which it based on modeling of how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. *Id.*, at 64797–64811. Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014. *Id.*, at 64665, 64694; see Dept. of Energy, U. S. Energy Information Admin., Monthly Energy Review (May 2015), Electricity Net Generation: Electric Power Sector, p. 106 (Table 7.2b).

From these significant projected reductions in generation, EPA developed a series of complex equations to "determine the emission performance rates" that States would be required to implement. 80 Fed. Reg. 64815. The calculations resulted in numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation described above. Indeed, the emissions limit the Clean Power Plan established for existing power plants was actually *stricter* than the cap imposed by the simultaneously published standards for *new* plants. Compare *id.*, at 64742, with *id.*, at 64513.

The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar. The White House stated that the Clean Power Plan would "drive a[n] . . . aggressive transformation in the domestic energy industry." White House Fact Sheet, App. in *American Lung Assn.* v. *EPA*, No. 19–1140 etc. (CADC), p. 2076. EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3–22, 3–30, 3–33, 6–24, 6–25 (2015). The Energy Information Administration reached similar conclusions, projecting that the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040. Dept. of Energy, Analysis of the Impacts of the Clean Power Plan 21, 63–64 (May 2015).

C

These projections were never tested, because the Clean Power Plan never went into effect. The same day that EPA promulgated the rule, dozens of parties (including 27 States) petitioned for review in the D. C. Circuit. After that

court declined to enter a stay of the rule, the challengers sought the same relief from this Court. We granted a stay, preventing the rule from taking effect. *West Virginia* v. *EPA*, 577 U. S. 1126 (2016). The Court of Appeals later heard argument on the merits en banc. But before it could issue a decision, there was a change in Presidential administrations. The new administration requested that the litigation be held in abeyance so that EPA could reconsider the Clean Power Plan. The D. C. Circuit obliged, and later dismissed the petitions for review as moot.

EPA eventually repealed the rule in 2019, concluding that the Clean Power Plan had been "in excess of its statutory authority" under Section 111(d). 84 Fed. Reg. 32523 (2019). Specifically, the Agency concluded that generation shifting should not have been considered as part of the BSER. The Agency interpreted Section 111 as "limit[ing] the BSER to those systems that can be put into operation *at* a building, structure, facility, or installation," such as "add-on controls" and "inherently lower-emitting processes/practices/designs." *Id.*, at 32524. It then explained that the Clean Power Plan, rather than setting the standard "based on the application of equipment and practices at the level of an individual facility," had instead based it on "a shift in the energy generation mix at the grid level," *id.*, at 32523—not the sort of measure that has "a potential for application to an individual source." *Id.*, at 32524.

The Agency determined that "the interpretative question raised" by the Clean Power Plan—"*i.e.*, whether a 'system of emission reduction' can consist of generation-shifting measures"—fell under the "major question doctrine." *Id.*, at 32529. Under that doctrine, EPA explained, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Ibid.* (quoting *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014) (internal quotation marks omitted)). The Agency concluded that the Clean Power Plan was

such a decision, for a number of reasons. Its "generation-shifting scheme was projected to have billions of dollars of impact." 84 Fed. Reg. 32529. "[N]o section 111 rule of the scores issued ha[d] ever been based on generation shifting." *Ibid.* And that novel reading of the statute would empower EPA "to order the wholesale restructuring of any industrial sector" based only on its discretionary assessment of "such factors as 'cost' and 'feasibility.'" *Ibid.*

EPA argued that under the major questions doctrine, a clear statement was necessary to conclude that Congress intended to delegate authority "of this breadth to regulate a fundamental sector of the economy." *Ibid.* It found none. "Indeed," it concluded, given the text and structure of the statute, "Congress has directly spoken to this precise question and precluded" the use of measures such as generation shifting. *Ibid.*

In the same rulemaking, the Agency replaced the Clean Power Plan by promulgating a different Section 111(d) regulation, known as the Affordable Clean Energy (ACE) Rule. *Id.*, at 32532. Based on its view of what measures may permissibly make up the BSER, EPA determined that the best system would be akin to building block one of the Clean Power Plan: a combination of equipment upgrades and operating practices that would improve facilities' heat rates. *Id.*, at 32522, 32537. The ACE Rule determined that the application of its BSER measures would result in only small reductions in carbon dioxide emissions. *Id.*, at 32561.

D

A number of States and private parties immediately filed petitions for review in the D. C. Circuit, challenging EPA's repeal of the Clean Power Plan and its enactment of the replacement ACE Rule. Other States and private entities—including petitioners here West Virginia, North Dakota, Westmoreland Mining Holdings LLC, and The North American Coal Corporation (NACC)—intervened to defend both

actions.

The Court of Appeals consolidated all 12 petitions for review into one case. It then held that EPA's "repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act"—namely, that generation shifting cannot be a "system of emission reduction" under Section 111. 985 F. 3d, at 995. To the contrary, the court concluded, the statute could reasonably be read to encompass generation shifting. As part of that analysis, the Court of Appeals concluded that the major questions doctrine did not apply, and thus rejected the need for a clear statement of congressional intent to delegate such power to EPA. *Id.*, at 959–968. Having found that EPA misunderstood the scope of its authority under the Clean Air Act, the Court vacated the Agency's repeal of the Clean Power Plan and remanded to the Agency for further consideration. *Id.*, at 995. It also vacated and remanded the replacement rule, the ACE Rule, for the same reason. *Ibid.*

The court's decision, handed down on January 19, 2021, was quickly followed by another change in Presidential administrations. One month later, EPA moved the Court of Appeals to partially stay the issuance of its mandate as it pertained to the Clean Power Plan. The Agency did so to ensure that the Clean Power Plan would not immediately go back into effect. Respondents' Motion for a Partial Stay of Issuance of the Mandate in *American Lung Assn.* v. *EPA*, No. 19–1140 etc. (CADC), p. 4. EPA believed that such a result would not make sense while it was in the process of considering whether to promulgate a new Section 111(d) rule. *Ibid.* No party opposed the motion, and the court accordingly stayed its vacatur of the Agency's repeal of the Clean Power Plan.

Westmoreland, NACC, and the States defending the repeal of the Clean Power Plan all filed petitions for certiorari. We granted the petitions and consolidated the cases. 595 U. S. ___ (2021).

II

We first consider the Government's contention that no petitioner has Article III standing to seek our review.

Although most disputes over standing concern whether a plaintiff has satisfied the requirement when filing suit, "Article III demands that an actual controversy persist throughout all stages of litigation." *Hollingsworth* v. *Perry*, 570 U. S. 693, 705 (2013) (internal quotation marks omitted). The requirement of standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64 (1997). In considering a litigant's standing to appeal, the question is whether it has experienced an injury "fairly traceable to the *judgment below*." *Food Marketing Institute* v. *Argus Leader Media*, 588 U. S. ___, ___ (2019) (slip op., at 4) (emphasis added; internal quotation marks omitted). If so, and a "favorable ruling" from the appellate court "would redress [that] injury," then the appellant has a cognizable Article III stake. *Ibid.*

Here, it is apparent that at least one group of petitioners—the state petitioners—are injured by the Court of Appeals' judgment. That judgment vacated "the ACE rule *and* its embedded repeal of the Clean Power Plan," 985 F. 3d, at 995 (emphasis added), and accordingly purports to bring the Clean Power Plan back into legal effect. Thus, to the extent the Clean Power Plan harms the States, the D. C. Circuit's judgment inflicts the same injury. And there can be "little question" that the rule does injure the States, since they are "the object of" its requirement that they more stringently regulate power plant emissions within their borders. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561–562 (1992).

The Government counters that "agency and judicial actions" subsequent to the court's entry of judgment have "eliminated any . . . possibility" of injury. Brief for Federal

Respondents 16. First, after the decision, EPA informed the Court of Appeals that it does not intend to enforce the Clean Power Plan because it has decided to promulgate a new Section 111(d) rule. Second, on EPA's request, the lower court stayed the part of its judgment that vacated the repeal, pending that new rulemaking. "These circumstances," says the Government, "have *mooted* the prior dispute as to the CPP Repeal Rule's legality." *Id.*, at 17 (emphasis added).

That Freudian slip, however, reveals the basic flaw in the Government's argument: It is the doctrine of *mootness*, not standing, that addresses whether "an intervening circumstance [has] deprive[d] the plaintiff of a personal stake in the outcome of the lawsuit." *Genesis HealthCare Corp.* v. *Symczyk*, 569 U. S. 66, 72 (2013) (internal quotation marks omitted); see also *Friends of the Earth*, *Inc.* v. *Laidlaw Environmental Services (TOC)*, *Inc.*, 528 U. S. 167, 189–192 (2000). The distinction matters because the Government, not petitioners, bears the burden to establish that a once-live case has become moot. *Id.*, at 189; *Adarand Constructors*, *Inc.* v. *Slater*, 528 U. S. 216, 222 (2000) (*per curiam*).

That burden is "heavy" where, as here, "[t]he only conceivable basis for a finding of mootness in th[e] case is [the respondent's] voluntary conduct." *Friends of the Earth*, 528 U. S., at 189. Although the Government briefly argues that the lower court's stay of its mandate extinguished the controversy, it cites no authority for that proposition, and it does not make sense: Lower courts frequently stay their mandates when notified that the losing party intends to seek our certiorari review. So the Government's mootness argument boils down to its representation that EPA has no intention of enforcing the Clean Power Plan prior to promulgating a new Section 111(d) rule.

But "voluntary cessation does not moot a case" unless it is "absolutely clear that the allegedly wrongful behavior

could not reasonably be expected to recur." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 719 (2007). Here the Government "nowhere suggests that if this litigation is resolved in its favor it will not" reimpose emissions limits predicated on generation shifting; indeed, it "vigorously defends" the legality of such an approach. *Ibid.* We do not dismiss a case as moot in such circumstances. See *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 288–289 (1982). The case thus remains justiciable, and we may turn to the merits.

III

A

In devising emissions limits for power plants, EPA first "determines" the "best system of emission reduction" that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated." 42 U. S. C. §7411(a)(1). The Agency then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. *Ibid.*; see also 80 Fed. Reg. 64719. The BSER, therefore, "is the central determination that the EPA must make in formulating [its emission] guidelines" under Section 111. *Id.*, at 64723. The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the "best system of emission reduction" within the meaning of Section 111.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. *FDA* v. *Brown &*

Williamson Tobacco Corp., 529 U. S. 120, 159 (2000). In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *Id.*, at 159–160.

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. *Id.*, at 126–127. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." *Id.*, at 160. In *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 3), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the . . . spread of" disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so. *Id.*, at ___–___ (slip op., at 6–8).

Our decision in *Utility Air* addressed another question regarding EPA's authority—namely, whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. 573 U. S., at 310. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office

buildings, that had never before been subject to such requirements. *Id.*, at 310, 324. We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." *Id.*, at 324. In *Gonzales* v. *Oregon*, 546 U. S. 243 (2006), we confronted the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power to revoke licenses where he found them "inconsistent with the public interest," 21 U. S. C. §823(f). We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation . . . not sustainable." 546 U. S., at 267. Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration's mandate that "84 million Americans . . . either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense." *National Federation of Independent Business* v. *Occupational Safety and Health Administration*, 595 U. S. ___, ___ (2022) (*per curiam*) (slip op., at 5). We found it "telling that OSHA, in its half century of existence," had never relied on its authority to regulate occupational hazards to impose such a remarkable measure. *Id.*, at ___ (slip op., at 8).

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue, *Brown & Williamson*, 529 U. S., at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *Whitman*, 531 U. S., at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. *MCI Telecommunications Corp.* v.

American Telephone & Telegraph Co., 512 U. S. 218, 229 (1994). Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." E. Gellhorn & P. Verkuil, Controlling *Chevron*-Based Delegations, 20 Cardozo L. Rev. 989, 1011 (1999). We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn.* v. *FCC*, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. *Utility Air*, 573 U. S., at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims. *Ibid.*

The dissent criticizes us for "announc[ing] the arrival" of this major questions doctrine, and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation," *post,* at 13, 15 (opinion of KAGAN, J.). But in what the dissent calls the "key case" in this area, *Brown & Williamson*, *post,* at 15, the Court could not have been clearer: "In extraordinary cases . . . there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. 529 U. S., at 159. Or, as we put it more recently, we "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." *Utility Air*, 573 U. S., at 324. The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear

congressional authorization," *ibid.*—confirms that the approach under the major questions doctrine is distinct.

As for the major questions doctrine "label[]," *post,* at 13, it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we. See *Utility Air*, 573 U. S., at 324 (citing *Brown & Williamson* and *MCI*); *King* v. *Burwell*, 576 U. S. 473, 486 (2015) (citing *Utility Air*, *Brown & Williamson*, and *Gonzales*).

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air*, 573 U. S., at 324. It located that newfound power in the vague language of an "ancillary provision[]" of the Act, *Whitman*, 531 U. S., at 468, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Brown & Williamson*, 529 U. S., at 159–160; *Gonzales*, 546 U. S., at 267–268; *Alabama Assn.*, 594 U. S., at ___, ___ (slip op., at 2, 8). Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U. S., at 159–160.

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to

operate more cleanly. See, *e.g.*, 41 Fed. Reg. 48706 (requiring "degree of control achievable through the application of fiber mist eliminators"); see also *supra*, at 6. It had never devised a cap by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." 80 Fed. Reg. 64726; see *id.*, at 64738 ("[O]ur traditional interpretation . . . has allowed regulated entities to produce as much of a particular good as they desire provided that they do so through an appropriately clean (or low-emitting) process."). And as Justice Frankfurter has noted, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC* v. *Bunte Brothers*, *Inc.*, 312 U. S. 349, 352 (1941).

The Government quibbles with this description of the history of Section 111(d), pointing to one rule that it says relied upon a cap-and-trade mechanism to reduce emissions. See 70 Fed. Reg. 28616 (2005) (Mercury Rule). The legality of that choice was controversial at the time and was never addressed by a court. See *New Jersey* v. *EPA*, 517 F. 3d 574 (CADC 2008) (vacating on other grounds). Even assuming the Rule was valid, though, it still does not help the Government. In that regulation, EPA set the actual "emission cap"—*i.e.*, the limit on emissions that sources would be required to meet—"based on the level of [mercury] emissions reductions that w[ould] be achievable by" the use of "technologies [that could be] installed and operational on a nationwide basis" in the relevant timeframe—namely, wet scrubbers. 70 Fed. Reg. 28620–28621. In other words, EPA set the cap based on the application of particular controls, and regulated sources could have complied by installing them. By contrast, and by design, there is no control a coal

plant operator can deploy to attain the emissions limits established by the Clean Power Plan. See *supra*, at 10. The Mercury Rule, therefore, is no precedent for the Clean Power Plan. To the contrary, it was one more entry in an unbroken list of prior Section 111 rules that devised the enforceable emissions limit by determining the best control mechanisms available for the source.[1]

This consistent understanding of "system[s] of emission reduction" tracked the seemingly universal view, as stated by EPA in its inaugural Section 111(d) rulemaking, that "Congress intended a technology-based approach" to regulation in that Section. 40 Fed. Reg. 53343 (1975); see *id.*, at 53341 ("degree of control to be reflected in EPA's emission guidelines" will be based on "application of best adequately demonstrated control technology").[2] A technology-based standard, recall, is one that focuses on improving the emissions performance of individual sources. EPA "commonly

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[1] The dissent cites other ostensible precedents, see *post*, at 25–26, but they are also inapposite. A few allowed cap-and-trade or similar averaging measures as compliance mechanisms, like the Mercury Rule. See, *e.g.*, 60 Fed. Reg. 65402 (1995). The others were not Section 111 rules.

[2] See McGarity 165 (EPA promulgates "technology-based new source performance standards that require the implementation of the 'best available demonstrated' technology"); P. McCubbin, The Risk in Technology-Based Standards, 16 Duke Env. L. & Pol'y Forum 1, 46, n. 180 (2003) (Section 111 standards "are another set of technology-based standards"); W. Wagner, The Triumph of Technology-Based Standards, 2000 U. Ill. L. Rev 83, 84, n. 4 ("Technology-based standards made their initial appearance" in "Section 111 of the Clean Air Act," which "requires the EPA to set technology-based emission limitations").

The dissent points to a 1977 amendment to Section 111 as evidence that the 1970 Congress did not intend for EPA to establish this sort of source-specific standard. *Post*, at 10–11. But it is clear that the 1977 amendment was merely intended to prohibit power plants from adopting one specific kind of at-the-source measure—a switch from burning high-sulfur coal to low-sulfur coal—and was not intended or understood to change the basic, source-focused regulatory approach. See *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F. 2d 901, 919 (CA8 1990) (explaining the history); B. Ackerman & W. Hassler, Clean Coal/Dirty Air (1981) (same).

referred to" the "level of control" required as a "best demonstrated technology (BDT)" standard, 73 Fed. Reg. 34073, and consistently applied it as such. *E.g.*, 61 Fed. Reg. 9907 (declaring "BDT" to be "a well-designed and well-operated gas collection system and . . . a control device capable of reducing [harmful gases] in the collected gas by 98 weight-percent.").

Indeed, EPA nodded to this history in the Clean Power Plan itself, describing the sort of "systems of emission reduction" it had always before selected—"efficiency improvements, fuel-switching," and "add-on controls"—as "more traditional air pollution control measures." 80 Fed. Reg. 64784. The Agency noted that it had "considered" such measures as potential systems of emission reduction for carbon dioxide, *ibid.*, including a measure it ultimately adopted as a "component" of the BSER, namely, heat rate improvements. *Id.*, at 64727.

But, the Agency explained, in order to "control[] CO_2 from affected [plants] at levels . . . necessary to mitigate the dangers presented by climate change," it could not base the emissions limit on "measures that improve efficiency at the power plants." *Id.*, at 64728. "The quantity of emissions reductions resulting from the application of these measures" would have been "too small." *Id.*, at 64727. Instead, to attain the necessary "critical CO_2 reductions," EPA adopted what it called a "broader, forward-thinking approach to the design" of Section 111 regulations. *Id.*, at 64703. Rather than focus on improving the performance of individual sources, it would "improve the *overall power system* by lowering the carbon intensity of power generation." *Ibid.* (emphasis added). And it would do that by forcing a shift throughout the power grid from one type of energy source to another. In the words of the then-EPA Administrator, the rule was "not about pollution control" so much as it was "an investment opportunity" for States, especially "investments in renewables and clean energy." Oversight

Hearing on EPA's Proposed Carbon Pollution Standards for Existing Power Plants before the Senate Committee on Environment and Public Works, 113th Cong., 2d Sess., p. 33 (2014).

This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. *MCI*, 512 U. S., at 231. Under the Agency's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source. Under that paradigm, if a source was already operating at that level, there was nothing more for EPA to do. Under its newly "discover[ed]" authority, *Utility Air*, 573 U. S., at 324, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be "best" if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants to "shift" away virtually all of their generation—*i.e.*, to cease making power altogether.[3]

The Government attempts to downplay the magnitude of this "unprecedented power over American industry." *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion). The amount of generation shifting ordered, it argues, must be "adequately demonstrated" and "best" in light of the statu-

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[3] The dissent suggests that EPA could bring about the same result by, for example, simply requiring coal plants to become natural gas plants, and that this would fit within the prior regulatory approach of efficiency-improving, at-the-source measures. *Post*, at 24. Of course, EPA has never ordered anything remotely like that, and we doubt it could. Section 111(d) empowers EPA to guide States in "establish[ing] standards of performance" for "existing source[s]," §7411(d)(1), not to direct existing sources to effectively cease to exist.

tory factors of "cost," "nonair quality health and environmental impact," and "energy requirements." 42 U. S. C. §7411(a)(1). EPA therefore must limit the magnitude of generation shift it demands to a level that will not be "exorbitantly costly" or "threaten the reliability of the grid." Brief for Federal Respondents 42.

But this argument does not so much *limit* the breadth of the Government's claimed authority as *reveal* it. On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably "exorbitant."

There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development." EPA, Fiscal Year 2016: Justification of Appropriation Estimates for the Committee on Appropriations 213 (2015) (emphasis added). "When [an] agency has no comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so. *Kisor* v. *Wilkie*, 588 U. S. ___, ___ (2019) (slip op., at 17); see also *Gonzales*, 546 U. S., at 266–267.

We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal-based generation there should be over the coming decades. *MCI*, 512 U. S., at 231; see also *Brown & Williamson*, 529 U. S., at 160 ("We are confident that Congress could not have intended to delegate a decision of such economic and

political significance to an agency in so cryptic a fashion."). The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. See W. Eskridge, Interpreting Law: A Primer on How To Read Statutes and the Constitution 288 (2016) ("Even if Congress has delegated an agency general rulemaking or adjudicatory power, judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions."). Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d).

The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter. *Post*, at 20–22. But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly "raise[s] an eyebrow." *Post*, at 18. We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," *post*, at 21, even though reducing generation at coal plants would reduce workplace illness and injury from coal dust.

The dissent also cites our decision in *American Elec. Power Co.* v. *Connecticut*, 564 U. S. 410 (2011). *Post*, at 20. The question there, however, was whether Congress wanted district court judges to decide, under unwritten federal nuisance law, "whether and how to regulate carbon-dioxide emissions from powerplants." 564 U. S., at 426. We answered no, given the existence of Section 111(d). But we said nothing about the ways in which Congress intended EPA to exercise its power under that provision. And it is doubtful we had in mind that it would claim the authority

to require a large shift from coal to natural gas, wind, and solar. After all, EPA had never regulated in that manner, despite having issued many prior rules governing power plants under Section 111. See, *e.g.*, 71 Fed. Reg. 9866 (2006); 70 Fed. Reg. 28616; 44 Fed. Reg. 33580; 36 Fed. Reg. 24875 (1973).[4]

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. *Brown & Williamson*, 529 U. S., at 144; see also *Alabama Assn.*, 594 U. S., at ___ (slip op., at 2); *Bunte Brothers*, 312 U. S., at 352 (lack of authority not previously exercised "reinforced by [agency's] unsuccessful attempt . . . to secure from Congress an express grant of [the challenged] authority"). At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. See 80 Fed. Reg. 64734 ("Emissions trading is . . . an integral part of our BSER analysis."). Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. See, *e.g.*, American Clean Energy and Security

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[4] According to the dissent, "EPA is always controlling the mix of energy sources" under Section 111 because all of the Agency's rules impose some costs on regulated plants, and therefore (all else equal) cause those plants to lose some share of the electricity market. *Post,* at 22. But there is an obvious difference between (1) issuing a rule that may end up causing an incidental loss of coal's market share, and (2) simply announcing what the market share of coal, natural gas, wind, and solar must be, and then requiring plants to reduce operations or subsidize their competitors to get there. No one has ever thought that the Clean Power Plan was just business as usual. See *American Lung Assn.* v. *EPA*, 985 F. 3d 914, 1000 (CADC 2021) (Walker, J., dissenting) ("Leaders of the environmental movement considered the rule 'groundbreaking,' called its announcement 'historic,' and labeled it a 'critically important catalyst.'" (footnotes omitted)).

Act of 2009, H. R. 2454, 111th Cong., 1st Sess.; Clean Energy Jobs and American Power Act, S. 1733, 111th Cong., 1st Sess. (2009). It has also declined to enact similar measures, such as a carbon tax. See, *e.g.*, Climate Protection Act of 2013, S. 332, 113th Cong., 1st Sess.; Save our Climate Act of 2011, H. R. 3242, 112th Cong., 1st Sess. "The importance of the issue," along with the fact that the same basic scheme EPA adopted "has been the subject of an earnest and profound debate across the country, . . . makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U. S., at 267–268 (internal quotation marks omitted).

C

Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to "clear congressional authorization" to regulate in that manner. *Utility Air*, 573 U. S., at 324.

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated." 42 U. S. C. §7411(a)(1). As a matter of "definitional possibilities," *FCC* v. *AT&T Inc.*, 562 U. S. 397, 407 (2011), generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction," Brief for Federal Respondents 31—capable of reducing emissions. But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.

The Government, echoed by the other respondents, looks to other provisions of the Clean Air Act for support. It

points out that the Act elsewhere uses the word "system" or "similar words" to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution. *Ibid.* The Acid Rain program set out in Title IV of the Act establishes a cap-and-trade scheme for reducing sulfur dioxide emissions, which the statute refers to as an "emission allocation and transfer *system*." §7651(b) (emphasis added). And Section 110 of the NAAQS program specifies that "marketable permits" and "auctions of emissions rights" qualify as "control measures, means, or techniques" that States may adopt in their state implementation plans in order "to meet the applicable requirements of" a NAAQS. §7410(a)(2)(A). If the word "system" or similar words like "technique" or "means" can encompass cap-and-trade, the Government maintains, why not in Section 111?

But just because a cap-and-trade "system" can be used to reduce emissions does not mean that it is the kind of "system of emission reduction" referred to in Section 111. Indeed, the Government's examples demonstrate why it is not.

First, unlike Section 111, the Acid Rain and NAAQS programs contemplate trading systems as a means of *complying* with an *already established emissions limit*, set either directly by Congress (as with Acid Rain, see 42 U. S. C. §7651c) or by reference to the safe concentration of the pollutant in the ambient air (as with the NAAQS). In Section 111, by contrast, it is EPA's job to come up with the cap itself: the "numerical limit on emissions" that States must apply to each source. 80 Fed. Reg. 64768. We doubt that Congress directed the Agency to set an emissions cap at the level "which reflects the degree of emission limitation achievable through the application of [a cap-and-trade] system," §7411(a)(1), for that degree is indeterminate. It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion, such as the

NAAQS. It is quite another to simply authorize EPA to set the cap itself wherever the Agency sees fit.

Second, Congress added the above authorizations for the use of emissions trading programs in 1990, simultaneous with amending Section 111 to its present form. At the time, cap-and-trade was a novel and highly touted concept. The Acid Rain program was "the nation's first-ever emissions trading program." L. Heinzerling & R. Steinzor, A Perfect Storm: Mercury and the Bush Administration, 34 Env. L. Rep. 10297, 10309 (2004). And Congress went out of its way to amend the NAAQS statute to make absolutely clear that the "measures, means, [and] techniques" States could use to meet the NAAQS included cap-and-trade. §7410(a)(2)(A). Yet "not a peep was heard from Congress about the possibility that a trading regime could be installed under §111." *Id.*, at 10309.

Finally, the Government notes that other parts of the Clean Air Act, past and present, have "explicitly limited the permissible components of a particular 'system'" of emission reduction in some regard. Brief for Federal Respondents 32. For instance, a separate section of the statute empowers EPA to require the "degree of reduction achievable through the *retrofit* application of the best system of *continuous* emission reduction." §7651f(b)(2) (emphasis added). The comparatively unadorned use of the phrase "best system of emission reduction" in Section 111, the Government urges, "suggest[s] a conscious congressional" choice *not* to limit the measures that may constitute the BSER to those applicable at or to an individual source. *Id.*, at 32.

These arguments, however, concern an interpretive question that is not at issue. We have no occasion to decide whether the statutory phrase "system of emission reduction" refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. To be sure, it is pertinent to our analysis that EPA has acted consistent

with such a limitation for the first four decades of the statute's existence. But the only interpretive question before us, and the only one we answer, is more narrow: whether the "best system of emission reduction" identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.[5]

* * *

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." *New York* v. *United States*, 505 U. S. 144, 187 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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[5] We find it odd that the dissent accuses us of champing at the bit to "constrain EPA's efforts to address climate change," *post*, at 4, yet also chides us for "mak[ing] no effort" to opine—in what would be plain dicta—on "how far [our] opinion constrain[s] EPA," *post*, at 12.

SUPREME COURT OF THE UNITED STATES

Nos. 20–1530, 20–1531, 20–1778 and 20–1780

WEST VIRGINIA, ET AL., PETITIONERS
20–1530 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

THE NORTH AMERICAN COAL CORPORATION, PETITIONER
20–1531 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

WESTMORELAND MINING HOLDINGS LLC, PETITIONER
20–1778 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NORTH DAKOTA, PETITIONER
20–1780 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 30, 2022]

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to "'clear congressional authorization'" when they claim the power to make decisions of vast "'economic and political significance.'" *Ante*, at 17, 19. Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional

guarantees. I join the Court's opinion and write to offer some additional observations about the doctrine on which it rests.

I

A

One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts "act as faithful agents of the Constitution." A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 169 (2010) (Barrett).

Consider some examples. The Constitution prohibits Congress from passing laws imposing various types of retroactive liability. See Art. I, § 9; *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265–266 (1994). Consistent with this rule, Chief Justice Marshall long ago advised that "a court . . . ought to struggle hard against a [statutory] construction which will, by a retrospective operation, affect the rights of parties." *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801). Justice Paterson likewise insisted that courts must interpret statutes to apply only prospectively "unless they are so clear, strong, and imperative, that no other meaning can be annexed to them." *United States* v. *Heth*, 3 Cranch 399, 413 (1806).

The Constitution also incorporates the doctrine of sovereign immunity. See, *e.g.*, *Hans* v. *Louisiana*, 134 U. S. 1, 12–17 (1890). To enforce that doctrine, courts have consistently held that "nothing but express words, or an insurmountable implication" would justify the conclusion that

lawmakers intended to abrogate the States' sovereign immunity. *Chisholm* v. *Georgia*, 2 Dall. 419, 450 (1793) (Iredell, J., dissenting); see *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 55 (1996). In a similar vein, Justice Story observed that "[i]t is a general rule in the interpretation of legislative acts not to construe them to embrace the sovereign power or government, unless expressly named or included by necessary implication." *United States* v. *Greene*, 26 F. Cas. 33, 34 (No. 15, 258) (CC Me. 1827).

The major questions doctrine works in much the same way to protect the Constitution's separation of powers. *Ante*, at 19. In Article I, "the People" vested "[a]ll" federal "legislative powers . . . in Congress." Preamble; Art. I, § 1. As Chief Justice Marshall put it, this means that "important subjects . . . must be entirely regulated by the legislature itself," even if Congress may leave the Executive "to act under such general provisions to fill up the details." *Wayman* v. *Southard*, 10 Wheat. 1, 42–43 (1825). Doubtless, what qualifies as an important subject and what constitutes a detail may be debated. See, *e.g.*, *Gundy* v. *United States*, 588 U. S. ___, ___–___ (2019) (plurality opinion) (slip op., at 4–6); *id.*, at ___–___ (GORSUCH, J., dissenting) (slip op., at 10–12). But no less than its rules against retroactive legislation or protecting sovereign immunity, the Constitution's rule vesting federal legislative power in Congress is "vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 692 (1892).

It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable "ministers." The Federalist No. 11, p. 85 (C. Rossiter ed. 1961) (A. Hamilton). From time to time, some

have questioned that assessment.[1] But by vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure "not only that all power [w]ould be derived from the people," but also "that those [e]ntrusted with it should be kept in dependence on the people." *Id.*, No. 37, at 227 (J. Madison). The Constitution, too, placed its trust not in the hands of "a few, but [in] a number of hands," *ibid.*, so that those who make our laws would better reflect the diversity of the people they represent and have an "immediate dependence on, and an intimate sympathy with, the people." *Id.*, No. 52, at 327 (J. Madison). Today, some might describe the Constitution as having designed the federal lawmaking process to capture the wisdom of the masses. See P. Hamburger, Is Administrative Law Unlawful? 502–503 (2014).

Admittedly, lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident. The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty. See The Federalist No. 48, at 309–312 (J. Madison); see also *id.*, No. 73, at 441–442 (A. Hamilton). As a result,

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[1] For example, Woodrow Wilson famously argued that "popular sovereignty" "embarrasse[d]" the Nation because it made it harder to achieve "executive expertness." The Study of Administration, 2 Pol. Sci. Q. 197, 207 (1887) (Administration). In Wilson's eyes, the mass of the people were "selfish, ignorant, timid, stubborn, or foolish." *Id.*, at 208. He expressed even greater disdain for particular groups, defending "[t]he white men of the South" for "rid[ding] themselves, by fair means or foul, of the intolerable burden of governments sustained by the votes of ignorant [African-Americans]." 9 W. Wilson, History of the American People 58 (1918). He likewise denounced immigrants "from the south of Italy and men of the meaner sort out of Hungary and Poland," who possessed "neither skill nor energy nor any initiative of quick intelligence." 5 *id.*, at 212. To Wilson, our Republic "tr[ied] to do too much by vote." Administration 214.

the framers deliberately sought to make lawmaking difficult by insisting that two houses of Congress must agree to any new law and the President must concur or a legislative supermajority must override his veto.

The difficulty of the design sought to serve other ends too. By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time. See *id.*, No. 10, at 82–84 (J. Madison). The need for compromise inherent in this design also sought to protect minorities by ensuring that their votes would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority. See *id.*, No. 51, at 322–324 (J. Madison). The difficulty of legislating at the federal level aimed as well to preserve room for lawmaking "by governments more local and more accountable than a distant federal" authority, *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 536 (2012) (plurality opinion), and in this way allow States to serve as "laborator[ies]" for "novel social and economic experiments," *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting); see J. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 11 (2018).

Permitting Congress to divest its legislative power to the Executive Branch would "dash [this] whole scheme." *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 61 (2015) (ALITO, J., concurring). Legislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him. See S. Breyer, Making Our Democracy Work: A Judge's View 110 (2010) ("[T]he president may not have the time or willingness to review [agency] decisions"). In a world like that, agencies could churn out new laws more or less at whim. Intrusions on

liberty would not be difficult and rare, but easy and profuse. See The Federalist No. 47, at 303 (J. Madison); *id.*, No. 62, at 378 (J. Madison). Stability would be lost, with vast numbers of laws changing with every new presidential administration. Rather than embody a wide social consensus and input from minority voices, laws would more often bear the support only of the party currently in power. Powerful special interests, which are sometimes "uniquely" able to influence the agendas of administrative agencies, would flourish while others would be left to ever-shifting winds. T. Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039, 1043 (1997). Finally, little would remain to stop agencies from moving into areas where state authority has traditionally predominated. See, *e.g.*, *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 173–174 (2001) (*SWANC*). That would be a particularly ironic outcome, given that so many States have robust nondelegation doctrines designed to ensure democratic accountability in their state lawmaking processes. See R. May, The Nondelegation Doctrine is Alive and Well in the States, The Reg. Rev. (Oct. 15, 2020).

B

Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine. See *Gundy*, 588 U. S., at ___–___ (GORSUCH, J., dissenting) (slip op., at 20–21). Some version of this clear-statement rule can be traced to at least 1897, when this Court confronted a case involving the Interstate Commerce Commission, the federal government's "first modern regulatory agency." S. Dudley, Milestones in the Evolution of the Administrative State 3 (Nov. 2020). The ICC argued that Congress had endowed it with the power to set carriage prices for railroads. See *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 499 (1897). The Court

deemed that claimed authority "a power of supreme delicacy and importance," given the role railroads then played in the Nation's life. *Id.*, at 505. Therefore, the Court explained, a special rule applied:

> "That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and if Congress had intended to grant such a power to the [agency], it cannot be doubted that it would have used language *open to no misconstruction*, but *clear and direct*." *Ibid.* (emphasis added).

With the explosive growth of the administrative state since 1970, the major questions doctrine soon took on special importance.[2] In 1980, this Court held it "unreasonable to assume" that Congress gave an agency "unprecedented power[s]" in the "absence of a clear [legislative] mandate." *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (plurality opinion). In the years that followed, the Court routinely enforced "the nondelegation doctrine" through "the interpretation of statu-

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[2] In the 1960s and 1970s, Congress created dozens of new federal administrative agencies. See W. Howell & D. Lewis, Agencies by Presidential Design, 64 J. of Politics 1095, 1105 (Nov. 2002). Between 1970 and 1990, the Code of Federal Regulations grew from about 44,000 pages to about 106,000. See C. DeMuth, Can the Administrative State be Tamed?, 8 J. Legal Analysis 121, 126 (Feb. 2016). Today, Congress issues "roughly two hundred to four hundred laws" every year, while "federal administrative agencies adopt something on the order of three thousand to five thousand final rules." R. Cass, Rulemaking Then and Now: From Management to Lawmaking, 28 Geo. Mason L. Rev. 683, 694 (2021). Beyond that, agencies regularly "produce thousands, if not millions," of guidance documents which, as a practical matter, bind affected parties too. See C. Coglianese, Illuminating Regulatory Guidance, 9 Mich. J. Env. & Admin. L. 243, 247–248 (2020).

tory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta* v. *United States*, 488 U. S. 361, 373, n. 7 (1989). In fact, this Court applied the major questions doctrine in "all corners of the administrative state," whether the issue at hand involved an agency's asserted power to regulate tobacco products, ban drugs used in physician-assisted suicide, extend Clean Air Act regulations to private homes, impose an eviction moratorium, or enforce a vaccine mandate. *Ante*, at 17; see *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 160 (2000); *Gonzales* v. *Oregon*, 546 U. S. 243, 267 (2006); *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014); *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 6); *National Federation of Independent Business* v. *OSHA*, 595 U. S. ___, ___ (2022) (*per curiam*) (slip op., at 6).[3]

The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does "not inadvertently cross constitutional lines." Barrett 175. And the constitutional lines at stake here are surely no less important than those this Court has long held sufficient to justify parallel clear-statement rules. At stake is not just a question of retroactive liability or sovereign immunity, but basic questions about self-government, equality, fair notice,

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[3] At times, this Court applied the major questions doctrine more like an ambiguity canon. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000). Ambiguity canons merely instruct courts on how to "choos[e] between equally plausible interpretations of ambiguous text," and are thus weaker than clear-statement rules. Barrett 109. But our precedents have usually applied the doctrine as a clear-statement rule, and the Court today confirms that is the proper way to apply it. See *ante*, at 19–20, 28.

federalism, and the separation of powers. See Part I–A, *supra*. The major questions doctrine seeks to protect against "unintentional, oblique, or otherwise unlikely" intrusions on these interests. *NFIB* v. *OSHA*, 595 U. S., at ___ (GORSUCH, J., concurring) (slip op., at 5). The doctrine does so by ensuring that, when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not "exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond" those the people's representatives actually conferred on them. *Ibid.* As the Court aptly summarizes it today, the doctrine addresses "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *Ante*, at 20.

II

A

Turning from the doctrine's function to its application, it seems to me that our cases supply a good deal of guidance about when an agency action involves a major question for which clear congressional authority is required.

First, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great "political significance," *NFIB* v. *OSHA*, 595 U. S., at ___ (slip op., at 6) (internal quotation marks omitted), or end an "earnest and profound debate across the country," *Gonzales*, 546 U. S., at 267–268 (internal quotation marks omitted); see *ante*, at 17. So, for example, in *Gonzales*, the Court found that the doctrine applied when the Attorney General issued a regulation that would have effectively banned most forms of physician-assisted suicide even as certain States were considering whether to permit the practice. 546 U. S., at 267. And in *NFIB* v. *OSHA*, the Court held the doctrine applied when an agency sought to mandate COVID–19 vaccines nationwide for most workers at a

time when Congress and state legislatures were engaged in robust debates over vaccine mandates. 595 U. S., at ___ (slip op., at 5); *id.*, at ___ (GORSUCH, J., concurring) (slip op., at 3). Relatedly, this Court has found it telling when Congress has "'considered and rejected'" bills authorizing something akin to the agency's proposed course of action. *Ante*, at 20, 27 (quoting *Brown & Williamson*, 529 U. S., at 144). That too may be a sign that an agency is attempting to "'work [a]round'" the legislative process to resolve for itself a question of great political significance. *NFIB* v. *OSHA*, 595 U. S., at ___ (GORSUCH, J., concurring) (slip op., at 3).[4]

Second, this Court has said that an agency must point to clear congressional authorization when it seeks to regulate "'a significant portion of the American economy,'" *ante*, at 18 (quoting *Utility Air*, 573 U. S., at 324), or require "billions of dollars in spending" by private persons or entities, *King* v. *Burwell*, 576 U. S. 473, 485 (2015). The Court has held that regulating tobacco products, eliminating rate regulation in the telecommunications industry, subjecting private homes to Clean Air Act restrictions, and suspending local housing laws and regulations can sometimes check this box. See *Brown & Williamson*, 529 U. S., at 160; *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994) (*MCI*); *Utility Air*, 573 U. S., at 324; *Alabama Assn. of Realtors*, 594 U. S., at ___ (slip op., at 6).

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[4] In the dissent's view, the Court has erred both today and in the past by pointing to failed legislation. *Post*, at 27–28 (opinion of KAGAN, J.). But the Court has not pointed to failed legislation to resolve what a duly enacted statutory text means, only to help resolve the antecedent question whether the agency's challenged action implicates a major question. The dissent endorses looking to extrinsic evidence to resolve that question too. See *post*, at 21–22 (discussing whether there is a "mismatch" between an agency's expertise and its challenged action).

Third, this Court has said that the major questions doctrine may apply when an agency seeks to "intrud[e] into an area that is the particular domain of state law." *Ibid*. Of course, another longstanding clear-statement rule—the federalism canon—also applies in these situations. To preserve the "proper balance between the States and the Federal Government" and enforce limits on Congress's Commerce Clause power, courts must "'be certain of Congress's intent'" before finding that it "legislate[d] in areas traditionally regulated by the States." *Gregory* v. *Ashcroft*, 501 U. S. 452, 459–460 (1991). But unsurprisingly, the major questions doctrine and the federalism canon often travel together. When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States. See *SWANC*, 531 U. S., at 162, 174.

While this list of triggers may not be exclusive, each of the signs the Court has found significant in the past is present here, making this a relatively easy case for the doctrine's application. The EPA claims the power to force coal and gas-fired power plants "to cease [operating] altogether." *Ante*, at 24. Whether these plants should be allowed to operate is a question on which people today may disagree, but it is a question everyone can agree is vitally important. See *ante*, at 24–25. Congress has debated the matter frequently. *Ibid.*; see generally Climate Change, The History of a Consensus and the Causes of Inaction, Hearing before the Subcommittee on Environment of the House Committee on Oversight and Reform, 116th Cong., 1st Sess., pt. I (2019). And so far it has "conspicuously and repeatedly declined" to adopt legislation similar to the Clean Power Plan (CPP). *Ante*, at 20; see *American Lung Assn.* v. *EPA*, 985 F. 3d 914, 998, n. 19 (CADC 2021) (Walker, J., concurring in part, concurring in judgment in part, and dissenting in part) (cataloguing failed legislative proposals); cf. *Brown &*

Williamson, 529 U. S., at 144. It seems that fact has frustrated the Executive Branch and led it to attempt its own regulatory solution in the CPP. See 985 F. 3d, at 998, n. 20 (President stating that "'if Congress won't act soon . . . I will'"); cf. *United States Telecom Assn.* v. *FCC*, 855 F. 3d 381, 423–424 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (noting a "President's intervention [may] underscor[e] the enormous significance" of a regulation).

Other suggestive factors are present too. "The electric power sector is among the largest in the U. S. economy, with links to every other sector." N. Richardson, Keeping Big Cases From Making Bad Law: The Resurgent "Major Questions" Doctrine, 49 Conn. L. Rev. 355, 388 (2016). The Executive Branch has acknowledged that its proposed rule would force an "aggressive transformation" of the electricity sector through "transition to zero-carbon renewable energy sources." White House Fact Sheet, App. in *American Lung Assn.* v. *EPA*, No. 19–1140 (CADC), pp. 2076–2077. The Executive Branch has also predicted its rule would force dozens of power plants to close and eliminate thousands of jobs by 2025. See EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3–27, 3–30, 3–33, 6–25 (Oct. 23, 2015). And industry analysts have estimated the CPP would cause consumers' electricity costs to rise by over $200 billion. See National Mining Assn., EPA's Clean Power Plan: An Economic Impact Analysis 2, 4 (2015). Finally, the CPP unquestionably has an impact on federalism, as "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Cooperative Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U. S. 375, 377 (1983). None of this is to say the policy the agency seeks to pursue is unwise or should not be pursued. It is only to say that the agency seeks to resolve for itself the sort of question normally reserved for Congress. As a result, we look for clear evidence

that the people's representatives in Congress have actually afforded the agency the power it claims.

B

At this point, the question becomes what qualifies as a clear congressional statement authorizing an agency's action. Courts have long experience applying clear-statement rules throughout the law, and our cases have identified several telling clues in this context too.

First, courts must look to the legislative provisions on which the agency seeks to rely "'with a view to their place in the overall statutory scheme.'" *Brown & Williamson*, 529 U. S., at 133. "[O]blique or elliptical language" will not supply a clear statement. *Ante*, at 18; see *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U. S. 119, 139 (2005) (plurality opinion) (cautioning against reliance on "broad or general language"). Nor may agencies seek to hide "elephants in mouseholes," *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001), or rely on "gap filler" provisions, *ante*, at 20. So, for example, in *MCI* this Court rejected the Federal Communication Commission's attempt to eliminate rate regulation for the telecommunications industry based on a "subtle" provision that empowered the FCC to "'modify'" rates. 512 U. S., at 231. In *Brown & Williamson*, the Court rejected the Food and Drug Administration's attempt to regulate cigarettes based a "cryptic" statutory provision that granted the agency the power to regulate "drugs" and "devices." 529 U. S., at 126, 156, 160. And in *Gonzales*, the Court doubted that Congress gave the Attorney General "broad and unusual authority" to regulate drugs for physician-assisted suicide through "oblique" statutory language. 546 U. S., at 267.

Second, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address. As the Court puts it today, it is unlikely

that Congress will make an "[e]xtraordinary gran[t] of regulatory authority" through "vague language" in "'a long-extant statute.'" *Ante*, at 18–20 (quoting *Utility Air*, 573 U. S., at 324). Recently, too, this Court found a clear statement lacking when OSHA sought to impose a nationwide COVID–19 vaccine mandate based on a statutory provision that was adopted 40 years before the pandemic and that focused on conditions specific to the workplace rather than a problem faced by society at large. See *NFIB* v. *OSHA*, 595 U. S., at ___ (GORSUCH, J., concurring) (slip op., at 3). Of course, sometimes old statutes may be written in ways that apply to new and previously unanticipated situations. See *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 499 (1985). But an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority. See *ante*, at 18.

Third, courts may examine the agency's past interpretations of the relevant statute. See *ante*, at 20–21. A "contemporaneous" and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency. *United States* v. *Philbrick*, 120 U. S. 52, 59 (1887). Conversely, in *NFIB* v. *OSHA*, the Court found it "telling that OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation" under the statute that the agency sought to invoke as authority for a nationwide vaccine mandate. 595 U. S., at ___ (slip op., at 8); *ante*, at 18; see also *Brown & Williamson*, 529 U. S., at 158–159 (noting that for decades the FDA had said it lacked statutory power to regulate cigarettes). As the Court states today, "'the want of [an] assertion of power by those who presumably would be alert'" to it is "'significant in determining whether such power was actually conferred.'" *Ante*, at 21. When an agency claims to have found a previously "unheralded power," its assertion generally warrants "a measure of

skepticism." *Utility Air*, 573 U. S., at 324.

Fourth, skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise. *Ante*, at 25. As the Court explains, "[w]hen an agency has no comparative expertise in making certain policy judgments, . . . Congress presumably would not task it with doing so." *Ibid.* (internal quotation marks and alterations omitted). So, for example, in *Alabama Assn. of Realtors*, this Court rejected an attempt by a public health agency to regulate housing. 594 U. S., at ___ (slip op., at 5). And in *NFIB* v. *OSHA*, the Court rejected an effort by a workplace safety agency to ordain "broad public health measures" that "f[ell] outside [its] sphere of expertise." 595 U. S., at ___ (slip op., at 6).[5]

Asking these questions again yields a clear answer in our case. See *ante*, at 28–31. As the Court details, the agency before us cites no specific statutory authority allowing it to transform the Nation's electrical power supply. See *ante*, at 28. Instead, the agency relies on a rarely invoked statutory provision that was passed with little debate and has been characterized as an "obscure, never-used section of the law." *Ante*, at 6 (internal quotation marks omitted). Nor has the agency previously interpreted the relevant provision to confer on it such vast authority; there is no original, longstanding, and consistent interpretation meriting judi-

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[5]The dissent not only agrees that a mismatch between an agency's expertise and its challenged action is relevant to the major questions doctrine analysis; the dissent suggests that such a mismatch is necessary to the doctrine's application. See *post*, at 14–15. But this Court has never taken that view. See, *e.g.*, *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 505 (1897) (interstate commerce agency regulating interstate railroad commerce); *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion) (workplace safety agency regulating workplace carcinogens); *Brown & Williamson*, 529 U. S., at 159–160 (drug agency regulating tobacco); *King* v. *Burwell*, 576 U. S. 473, 485–486 (2015) (tax agency administering tax credits).

cial respect. See *ante*, at 20–22. Finally, there is a "mismatch" between the EPA's expertise over environmental matters and the agency's claim that "Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy." *Ante*, at 25. Such a claimed power "requires technical and policy expertise *not* traditionally needed in [the] EPA's regulatory development." *Ibid.* (internal quotation marks omitted). Again, in observing this much, the Court does not purport to pass on the wisdom of the agency's course. It acknowledges only that agency officials have sought to resolve a major policy question without clear legislative authorization to do so.

III

In places, the dissent seems to suggest that we should not be unduly "'concerned'" with the Constitution's assignment of the legislative power to Congress. *Post*, at 29 (opinion of KAGAN, J.). Echoing Woodrow Wilson, the dissent seems to think "a modern Nation" cannot afford such sentiments. *Post*, at 29–31. But recently, our dissenting colleagues acknowledged that the Constitution assigns "all legislative Powers" to Congress and "bar[s their] further delegation." *Gundy*, 588 U. S., at ___ (plurality opinion of KAGAN, J.) (slip op., at 4) (internal quotation marks and alteration omitted). To be sure, in that case we disagreed about the exact nature of the "nondelegation inquiry" courts must employ to vindicate the Constitution. *Id.*, at ___ (slip op., at 5). But like Chief Justice Marshall, we all recognized that the Constitution does impose some limits on the delegation of legislative power. See *ibid.*; *Wayman*, 10 Wheat., at 42–43. And while we all agree that administrative agencies have important roles to play in a modern nation, surely none of us wishes to abandon our Republic's promise that the people and their representatives should have a mean-

ingful say in the laws that govern them. Cf. *Rucho* v. *Common Cause*, 588 U. S. ___, ___ (2019) (KAGAN, J., dissenting) (slip op., at 7) ("Republican liberty demands not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people" (internal quotation marks and alteration omitted)).[6]

So what is our real point of disagreement? The dissent next suggests that the Court strays from its commitment to textualism by relying on a clear-statement rule (the major questions doctrine) to resolve today's case. *Post*, at 28. But our law is full of clear-statement rules and has been since the founding. Our colleagues do not dispute the point. In fact, they have regularly invoked many of these rules.[7]

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[6] In the course of its argument, the dissent leans heavily on two recent academic articles. *Post*, at 29. But if a battle of law reviews were the order of the day, it might be worth adding to the reading list. See, *e.g.*, I. Wurman, Nondelegation at the Founding, 130 Yale L. J. 1490, 1493–1494 (2021); D. Candeub, Preference and Administrative Law, 72 Admin. L. Rev. 607, 614–628 (2020); P. Hamburger, Delegation or Divesting?, 115 Nw. L. Rev. Online 88, 91–110 (2020); M. McConnell, The President Who Would Not Be King 326–335 (2020); A. Gordon, Nondelegation, 12 N. Y. U. J. L. & Liberty 718, 719 (2019); R. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. & Pub. Pol'y 147, 155–161 (2017); G. Lawson & G. Seidman, "A Great Power of Attorney:" Understanding the Fiduciary Constitution 104–129 (2017); P. Hamburger, Is Administrative Law Unlawful? 377–402 (2014); L. Alexander & S. Prakash, Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1298–1299 (2003); G. Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 335–343 (2002); D. Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance? 83 Mich. L. Rev. 1223, 1252–1255, 1260–1261 (1985); see generally P. Wallison & J. Yoo, The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine (2022).

[7] See, *e.g.*, *United States* v. *Washington*, 596 U. S. ___, ___ (2022) (slip op., at 6) (intergovernmental immunity); *Rehaif* v. *United States*, 588 U. S. ___, ___ (2019) (slip op., at 3) (*mens rea*); *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 790–791 (2014) (sovereign immunity); *Vartelas* v. *Holder*, 566 U. S. 257, 261, 266–267 (2012) (retroactivity); *Gonzalez* v. *Thaler*, 565 U. S. 134, 141–142 (2012) (presumption against

If that's not the problem, perhaps the dissent means to suggest that the major questions doctrine does not belong on the list of our clear-statement rules. At times, the dissent appears to dismiss the doctrine as a "get-out-of-text free car[d]." *Ibid.* The dissent even seems to suggest that the doctrine could threaten "the safety and efficacy of medications" or lead to "the routine adulteration of food." *Post*, at 31. But then again, the dissent also acknowledges that the major questions doctrine should "sensibl[y]" apply in at least some situations. *Post*, at 14–15. The dissent even favorably highlights one application of the doctrine that our colleagues criticized less than a year ago. See *post*, at 18 (citing *Alabama Assn. of Realtors*, 594 U. S. ___). And, of course, our colleagues have joined other applications of the major questions doctrine in the past. See, *e.g.*, *King*, 576 U. S., at 485–486; *Gonzales*, 546 U. S., at 267–268. Nor does the dissent really seem to dispute that a major question is at stake in this case. As the dissent observes, the agency's challenged action before us concerns one of "the greatest . . . challenge[s] of our time." *Post*, at 21. If this case does not implicate a "question of deep economic and political significance," *King*, 576 U. S., at 486 (internal quotation marks omitted), it is unclear what might.[8]

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rule being jurisdictional); *Smith* v. *Bayer Corp.*, 564 U. S. 299, 307 (2011) (presumption that federal injunctions don't bar parallel state proceedings); *Fowler* v. *United States*, 563 U. S. 668, 677 (2011) (federalism canon); *Kucana* v. *Holder*, 558 U. S. 233, 237 (2010) (presumption in favor of judicial review); *Holland* v. *Florida*, 560 U. S. 631, 645–646 (2010) (presumption in favor of equitable tolling); *Hamilton* v. *Lanning*, 560 U. S. 505, 517 (2010) (presumption that Bankruptcy Code didn't erode past practice).

[8]The dissent seeks to invoke Justice Scalia as authority against the major questions doctrine. See *post*, at 31–32. But the dissent neglects to mention that Justice Scalia authored or joined several of the Court's major questions decisions, including *Brown & Williamson*, which the dissent describes as the "key case." *Post*, at 15–16 (citing 529 U. S. 120); see also *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); *Utility Air*, 573 U. S., at 307; A. Scalia, A Note on the Benzene

In the end, our disagreement really seems to center on a difference of opinion about whether the statute at issue here clearly authorizes the agency to adopt the CPP. The dissent even complains that I have failed to conduct an exhaustive analysis of the relevant statutory language. See *post*, at 28, n. 8. But in this concurrence, I have sought to provide some observations about the underlying doctrine on which today's decision rests. On the merits of the case before us, I join the Court's opinion, which comprehensively sets forth why Congress did not clearly authorize the EPA to engage in a "generation shifting approach" to the production of energy in this country. *Ante*, at 28. In reaching its judgment, the Court hardly professes to "appoin[t] itself" "the decision-maker on climate policy." *Post*, at 33. The Court acknowledges only that, under our Constitution, the people's elected representatives in Congress are the decisionmakers here—and they have not clearly granted the agency the authority it claims for itself. *Ante*, at 31.

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When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives. In our Republic, "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society." *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810). Because today's decision helps safeguard that foundational constitutional promise, I am pleased to concur.

Case, American Enterprise Institute, J. on Govt. & Soc., July–Aug. 1980, pp. 27–28.

SUPREME COURT OF THE UNITED STATES

Nos. 20–1530, 20–1531, 20–1778 and 20–1780

WEST VIRGINIA, ET AL., PETITIONERS
20–1530 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

THE NORTH AMERICAN COAL CORPORATION, PETITIONER
20–1531 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

WESTMORELAND MINING HOLDINGS LLC, PETITIONER
20–1778 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NORTH DAKOTA, PETITIONER
20–1780 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 30, 2022]

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to "the most pressing environmental challenge of our time." *Massachusetts* v. *EPA*, 549 U. S. 497, 505 (2007).

Climate change's causes and dangers are no longer subject to serious doubt. Modern science is "unequivocal that

human influence"—in particular, the emission of greenhouse gases like carbon dioxide—"has warmed the atmosphere, ocean and land." Intergovernmental Panel on Climate Change, Sixth Assessment Report, The Physical Science Basis: Headline Statements 1 (2021). The Earth is now warmer than at any time "in the history of modern civilization," with the six warmest years on record all occurring in the last decade. U. S. Global Change Research Program, Fourth National Climate Assessment, Vol. I, p. 10 (2017); Brief for Climate Scientists as *Amici Curiae* 8. The rise in temperatures brings with it "increases in heat-related deaths," "coastal inundation and erosion," "more frequent and intense hurricanes, floods, and other extreme weather events," "drought," "destruction of ecosystems," and "potentially significant disruptions of food production." *American Elec. Power Co.* v. *Connecticut*, 564 U. S. 410, 417 (2011) (internal quotation marks omitted). If the current rate of emissions continues, children born this year could live to see parts of the Eastern seaboard swallowed by the ocean. See Brief for Climate Scientists as *Amici Curiae* 6. Rising waters, scorching heat, and other severe weather conditions could force "mass migration events[,] political crises, civil unrest," and "even state failure." Dept. of Defense, Climate Risk Analysis 8 (2021). And by the end of this century, climate change could be the cause of "4.6 million excess yearly deaths." See R. Bressler, The Mortality Cost of Carbon, 12 Nature Communications 4467, p. 5 (2021).

Congress charged EPA with addressing those potentially catastrophic harms, including through regulation of fossil-fuel-fired power plants. Section 111 of the Clean Air Act directs EPA to regulate stationary sources of any substance that "causes, or contributes significantly to, air pollution" and that "may reasonably be anticipated to endanger public health or welfare." 42 U. S. C. §7411(b)(1)(A). Carbon dioxide and other greenhouse gases fit that description. See

American Elec. Power, 564 U. S., at 416–417; *Massachusetts*, 549 U. S., at 528–532. EPA thus serves as the Nation's "primary regulator of greenhouse gas emissions." *American Elec. Power*, 564 U. S., at 428. And among the most significant of the entities it regulates are fossil-fuel-fired (mainly coal- and natural-gas-fired) power plants. Today, those electricity-producing plants are responsible for about one quarter of the Nation's greenhouse gas emissions. See EPA, Sources of Greenhouse Gas Emissions (Apr. 14, 2022), https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions. Curbing that output is a necessary part of any effective approach for addressing climate change.

To carry out its Section 111 responsibility, EPA issued the Clean Power Plan in 2015. The premise of the Plan—which no one really disputes—was that operational improvements at the individual-plant level would either "lead to only small emission reductions" or would cost far more than a readily available regulatory alternative. 80 Fed. Reg. 64727–64728 (2015). That alternative—which fossil-fuel-fired plants were "already using to reduce their [carbon dioxide] emissions" in "a cost effective manner"—is called generation shifting. *Id.*, at 64728, 64769. As the Court explains, the term refers to ways of shifting electricity generation from higher emitting sources to lower emitting ones—more specifically, from coal-fired to natural-gas-fired sources, and from both to renewable sources like solar and wind. See *ante*, at 8. A power company (like the many supporting EPA here) might divert its own resources to a cleaner source, or might participate in a cap-and-trade system with other companies to achieve the same emissions-reduction goals.

This Court has obstructed EPA's effort from the beginning. Right after the Obama administration issued the Clean Power Plan, the Court stayed its implementation. That action was unprecedented: Never before had the Court stayed a regulation then under review in the lower courts.

See Reply Brief for 29 States and State Agencies in No. 15A773, p. 33 (conceding the point). The effect of the Court's order, followed by the Trump administration's repeal of the rule, was that the Clean Power Plan never went into effect. The ensuing years, though, proved the Plan's moderation. Market forces alone caused the power industry to meet the Plan's nationwide emissions target—through exactly the kinds of generation shifting the Plan contemplated. See 84 Fed. Reg. 32561–32562 (2019); Brief for United States 47. So by the time yet another President took office, the Plan had become, as a practical matter, obsolete. For that reason, the Biden administration announced that, instead of putting the Plan into effect, it would commence a new rulemaking. Yet this Court determined to pronounce on the legality of the old rule anyway. The Court may be right that doing so does not violate Article III mootness rules (which are notoriously strict). See *ante*, at 14–16. But the Court's docket is discretionary, and because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering. That new rule will be subject anyway to immediate, pre-enforcement judicial review. But this Court could not wait—even to see what the new rule says—to constrain EPA's efforts to address climate change.

The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. *Ante*, at 31. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. §7411(a)(1). The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the "best system"—the

most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan's regulatory approach fits hand-in-glove with the rest of the statute. The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.

I

The Clean Air Act was major legislation, designed to deal with a major public policy issue. As Congress explained, its goal was to "speed up, expand, and intensify the war against air pollution" in all its forms. H. R. Rep. No. 91–1146, p. 1 (1970). Or as this Court similarly recognized, the Act was a "drastic remedy to what was perceived as a serious and otherwise uncheckable problem." *Union Elec. Co.* v. *EPA*, 427 U. S. 246, 256 (1976). The Act, as the majority describes, established three major regulatory programs to control air pollution from stationary sources like power plants. See *ante*, at 2–6. The National Ambient Air Quality Standards (NAAQS) and Hazardous Air Pollutants (HAP) programs prescribe standards for specified pollutants, not including carbon dioxide. Section 111's New Source Performance Standards program provides an additional tool for

regulating emissions from categories of stationary sources deemed to contribute significantly to pollution. As applied to existing (not new) sources, the program mandates—via Section 111(d)—that EPA set emissions levels for pollutants not covered by the NAAQS or HAP programs, including carbon dioxide.

Section 111(d) thus ensures that EPA regulates existing power plants' emissions of *all* pollutants. When the pollutant at issue falls within the NAAQS or HAP programs, EPA need do no more. But when the pollutant falls outside those programs, Section 111(d) requires EPA to set an emissions level for currently operating power plants (and other stationary sources). That means no pollutant from such a source can go unregulated: As the Senate Report explained, Section 111(d) guarantees that "there should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91–1196, p. 20 (1970). Reflecting that language, the majority calls Section 111(d) a "gap-filler." *Ante*, at 5. It might also be thought of as a backstop or catch-all provision, protecting against pollutants that the NAAQS and HAP programs let go by. But the section is *not*, as the majority further claims, an "ancillary provision" or a statutory "backwater." *Ante*, at 20, 26. That characterization is a non-sequitur. That something is a backstop does not make it a backwater. Even if they are needed only infrequently, see *ante*, at 6, 20, backstops can perform a critical function—and this one surely does. Again, Section 111(d) tells EPA that when a pollutant—like carbon dioxide—is not regulated through other programs, EPA must undertake a further regulatory effort to control that substance's emission from existing stationary sources. In that way, Section 111(d) operates to ensure that the Act achieves comprehensive pollution control.

Section 111 describes the prescribed regulatory effort in expansive terms. EPA must set for the relevant source

(here, fossil-fuel-fired power plants) and the relevant pollutant (here, carbon dioxide) an emission level—more particularly,

> "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." §7411(a)(1).

To take that language apart a bit, the provision instructs EPA to decide upon the "best system of emission reduction which . . . has been adequately demonstrated." The provision tells EPA, in making that determination, to take account of both costs and varied "nonair" impacts (on health, the environment, and the supply of energy). And the provision finally directs EPA to set the particular emissions limit achievable through use of the demonstrated "best system." Taken as a whole, the section provides regulatory flexibility and discretion. It imposes, to be sure, meaningful constraints: Take into account costs and nonair impacts, and make sure the best system has a proven track record.[1] But the core command—go find the best system of emission reduction—gives broad authority to EPA.

If that flexibility is not apparent on the provision's face, consider some dictionary definitions—supposedly a staple of this Court's supposedly textualist method of reading statutes. A "system" is "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." Webster's Third New International Dictionary 2322 (1971). Or again: a "system" is "[a]n organized and

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[1] Those constraints have had real effect: They have led EPA in prior rulemakings to exclude a number of pollution-control measures from the "best system of emission reduction." See Brief for United States 49 (collecting citations).

coordinated method; a procedure." American Heritage Dictionary 1768 (5th ed. 2018). The majority complains that a similar definition—cited to the Solicitor General's brief but originally from another dictionary—is just too darn broad. *Ante*, at 28; see Brief for United States 31 (quoting Webster's New International Dictionary 2562 (2d ed. 1959)). "[A]lmost anything" capable of reducing emissions, the majority says, "could constitute such a 'system'" of emission reduction. *Ante*, at 28. But that is rather the point. Congress used an obviously broad word (though surrounding it with constraints, see *supra*, at 7) to give EPA lots of latitude in deciding how to set emissions limits. And contra the majority, a broad term is not the same thing as a "vague" one. *Ante*, at 18, 20, 28. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. (Once again, dictionaries would tell the tale.) So EPA was quite right in stating in the Clean Power Plan that the "[p]lain meaning" of the term "system" in Section 111 refers to "a set of measures that work together to reduce emissions." 80 Fed. Reg. 64762. Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there.

For generation shifting fits comfortably within the conventional meaning of a "system of emission reduction." Consider one of the most common mechanisms of generation shifting: the use of a cap-and-trade scheme. Here is how the majority describes cap and trade: "Under such a scheme, sources that receive a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps." *Ante*, at 8–9. Does that sound like a "system" to you? It does to me too. And it also has to this Court. In the past, we have explained that "[t]his type of 'cap-and-trade' *system* cuts costs while still reducing pollution to target levels." *EPA* v. *EME Homer City Generation, L. P.*, 572 U. S. 489, 503, n. 10 (2014) (emphasis added). So what does

the majority mean when it says that "[a]s a matter of definitional *possibilities*, generation shifting *can* be described as a 'system'"? *Ante*, at 28 (emphasis added; citation and some internal quotation marks omitted). Rarely has a statutory term so clearly applied.

Other statutory provisions confirm the point. The Clean Air Act's acid rain provision, for example, describes a cap-and-trade program as an "emission allocation and transfer *system*." §7651(b) (emphasis added). So a "system," according to the statute's own usage, includes the kind of cap-and-trade mechanism that the Clean Power Plan relied on. And in a somewhat different way, the NAAQS provision shows that Section 111 encompasses such a regulatory technique. Under that provision, cap-and-trade schemes qualify as "control measures, means, or techniques" that state plans may use to reduce emissions. §7410(a)(2)(A). That language, of course, does not use the word "system." But in specifying that cap and trade is allowable under the NAAQS program, the provision supports the same conclusion here—because Section 111 directs EPA to use "a procedure similar to that provided by [the NAAQS]." §7411(d)(1). The majority discounts the relevance of both those provisions on the ground that they contemplate trading systems only "as a means of *complying* with an *already established emissions limit*." *Ante*, at 29 (emphasis in original). That is a distinction, to be sure. But to begin, it is far less of one than the majority thinks: In arguing that EPA's claim of authority here would allow it to take the emissions limit as low as it wants, the majority ignores the varied constraints surrounding the "best system" language. See *supra*, at 7. And still more important for interpretive purposes, the distinction appears only in the majority's opinion, not in any statutory language. That text, to the contrary, says to EPA: Do as you would do under the NAAQS and Acid Rain programs—go ahead and use cap and trade.

There is also a flipside point: Congress declined to include in Section 111 the restrictions on EPA's authority contained in other Clean Air Act provisions. Most relevant here, quite a number of statutory sections confine EPA's emissions-reduction efforts to technological controls—essentially, equipment or processes that can be put into place at a particular facility. See *ante*, at 4 (describing those controls). So, for example, one provision tells EPA to set standards "reflect[ing] the greatest degree of emission reduction achievable through the application of technology." §7521(a)(3)(A)(i). Others direct the use of the "best available retrofit technology," or the "best available control technology," or the "maximum achievable control technology." §§7491(b)(2)(A), (g)(2), 7475(a)(4), 7479(3), 7412(g)(2). There are still more. See, *e.g.*, §§7411(h), 7511a(c)(7), 7651f(b)(2). None of those provisions would allow EPA to set emissions limits based on generation shifting, as the Agency acknowledges. See Brief for United States 32–33. But nothing like the language of those provisions is included in Section 111. That matters under normal rules of statutory interpretation. As Justice Scalia once wrote for the Court: "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 341 (2005).

Statutory history serves only to pile on: It shows that Congress has specifically declined to restrict EPA to technology-based controls in its regulation of existing stationary sources. The key moment came in 1977, when Congress amended Section 111 to distinguish between new sources and existing ones. For new sources, EPA could select only the "best *technological* system of continuous emission reduction." Clean Air Act Amendments, §109(c)(1)(A),

91 Stat. 700 (emphasis added). But for existing sources, the word "technological" was struck out: EPA could select the "best system of continuous emission reduction." *Ibid.* The House Report emphasized Congress's deliberate choice: Whereas the standards set for new sources were to be based on "the best technological" controls, the "standards adopted for existing sources" were "to be based on available means of emission control (not necessarily technological)." H. R. Rep. No. 95–564, p. 129 (1977). The Report did not further explain the distinction. But presumably Congress gave EPA more flexibility over existing plants because imposing technological controls on old facilities is often not cost-effective.[2] Thirteen years later, Congress followed up by deleting from Section 111 the technological limitation applying to new facilities. See Clean Air Act Amendments of 1990, §403(a), 104 Stat. 2631. Once again, then, Congress faced a choice: confine EPA to technological controls, or not. And replicating its earlier action for existing sources, Congress chose not.

The majority breezes past that congressional choice on the ground that today's opinion does not resolve whether EPA can regulate in some non-technological ways; instead, the opinion says only that the Clean Power Plan goes too

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[2]The majority offers a theory for why Congress insisted on a technological system for new sources: It was, the majority says, to prevent EPA's use of a particular kind of technological system (involving fuel switching) to achieve emissions reductions. See *ante*, at 22, n. 2, 23. To begin with: I don't see how requiring EPA to select among technological systems precludes it from picking what the majority agrees is one such measure. See *ante*, at 4, 22, n. 2, 22–23. But more important, I can't see why the majority's explanation matters. Let's assume the majority is right about Congress's motive. The key point remains the same: Whatever that motive, Congress's instruction to use technological systems applied only to new sources, and not to existing ones. As to the latter, Congress allowed EPA more latitude: The Agency could use technological *or* non-technological methods, as it preferred. That distinction is what creates interpretive difficulties for the majority—again, no matter why it arose.

far. See *ante*, at 30–31. That is a puzzling point. As an initial matter, it recharacterizes what this case has always been about. The Trump administration repealed the Clean Power Plan for one central reason: because (in its view) Section 111 confines EPA to facility-specific, technological measures. See 84 Fed. Reg. 32523–32529. In reviewing that repeal, the court below thus addressed that limit alone. See *American Lung Assn.* v. *EPA*, 985 F. 3d 914, 944 (CADC 2021). So add to the oddity of the Court's declaring a defunct regulation unlawful, see *supra*, at 4, the irregularity of its suggesting some kind of non-technological limit that no one (not EPA, not the parties, not the court below) has ever considered. More important here, both the nature and the statutory basis of that limit are left a mystery. If the majority is not distinguishing between technological controls and all others, what is it doing—and how far does its opinion constrain EPA? The majority makes no effort to say. And because that is so, the majority cannot even attempt to ground its limit in the statutory language. I've just shown that restricting EPA to technological controls is inconsistent with Section 111, especially when read in conjunction with other statutory provisions. And the majority provides no reason to think that its (possibly) different limit fares any better. Section 111 does not impose *any* constraints—technological or otherwise—on EPA's authority to regulate stationary sources (except for those stated, like cost). In somehow (and to some extent) saying otherwise, the majority flouts the statutory text.

"Congress," this Court has said, "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Arlington* v. *FCC*, 569 U. S. 290, 296 (2013). In Section 111, Congress spoke in capacious terms. It knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts*, 549 U. S., at 532. So the provision

enables EPA to base emissions limits for existing stationary sources on the "best system." That system may be technological in nature; it may be whatever else the majority has in mind; or, most important here, it may be generation shifting. The statute does not care. And when Congress uses "expansive language" to authorize agency action, courts generally may not "impos[e] limits on [the] agency's discretion." *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. ___, ___ (2020) (slip op., at 16). That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

II

The majority thinks not, contending that in "certain extraordinary cases"—of which this is one—courts should start off with "skepticism" that a broad delegation authorizes agency action. *Ante*, at 19. The majority labels that view the "major questions doctrine," and claims to find support for it in our caselaw. *Ante*, at 19–20, 28. But the relevant decisions do normal statutory interpretation: In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense. Using that ordinary method, the decisions struck down agency actions (even though they plausibly fit within a delegation's terms) for two principal reasons. First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And second, the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme. But that is not true here. The Clean Power Plan falls within EPA's wheelhouse, and it fits perfectly—as I've just shown—with all the Clean Air Act's provisions. That the Plan addresses major issues of public policy does not upend the analysis. Congress wanted EPA to do just that.

Section 111 entrusts important matters to EPA in the expectation that the Agency will use that authority to combat pollution—and that courts will not interfere.

A

"[T]he words of a statute," as the majority states, "must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000); see *ante*, at 16. We do not assess the meaning of a single word, phrase, or provision in isolation; we also consider the overall statutory design. And that is just as true of statutes broadly delegating power to agencies as of any other kind. In deciding on the scope of such a delegation, courts must assess how an agency action claimed to fall within the provision fits with other aspects of a statutory plan.

So too, a court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate." *Brown & Williamson*, 529 U. S., at 133. Assume that a policy decision, like this one, is a matter of significant "economic and political magnitude." *Ibid.* We know that Congress delegates such decisions to agencies all the time—and often via broadly framed provisions like Section 111. See *infra*, at 29–31. But Congress does so in a sensible way. To decide whether an agency action goes beyond what Congress wanted, courts must assess (among other potentially relevant factors) the nature of the regulation, the nature of the agency, and the relationship of the two to each other. See, *e.g.*, *Barnhart* v. *Walton*, 535 U. S. 212, 222 (2002). In particular, we have understood, Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise. So when there is a mismatch between the agency's usual portfolio and a given assertion of power, courts have reason to question whether Congress intended a delegation to go so far.

The majority today goes beyond those sensible principles.

It announces the arrival of the "major questions doctrine," which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules. *Ante*, at 16–31. Apparently, there is now a two-step inquiry. First, a court must decide, by looking at some panoply of factors, whether agency action presents an "extraordinary case[]." *Ante*, at 17; see *ante*, at 20–28. If it does, the agency "must point to clear congressional authorization for the power it claims," someplace over and above the normal statutory basis we require. *Ante*, at 19 (internal quotation marks omitted); see *ante*, at 28–31. The result is statutory interpretation of an unusual kind. It is not until page 28 of a 31-page opinion that the majority begins to seriously discuss the meaning of Section 111. And even then, it does not address straight-up what should be the question: Does the text of that provision, when read in context and with a commonsense awareness of how Congress delegates, authorize the agency action here?

The majority claims it is just following precedent, but that is not so. The Court has never even used the term "major questions doctrine" before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has looked to the text of a delegation. It has addressed how an agency's view of that text works—or fails to do so—in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency's view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience. In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design.

The key case here is *FDA* v. *Brown & Williamson*. There, the Food and Drug Administration (FDA) asserted that its

power to regulate "drugs" and "devices" extended to tobacco products. The claim had something to it: FDA has broad authority over "drugs" and drug-delivery "devices," and the definitions of those terms could be read to encompass nicotine and cigarettes. But the asserted authority "simply [did] not fit" the overall statutory scheme. 529 U. S., at 143. FDA's governing statute required the agency to ensure that regulated products were "safe" to be marketed—but there was no making tobacco products safe in the usual sense. *Id.*, at 133–143. So FDA would have had to reinterpret what it meant to be "safe," or else ban tobacco products altogether. *Ibid.* Both options, the Court thought, were preposterous. Until the agency action at issue, tobacco products hadn't been spoken of in the same breath as pharmaceuticals (FDA's paradigmatic regulated product). And Congress had created in several statutes a "distinct regulatory scheme" for tobacco, not involving FDA. *Id.*, at 155–156. So all the evidence was that Congress had never meant for FDA to have any—let alone total—control over the tobacco industry, with its "unique political history." *Id.*, at 159. Again, there was "simply" a lack of "fit" between the regulation at issue, the agency in question, and the broader statutory scheme. *Id.*, at 143.

The majority's effort to find support in *Brown & Williamson* for its interpretive approach fails. See *ante*, at 19. It may be helpful here to quote the full sentence that the majority quotes half of. "In extraordinary cases," the Court stated, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." 529 U. S., at 159. For anyone familiar with this Court's *Chevron* doctrine, that language will ring a bell. The Court was saying only—and it was elsewhere explicit on this point—that there was reason to hesitate before giving FDA's position *Chevron* deference. See *id.*, at 132–133, 159–161. And what was that reason? The Court went on to explain that it would not defer to FDA because it read

the relevant statutory provisions as negating the agency's claimed authority. See *id.*, at 160 ("[W]e are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power"); *id.*, at 133 (finding at *Chevron*'s first step that "Congress has directly spoken to the issue here and precluded the FDA's" asserted power). In reaching that conclusion, the Court relied (as I've just explained) not on any special "clear authorization" demand, but on normal principles of statutory interpretation: look at the text, view it in context, and use what the Court called some "common sense" about how Congress delegates. *Ibid.* *That* is how courts are to decide, in the majority's language, whether an agency has asserted a "highly consequential power beyond what Congress could reasonably be understood to have granted." *Ante*, at 20.

The Court has applied the same kind of analysis in subsequent cases—holding in each that an agency exceeded the scope of a broadly framed delegation when it operated outside the sphere of its expertise, in a way that warped the statutory text or structure. In *Gonzales* v. *Oregon*, 546 U. S. 243 (2006), we rejected the Attorney General's assertion of authority (under a broad "public interest" standard) to rescind doctors' registrations for facilitating assisted suicide, even in States where doing so was legal. See *id.*, at 243, 248–249, 261–275. We doubted Congress would have delegated such a "quintessentially medical judgment[]" to "an executive official who lacks medical expertise." *Id.*, at 266–267. And we pointed to statutory provisions in which Congress—in opposition to the claimed power—had "painstakingly described the Attorney General's limited authority" to deregister physicians. *Id.*, at 262.[3]

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[3]Similarly, in *King* v. *Burwell*, 576 U. S. 473 (2015), we relied on *Brown & Williamson* in declining to defer to the Internal Revenue Service's construction of the Affordable Care Act. We thought it highly "unlikely that Congress would have delegated" an important decision about

Later, in *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302 (2014), the Court relied on similar reasoning to reject EPA's efforts to regulate "millions of small" and previously unregulated sources of emissions—"including retail stores, offices, apartment buildings, shopping centers, schools, and churches." *Id.*, at 328. Key to that decision was the Court's view that reading the delegation so expansively would be "inconsistent with" the statute's broader "structure and design." *Id.*, at 321. The Court explained that allowing the agency action to proceed would necessitate the "rewriting" of other "unambiguous statutory terms"—indeed, of "precise numerical thresholds." *Id.*, at 321, 325–326. (In quoting one cryptic sentence of *Utility Air* as supporting its new approach, see *ante*, at 19, the majority ignores the nine preceding pages of analysis of the statute's text and context, see 573 U. S., at 315–324.)

And last Term, the Court concluded that the Centers for Disease Control and Prevention (CDC) lacked the power to impose a nationwide eviction moratorium. *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___–___ (2021) (slip op., at 5–7). The Court held that other statutory language made it a "stretch" to read the relied-on delegation as covering the CDC's action. *Id.*, at ___ (slip op., at 6). And the Court raised an eyebrow at the thought of the CDC "intrud[ing]" into "the landlord-tenant relationship"—a matter outside the CDC's usual "domain." *Ibid.*[4]

The eyebrow-raise is indeed a consistent presence in these cases, responding to something the Court found anomalous—looked at from Congress's point of view—in a

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healthcare pricing to an agency with "no expertise in crafting health insurance policy." 576 U. S., at 486.

[4]Not every Justice, of course, agreed with the Court's conclusions in the above-discussed cases; to be frank, I dissented in a couple. But what matters here is the analysis those decisions undertook—and how, as I'll describe, it supports EPA's Clean Power Plan.

particular agency's exercise of authority. In each case, the Court thought, the agency had strayed out of its lane, to an area where it had neither expertise nor experience. The Attorney General making healthcare policy, the regulator of pharmaceutical concerns deciding the fate of the tobacco industry, and so on. And in each case, the proof that the agency had roamed too far afield lay in the statutory scheme itself. The agency action collided with other statutory provisions; if the former were allowed, the latter could not mean what they said or could not work as intended. FDA having to declare tobacco "safe" to avoid shutting down an industry; or EPA having literally to change hard numbers contained in the Clean Air Act. There, according to the Court, the statutory framework was "not designed to grant" the authority claimed. *Utility Air*, 573 U. S., at 324. The agency's "singular" assertion of power "would render the statute unrecognizable to the Congress" that wrote it. *Ibid.* (internal quotation marks omitted).

B

The Court today faces no such singular assertion of agency power. As I have already explained, nothing in the Clean Air Act (or, for that matter, any other statute) conflicts with EPA's reading of Section 111. Notably, the majority does not dispute that point. Of course, it views Section 111 (if for unexplained reasons) as less clear than I do. Compare *ante*, at 28, with *supra*, at 7–9. But nowhere does the majority provide evidence from within the statute itself that the Clean Power Plan conflicts with or undermines Congress's design. That fact alone makes this case different from all the cases described above. As to the other critical matter in those cases—is the agency operating outside its sphere of expertise?—the majority at least tries to say something. It claims EPA has no "comparative expertise" in "balancing the many vital considerations of national policy" implicated in regulating electricity sources. *Ante*, at

25–26. But that is wrong.

Start with what this Court has said before on the subject, reflecting Congress's view of the matter. About a decade ago, we recognized that Congress had "delegated to EPA" in Section 111 "the decision whether and how to regulate carbon-dioxide emissions from powerplants." *American Elec. Power*, 564 U. S., at 426. To stress the key word (because the majority seems to miss it, see *ante*, at 26–27): not merely "whether" but also "how." In making that delegation, we explained, Congress knew well what it was doing. Regulating power plant emissions is a complex undertaking. To do it right requires "informed assessment of competing interests": "Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." 564 U. S., at 427; see §7411(a)(1) (instructing EPA to consider "energy requirements," "cost," and other factors). Congress specifically "entrust[ed] such complex balancing to EPA," because that "expert agency" has the needed "scientific, economic, and technological resources" to carry it out. 564 U. S., at 427–428. So the balancing—including of the Nation's "energy requirements"—that the majority says EPA has no "comparative expertise" in? §7411(a)(1); *ante*, at 25. We explained 11 short years ago, citing Congress, that it was smack in the middle of EPA's wheelhouse.

And we were right. Consider the Clean Power Plan's component parts—let's call them the what, who, and how—to see the rule's normalcy. The "what" is the subject matter of the Plan: carbon dioxide emissions. This Court has already found that those emissions fall within EPA's domain. We said then: "[T]here is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter." *Massachusetts*, 549 U. S., at 531. This is not the Attorney General regulating medical care, or even the CDC regulating landlord-

tenant relations. It is EPA (that's the Environmental Protection Agency, in case the majority forgot) acting to address the greatest environmental challenge of our time. So too, there is nothing special about the Plan's "who": fossil-fuel-fired power plants. In *Utility Air*, we thought EPA's regulation of churches and schools highly unusual. See *supra*, at 18. But fossil-fuel-fired plants? Those plants pollute—a lot—and so they have long lived under the watchful eye of EPA. That was true even before EPA began regulating carbon dioxide. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60, 78 (1975).

Finally, the "how" of generation shifting creates no mismatch with EPA's expertise. As the Plan noted, generation shifting has a well-established pedigree as a tool for reducing pollution; even putting aside other federal regulation, see *infra*, at 25–26, both state regulators and power plants themselves have long used it to attain environmental goals. See 80 Fed. Reg. 64664; Brief for Power Company Respondents 47; see also S. Breyer, Regulation and Its Reform 444, n. 1 (1982) (citing literature on the subject from the 1970s). The technique is, so to speak, a tool in the pollution-control toolbox. And that toolbox is the one EPA uses. So that Agency, more than any other, has the desired "comparative expertise." *Ante*, at 25. The majority cannot contest that point frontally: It knows that cap and trade and similar mechanisms are an ordinary part of modern environmental regulation. Instead, the majority protests that Congress would not have wanted EPA to "dictat[e]," through generation shifting, the "mix of energy sources nationwide." *Ante*, at 26. But that statement reflects a misunderstanding of how the electricity market works. *Every* regulation of power plants—even the most conventional, facility-specific controls—"dictat[es]" the national energy mix to one or another degree. That result follows because regulations affect costs, and the electrical grid works by taking up

energy from low-cost providers before high-cost ones. Consider an example: Suppose EPA requires coal-fired plants to use carbon-capture technology. That action increases those plants' costs, and automatically (by virtue of the way the grid operates) reduces their share of the electricity market. So EPA is always controlling the mix of energy sources. In that sense (though the term has taken on a more specialized meaning), everything EPA does is "generation shifting." The majority's idea that EPA has no warrant to direct such a shift just indicates that courts sometimes do not really get regulation.[5]

Why, then, be "skeptic[al]" of EPA's exercise of authority? *Ante*, at 28. When there is no misfit, of the kind apparent in our precedents, between the regulation, the agency, and the statutory design? Although the majority offers a flurry of complaints, they come down in the end to this: The Clean Power Plan is a big new thing, issued under a minor statutory provision. See *ante*, at 20, 24, 26 (labeling the Plan "transformative" and "unprecedented" and calling Section 111(d) an "ancillary" "backwater"). I have already addressed the back half of that argument: In fact, there is

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[5] The majority's only response to the argument above similarly reveals a misperception as to the practical impact of different regulatory techniques. According to the majority, there is an "obvious difference" between changing the energy mix by conventional technological regulation and doing so by measures like cap and trade. *Ante*, at 27, n. 4. But in fact there is not. As I'll detail later, generation shifting can effect a significant—or instead an insignificant—change in the energy mix; and the same is true of technological regulations. See *infra*, at 24–25. It all depends on the specifics: There is no necessary connection (in either direction) between the *kind* of regulation and the magnitude of its effect. For example, a rule requiring the use of carbon-capture technology would have shifted far more electricity production from coal-fired plants than the Clean Power Plan would have. See *ibid.* In suggesting that cap-and-trade programs are somehow more suspect, the majority merely serves to disadvantage what is often the smartest kind of regulation: market-based programs that achieve the biggest bang for the buck. That is why so many power companies are on EPA's side in this litigation.

nothing insignificant about Section 111(d), which was intended to ensure that EPA would limit existing stationary sources' emissions of otherwise unregulated pollutants (however few or many there were). See *supra*, at 6. And the front half of the argument doesn't work either. The Clean Power Plan was not so big. It was not so new. And to the extent it was either, that should not matter.

As to bigness—well, events have proved the opposite: The Clean Power Plan, we now know, would have had little or no impact. The Trump administration's repeal of the Plan created a kind of controlled experiment: The Plan's "magnitude" (*ante*, at 24) could be measured by seeing how far short the industry fell of the Plan's nationwide emissions target. Except that turned out to be the wrong question, because the industry didn't fall short of the Plan's goal; rather, the industry exceeded that target, all on its own. See App. 265 (declaration of EPA official). And it did so mainly through the generation-shifting techniques that the Plan called for. See *ibid.*; Brief for United States 47. In effect, the Plan predicted market behavior, rather than altered it (as regulations usually do). Cf. *Utility Air*, 573 U. S., at 321–322 (discussing the "calamitous consequences" of the EPA approach there under review). And that fact has been understood for some years. At the time of the repeal, the Trump administration explained that "there [was] likely to be no difference between a world where the [Clean Power Plan was] implemented and one where it [was] not." 84 Fed. Reg. 32561.[6] It is small wonder, then, that the power

[6] Even when the Clean Power Plan was first issued, its projected impact was far less than what the majority implies. The majority states, for example, that the rule would have "reduce[d] GDP by at least a trillion 2009 dollars by 2040." *Ante*, at 10. That sounds like a lot, but it is in fact "equivalent to changes of a few tenths of 1 percent from baseline." Dept. of Energy, Analysis of the Impacts of the Clean Power Plan 63–64 (2015). And the "billions of dollars in compliance costs" the majority highlights were vastly outweighed by the Plan's projected benefits. *Ante*, at 10; see 80 Fed. Reg. 64679 (anticipating $5–$8 billion in costs and

industry overwhelmingly supports EPA in this case. See Brief for Power Company Respondents 2–3. In the regulated parties' view, the rule aimed to achieve what most power companies also want: substantial reductions in carbon dioxide emissions accomplished in a cost-effective way while maintaining a reliable electricity market. See *id.*, at 26–27, 38, 41–42.

The majority thus pivots to the massive consequences generation shifting *could* produce—but that claim fares just as poorly. On EPA's view of its own authority, the majority worries, some future rule might "forc[e] coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether." *Ante*, at 24. But looking at the text of Section 111(d) might here come in handy. For the statute imposes, as already shown, a set of constraints—particularly involving costs and energy needs—that would preclude so extreme a regulation. See Brief for United States 41–42 (conceding the point); *supra*, at 7. And if the majority thinks those constraints do not really constrain, then it has a much bigger problem. For "traditional" technological controls, of the kind the majority approves, can have equally dramatic effects. *Ante*, at 23. Take, for example, the "fuel-switching" regulation the majority mentions. *Ibid.* Such a rule does just what you might think: It requires a plant to burn a different kind of fuel—say, natural gas instead of coal. So it too can significantly "restructur[e] the Nation's overall mix of electricity generation." *Ante*, at 16. Or take an even more technological-sounding approach: the use of carbon-capture equipment. Order the installation of that equipment, the Trump administration concluded, and the "exorbitant" costs "would almost certainly force the closure" of all affected "coal-fired power plants." 84 Fed. Reg. 32548.

$32–$54 billion in benefits by 2030); see also EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 6–35 (2015) (estimating that by 2030 jobs gained from the Plan would be some two or three times greater than jobs lost).

The point is a simple one: If generation shifting can go big, so too can technological controls (assuming, once again, that the statute's text is ignored). The problem (if any exists) is not with the channel, but with the volume.[7]

The majority's claim about the Clean Power Plan's novelty—the most fleshed-out part of today's opinion, see *ante*, at 20–24—is also exaggerated. As EPA explained when it issued the Clean Power Plan, an earlier Section 111(d) regulation had determined that a cap-and-trade program was the "best system of emission reduction" for mercury. 70 Fed. Reg. 28616–28621 (2005); see 80 Fed. Reg. 64772. In the majority's view, that rule was different because the "actual emission cap" for the contemplated cap-and-trade scheme was based on the use of a plant-specific technology—namely, wet scrubbers. *Ante*, at 21 (internal quotation marks omitted). But the approval of cap and trade allowed EPA to make the emissions limits more stringent than it otherwise could have, because EPA knew that plants unable to cost-effectively install scrubbers could instead meet the limits through generation shifting. See 70 Fed. Reg. 28619. EPA could have designed the Clean Power Plan in the same way—say, by setting emissions limits based on carbon-capture technology, with the expectation that many plants would avail themselves of an approved cap-and-trade program instead. The majority gives no reason to think Section 111(d) allows that approach but disallows the Clean Power Plan. In both, generation shifting is

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[7]The majority dismisses these hypotheticals as fantastical, protesting that "EPA has never ordered anything remotely like [them], and we doubt it could." *Ante*, at 24, n. 3. But that's just the point. EPA hasn't forced the elimination of coal plants—whether through technological controls or generation shifting—*because* the statutory constraints prevent it from doing so. The majority offers no reason to think that those constraints suffice for the measures it approves (fuel switching and carbon capture) but not for the measure it rejects (generation shifting). Either the constraints are enough or they are not. The majority cannot have it both ways.

operating to increase the strictness of emissions limits.

And the mercury rule itself was rooted in precedent. A decade earlier, EPA had determined that States could comply with a Section 111(d) regulation for municipal waste combustors by establishing cap-and-trade programs. See 40 CFR §§60.30a, 60.33b(d)(2) (1996). And beyond Section 111(d), trading and other tools of generation shifting become still more common. For decades, EPA has relied on those pollution-control techniques in rules covering new internal-combustion engines under Section 111(b), sources of nitrogen oxide under the NAAQS program, and motor vehicles under Section 202(a). See 73 Fed. Reg. 3595 (2008); 71 Fed. Reg. 39159 (2006); 63 Fed. Reg. 57358–57359 (1998); 48 Fed. Reg. 33456 (1983); see also Brief for Richard L. Revesz as *Amicus Curiae* 24–29 (collecting similar rules). No doubt the majority is right that scrubbers and other "add-on controls" are "more traditional air pollution control measures." *Ante*, at 23. EPA readily acknowledged that fact in developing the Clean Power Plan. But the idea that the Plan's reliance on generation shifting effected some kind of revolution in power-plant pollution control? No. As I've noted before, power plants themselves use that method. State environmental regulators use that method. And EPA has used that method, including under the statutory provision invoked here.

In any event, newness might be perfectly legitimate—even required—from Congress's point of view. I do not dispute that an agency's longstanding practice may inform a court's interpretation of a statute delegating the agency power. See *ante*, at 20–21. But it is equally true, as *Brown & Williamson* recognized, that agency practices are "not carved in stone." 529 U. S., at 156–157 (internal quotation marks omitted). Congress makes broad delegations in part so that agencies can "adapt their rules and policies to the demands of changing circumstances." *Id.*, at 157. To keep

faith with that congressional choice, courts must give agencies "ample latitude" to revisit, rethink, and revise their regulatory approaches. *Ibid.* So it is here. Section 111(d) was written, as I've shown, to give EPA plenty of leeway. See *supra*, at 6–8. The enacting Congress told EPA to pick the "best system of emission reduction" (taking into account various factors). In selecting those words, Congress understood—it had to—that the "best system" would change over time. Congress wanted and instructed EPA to keep up. To ensure the statute's continued effectiveness, the "best system" should evolve as circumstances evolved—in a way Congress knew it couldn't then know. See *Massachusetts*, 549 U. S., at 532. EPA followed those statutory directions to the letter when it issued the Clean Power Plan. It selected a system (as the regulated parties agree) that achieved greater emissions reductions at lower cost than any technological alternative could have, while maintaining a reliable electricity market. Even if that system was novel, it was in EPA's view better—actually, "best." So it was the system that accorded with the enacting Congress's choice.

And contra the majority, it is that Congress's choice which counts, not any later one's. The majority says it "cannot ignore" that Congress in recent years has "considered and rejected" cap-and-trade schemes. *Ante*, at 27–28. But under normal principles of statutory construction, the majority *should* ignore that fact (just as I should ignore that Congress failed to enact bills barring EPA from implementing the Clean Power Plan). As we have explained time and again, failed legislation "offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress" adopted. *Bostock* v. *Clayton County*, 590 U. S. ___, ___ (2020) (slip op., at 20) (internal quotation marks omitted); see *Sullivan* v. *Finkelstein*, 496 U. S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history" should "not

be taken seriously, not even in a footnote"). Return to *Brown & Williamson*, which all agree is the key case in this sphere. It disclaimed any reliance on "Congress' failure" to grant FDA jurisdiction over tobacco. 529 U. S., at 155. Instead, the Court focused on the statutes Congress "*ha[d]* enacted," which created "a distinct regulatory scheme" for tobacco, incompatible with FDA's. *Ibid.* (emphasis added). Here, as I've shown and the majority effectively concedes, there is nothing equivalent. See *supra*, at 9–12. Search high and low, nothing in current law conflicts with, or otherwise casts doubt on, the Clean Power Plan. That leaves the Court in much the same place it was when deciding *Massachusetts* v. *EPA*. Said the Court then: "That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant" when it enacted the Clean Air Act. 549 U. S., at 529–530. And so the Court recognized EPA's authority to regulate carbon dioxide. But that Court was not this Court; and this Court deprives EPA of the authority Congress gave it in Section 111(d) to respond to the same environmental danger.

III

Some years ago, I remarked that "[w]e're all textualists now." Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards.[8] Today, one of those broader goals

[8]The majority opinion at least addresses the statute's text, though overstating its ambiguity and approaching the action taken under it with unwarranted "skepticism." *Ante*, at 28; see *ante*, at 28–31. The concurrence, by contrast, concludes that the Clean Air Act does not clearly enough authorize EPA's Plan without ever citing the statutory text. See

makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence. See *ante*, at 19, 25–26; *e.g.*, *ante*, at 3–6 (GORSUCH, J., concurring).

The kind of agency delegations at issue here go all the way back to this Nation's founding. "[T]he founding era," scholars have shown, "wasn't concerned about delegation." E. Posner & A. Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1734 (2002) (Posner & Vermeule). The records of the Constitutional Convention, the ratification debates, the Federalist—none of them suggests any significant limit on Congress's capacity to delegate policymaking authority to the Executive Branch. And neither does any early practice. The very first Congress gave sweeping authority to the Executive Branch to resolve some of the day's most pressing problems, including questions of "territorial administration," "Indian affairs," "foreign and domestic debt," "military service," and "the federal courts." J. Mortenson & N. Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 349 (2021) (Mortenson & Bagley). That Congress, to use a few examples, gave the Executive power to devise a licensing scheme for trading with Indians; to craft appropriate laws for the Territories; and to decide how to pay down the (potentially ruinous) national debt. See *id.*, at 334–338, 340–342, 344–345; C. Chabot, The Lost History of Delegation at the Founding, 56 Ga. L. Rev. 81, 113–134 (2021) (Chabot). Barely anyone objected on delegation grounds. See Mortenson & Bagley 281–282, 332, 339; Chabot 117–119; Posner & Vermeule 1733–1736.

It is not surprising that Congress has always delegated,

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ante, at 13–16. Nowhere will you find the concurrence ask: What does the phrase "best system of emission reduction" mean? §7411(a)(1). So much for "begin[ning], as we must, with a careful examination of the statutory text." *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. 79, ___ (2017) (slip op., at 3).

and continues to do so—including on important policy issues. As this Court has recognized, it is often "unreasonable and impracticable" for Congress to do anything else. *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 105 (1946). In all times, but ever more in "our increasingly complex society," the Legislature "simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta* v. *United States*, 488 U. S. 361, 372 (1989). Consider just two reasons why.

First, Members of Congress often don't know enough—and know they don't know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely, as all of us rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies. Congress looks to them to make specific judgments about how to achieve its more general objectives. And it does so especially, though by no means exclusively, when an issue has a scientific or technical dimension. Why *wouldn't* Congress instruct EPA to select "the best system of emission reduction," rather than try to choose that system itself? Congress knows that systems of emission reduction lie not in its own but in EPA's "unique expertise." *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 151 (1991).

Second and relatedly, Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur. Once again, that is most obviously true when it comes to scientific and technical matters. The "best system of emission reduction" is not today what it was yesterday, and will surely be something different tomorrow. So for this reason too, a rational Congress delegates. It enables an agency to adapt

old regulatory approaches to new times, to ensure that a statutory program remains effective. See, *e.g.*, *National Federation of Independent Business* v. *OSHA*, 595 U. S. ___, ___ (2022) (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (slip op., at 9) (observing that a statute's broad language was meant to ensure that an agency had "the tools needed to confront emerging dangers").

Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn't catch fire. It wanted to stop the routine adulteration of food and improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines.

This Court has historically known enough not to get in the way. Maybe the best explanation of why comes from Justice Scalia. See *Mistretta*, 488 U. S., at 415–416 (dissenting opinion). The context was somewhat different. He was responding to an argument that Congress could not constitutionally delegate broad policymaking authority; here, the Court reads a delegation with unwarranted skepticism, and thereby artificially constrains its scope. But Justice Scalia's reasoning remains on point. He started with the inevitability of delegations: "[S]ome judgments involving policy considerations," he stated, "must be left to [administrative] officers." *Id.*, at 415. Then he explained why courts should not try to seriously police those delegations, barring—or, I'll add, narrowing—some on the ground that they went too far. The scope of delegations, he said,

> "must be fixed according to common sense and the inherent necessities of the governmental co-ordination. Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the necessities of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.*, at 416 (internal quotation marks omitted).

In short, when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest.

Today, the Court is not. Section 111, most naturally read, authorizes EPA to develop the Clean Power Plan—in other words, to decide that generation shifting is the "best system of emission reduction" for power plants churning out carbon dioxide. Evaluating systems of emission reduction is what EPA does. And nothing in the rest of the Clean Air Act, or any other statute, suggests that Congress did not mean for the delegation it wrote to go as far as the text says. In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean Air Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.

The subject matter of the regulation here makes the Court's intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about

how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent.

9

COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

125-21-CA

LIBERTY UTILITIES (GAS NEW BRUNSWICK) LP, as represented by its general partner, LIBERTY UTILITIES (GAS NEW BRUNSWICK) CORP.

APPLICANT

- and -

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

RESPONDENT

LIBERTY UTILITIES (GAZ NOUVEAU-BRUNSWICK) LP, représentée par son associée commanditée, LIBERTY UTILITIES (GAZ NOUVEAU-BRUNSWICK) CORP.

REQUÉRANTE

- et -

COMMISSION DE L'ÉNERGIE ET DES SERVICES PUBLICS DU NOUVEAU-BRUNSWICK

INTIMÉE

Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner, Liberty Utilities (Gas New Brunswick) Corp. v. New Brunswick Energy and Utilities Board, 2022 NBCA 29

CORAM:
The Honourable Justice Quigg
The Honourable Justice French
The Honourable Justice LeBlond

Application for judicial review from a decision of the New Brunswick Energy and Utilities Board:
October 29, 2021

History of Case:

Decision under review:
Unreported

Preliminary or incidental proceedings:
None

Application heard:
March 22, 2022

Judgment rendered:
June 23, 2022

Liberty Utilities (Gaz Nouveau-Brunswick) LP, représentée par son associée commanditée, Liberty Utilities (Gaz Nouveau-Brunswick) Corp. c. Commission de l'énergie et des services publics du Nouveau-Brunswick, 2022 NBCA 29

CORAM :
l'honorable juge Quigg
l'honorable juge French
l'honorable juge LeBlond

Requête en révision judiciaire d'une décision de la Commission de l'énergie et des services publics du Nouveau-Brunswick :
le 29 octobre 2021

Historique de la cause :

Décision visée par la révision :
inédite

Procédures préliminaires ou accessoires :
aucune

Requête entendue :
le 22 mars 2022

Jugement rendu :
le 23 juin 2022

Reasons for judgment by:
The Honourable Justice LeBlond

Concurred in by:
The Honourable Justice Quigg
The Honourable Justice French

Counsel at hearing:

For the applicant:
Leonard Thomas Hoyt, Q.C., and Andrew R. Kinley

For the respondent:
Kelly T. VanBuskirk, Q.C., and Abigail Herrington

THE COURT

The application for judicial review is allowed. The matter is remitted to the New Brunswick Energy and Utilities Board for rehearing.

Motifs de jugement :
l'honorable juge LeBlond

Souscrivent aux motifs :
l'honorable juge Quigg
l'honorable juge French

Avocats à l'audience :

Pour la requérante :
Leonard Thomas Hoyt, c.r., et Andrew R. Kinley

Pour l'intimée :
Kelly T. VanBuskirk, c.r., et Abigail Herrington

LA COUR

La requête en révision judiciaire est accueillie. L'affaire est renvoyée à la Commission de l'énergie et des services publics du Nouveau-Brunswick pour la tenue d'une nouvelle audience.

The judgment of the Court was delivered by

LEBLOND, J.A.

I. Introduction

[1] This is an application brought by Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner, Liberty Utilities (Gas New Brunswick) Corp., pursuant to s. 52(1) of the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18 (the "*EUB Act*"), seeking judicial review of a decision issued and delivered by the New Brunswick Energy and Utilities Board on October 29, 2021. The decision followed a hearing before the Board which dealt with setting Liberty's cost of capital, a significant component of which required setting its rate of return on equity ("ROE").

[2] The Board set the ROE at 8.5%. Liberty asserts this decision is unreasonable when read in light of the reasonableness standard of review established by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] S.C.J. No. 65 (QL).

[3] For the reasons below, I would allow the application and remit the matter to the Board for rehearing.

II. Factual Context

[4] Part of Liberty's operations in New Brunswick consists of the distribution of natural gas. Its predecessor in name, Enbridge Gas New Brunswick Limited Partnership, acquired the general franchise to do this in 1999. That sector of its operations is regulated under the *Gas Distribution Act, 1999*, S.N.B. 1999, c. G-2.11. Section 23 of the *EUB Act* gives the Board the jurisdiction to exercise the powers conferred upon it under the *Gas Distribution Act*, and s. 52 of the latter sets out the Board's jurisdiction. Under that section, in approving or fixing just and reasonable rates and tariffs, the Board

may adopt any method or technique it considers appropriate. The cost of service model the Board adopts for Liberty's gas distribution operations determines the rates it can charge its customers. An important element of determining the cost of service is setting Liberty's cost of capital. That was the sole purpose of the hearing before the Board. It was not engaged in fixing customer distribution rates.

[5] The Board has rarely dealt with cost of capital determinations. As a result, the expert evidence tendered on point became particularly important for the Board's consideration as it could not draw on its own expertise to make its decision.

[6] The cost of capital for a utility is the aggregate return on investment required to encourage investment of capital in it. The cost of capital which the Board is required to set consists of the benchmark ROE plus the cost of debt and capital structure for the utility (the debt-to-equity ratio). Again, the only component discussed in this judicial review is the ROE.

[7] In a decision released November 30, 2010, the Board set Liberty's global ROE at 10.9%, which consisted of a benchmark ROE of 8.13% and a company-specific risk premium of 2.75%. In December 2019, in accordance with its ongoing obligation to verify the continuing reasonableness of established rates, the Board ordered Liberty to apply for a review of its cost of capital. The hearing before the Board was held July 19, 20 and 22, 2021. The critical evidence for the purposes of this judicial review was provided by Liberty's expert, Mr. James Coyne of Concentric Energy Advisors, Inc., and by the Public Intervener's expert, Dr. Laurence Booth. Both experts were fully qualified to provide their opinion evidence, which will be discussed in the analysis below. Mr. Coyne advocated for a global ROE of 11.5% whereas Dr. Booth argued the range was between 7.6% and 8.34%.

[8] I pause to emphasize that the Public Intervener (PI) is an individual appointed pursuant to *An Act Respecting a Public Intervener for the Energy Sector*, S.N.B. 2013, c. 28 (the "*PI Act*"). Section 6(2) of the *PI Act* states the PI "shall make

those representations that the Public Intervener considers to be in the public interest […].” Moreover, the PI “shall advocate in the public interest and does not represent the interests of nor advocate on behalf of a party to the proceeding […]” (s.6(5)). This legislated mandate is critical when considering the *Vavilov* analysis below which addresses this point.

III. Issues on Application for Judicial Review and Standard of Review

[9] As indicated, the Board’s decision reduced Liberty’s global ROE from 10.9% to 8.5%. Liberty asserts this determination is unreasonable, both in its amount and in the manner which the Board arrived at it. In addition to arguing the decision is unreasonable, Liberty asks the Court not to remit the matter to the Board but to make its own determination of a reasonable ROE, based on the evidence. There is no dispute the applicable standard of review is reasonableness and the review is to be conducted based on the factors established by the Supreme Court in *Vavilov*.

IV. Analysis

[10] The Board began its analysis by correctly referring to the long-standing Supreme Court decision of *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] S.C.R. 186, [1929] S.C.J. No. 3 (QL), which established the test for setting fair and reasonable rates. The Supreme Court held a rate must be fair not only to consumers, but also to the regulated company so that it may secure a reasonable return on invested capital. It held a fair return means a utility is allowed as much of a return on invested capital as it would receive if the same amount were invested in another security possessing a level of attractiveness, stability and certainty which is equal to that of the utility. As will be seen, this is why evidence of the ROEs of comparable companies becomes critical.

[11] The Board then determined that the process to set an acceptable return is the fair return standard established by the National Energy Board in *TransCanada Pipelines Ltd. (Re),* 2013 LNCNEB 2, at para. 565. It held the standard is required:

a) to be comparable to the return available from an enterprise of like risk (the comparable investment requirement);

b) to help maintain the financial integrity of the regulated enterprise (the financial integrity requirement); and

c) to promote further capital investment (the capital attraction requirement).

[12] There is no dispute all three requirements carry equal weight and must all be factored into the analysis. In its decision, the Board did not comment on the second and third requirements, nor did it provide any explanation for not doing so, notwithstanding its acceptance that all three must be met. The Board commented the fair and just standard is a component of setting just and reasonable rates "in the context of a general rate application" (at para. 20). It is not clear why this was stated as the application before it was not a general rate application, as noted. In the end, this comment does not appear to have impacted the decision.

[13] The Board heard evidence from the experts on several models used to determine a fair ROE. It exercised its jurisdiction by electing to rely on the Capital Asset Pricing Model ("CAPM") with some adjustments (a "modified CAPM") and to use another model for the purpose of conducting a "reasonableness check." The other model it indicated it would use for that purpose was the multistage growth Discounted Cash Flow Model ("DCFM"). It chose not to rely on this model as the primary basis for its analysis as it considered the variables used in it too "optimistic." However, as will be seen, the decision does not explain how the reasonableness check was undertaken.

[14] Within the CAPM, the ROE consists of the aggregate of:

a) a risk-free rate;

b) a market risk premium multiplied by a beta coefficient;

c) floatation costs; and

d) a company-specific risk premium.

A. *A risk-free rate*

[15] In terms of the risk-free rate, the Board accepted Dr. Booth's rate of 3.07% but, although it appears to have made an adjustment to this rate, its decision does not indicate what the adjustment was.

B. *A market-risk premium multiplied by a beta coefficient*

[16] The Board settled on a market-risk premium of 6.23%, which figure is not in dispute. It should be noted, however, this figure reflected the Board's acceptance of the multistage growth DCFM as the reasonableness check as recommended by the PI. This number then needed to be adjusted by the beta coefficient.

[17] The beta coefficient is designed to capture the riskiness of a company, or group of companies, when compared to the market. Mr. Coyne's calculations used a Canadian proxy group of companies which included AltaGas and Enbridge. Dr. Booth's calculations excluded these two companies from consideration, and the Board accepted their exclusion generated "a more appropriate beta" (at para. 74). In the end, the Board maintained the same beta it had set in 2010 at .55, and there is no dispute about this for the purposes of this review. That resulted in a market-risk premium of 3.43% (6.23 x .55).

C. *Floatation costs*

[18] Floatation costs represent all costs associated with issuing equities. For the purposes of this analysis, there is no need to delve into their calculations. Both experts agreed a factor of .50% was reasonable, and the Board accepted this. There is no dispute on this point.

[19] This generated a "benchmark" ROE of 7% (3.07 + 3.43 + .50) before adding the company-specific risk premium. The Board stated that, in arriving at this "benchmark" ROE, it used the list of comparators from the multistage growth DCFM as a reasonableness check. It did so by excluding AltaGas and Enbridge from the equation, the two companies which, by far, had the highest ROEs of all the companies in the Canadian proxy group. The confusion stems from the Board's indication that it would use the DCFM as a reasonableness check for the "upper range" of the ROE against the CAPM (at para. 46), which presumably meant against the "entire" ROE once calculated and not just against the benchmark components taken in isolation, which it later purported to do (at paras. 87-89). However, when indicating it would use the DCFM as a reasonableness check, the Board did not state it was excluding AltaGas and Enbridge. In the end, there is no indication as to how the Board conducted the reasonableness check.

D. *A company-specific risk premium*

[20] The Board addressed the adjustment to be made to the "benchmark" ROE of 7% to account for the specific risks facing Liberty's New Brunswick operations, the company-specific risk premium (at para. 90). Again, it need only be said that factor was set at 1.5% and there is no dispute about this for our purposes. That resulted in a "global" ROE of 8.5%.

[21] The multistage growth DCFM, excluding AltaGas and Enbridge, produced a benchmark ROE ranging from 7.33% to 9.69% plus floatation. The ROE for the U.S. proxy group was between 7.83% and 9.25% plus floatation. For Liberty, the Board

settled on 6.5% plus floatation for the 7% ROE before the company-specific premium without any explanation as to how the 6.5% related to the proxy numbers, or how applying the reasonableness check it says it would apply yielded that number. One is left to wonder whether these were the ranges the Board found "optimistic," or whether that comment was directed at the range with AltaGas and Enbridge in the proxy group. If removing them was meant to make the range less optimistic, that purpose was not clearly stated. The Board said it would use the results from the DCFM, which presumably included AltaGas and Enbridge, for its reasonableness check for the "upper range" of the return against the preferred CAPM (at para. 46) but, again, it is not clear what the Board meant by that. Why use DCFM only as a check against the upper range if AltaGas and Enbridge are excluded? The Board does not mention the "upper range" qualifier in its decision where it states it will rely primarily on the CAPM with use of other models as a reasonableness check (at para. 31).

[22] In referring to the PI's submissions arguing for a 10% global ROE as opposed to Liberty's submission for 11.5%, the Board agreed with her that it is important to consider ROEs from other utilities and then apply its own judgment. As will be seen, that is a mischaracterization of what the PI actually said.

The *Vavilov* guidelines

[23] *Vavilov* makes clear that administrative decisions on a whole must be transparent, intelligible and justified (at para. 15). The following guidelines emerge from that decision. A reviewing court must follow them in conducting a reasonableness review. They are:

a. Reasons help show the affected parties that their arguments have been considered and the decision was made in a fair manner and not arbitrarily (para. 79).

b. The review must focus on the reasoning process and the outcome (para. 83).

c. The reviewing court must examine the decision maker's reasons with a view to "seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (para. 84).

d. While deference is owed to the decision maker, the reviewing court must develop an understanding of the reasoning to determine if it is reasonable. A reasonable decision will reflect a "rational chain of analysis" (para. 85).

e. A reasonableness review requires an assessment of the process of articulating the reasons to reach the outcome. The decision must fall within a range of possible acceptable outcomes which are defensible in respect of the facts and law. It is not enough for a decision to be justifiable. The reasons must be justified (para. 86).

f. The standard for written reasons is not perfection (para. 91).

g. "Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge" (para. 92). I note, however, two of the three Board members in this case were lawyers.

h. On deference, the reviewing court should keep in mind the decision might have been made by bringing into play institutional expertise and experience (para. 93). That factor is less important in this instance given that, as previously noted, the Board had little experience with cost of capital hearings.

i. To set a decision aside, the reviewing court "must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and

transparency." The shortcomings must be "sufficiently central or significant to render the decision unreasonable" (para. 100).

j. There are two types of fundamental flaws:

(i) "a failure of rationality internal to the reasoning process"; and
(ii) an untenable decision "in light of the relevant factual and legal constraints that bear on it" (para. 101).

k. The first flaw can manifest itself in three ways:

(i) the line of analysis could not reasonably lead from the evidence to the conclusion;
(ii) the reasons, read holistically, do not reveal a chain of analysis or are not based on a rational chain of analysis; and
(iii) the reasons, when contrasted with the record, make it impossible to understand the reasoning on a critical point (paras. 102-103).

l. The second type of flaw requires consideration of the following elements:

(i) the statutory scheme;
(ii) other statutes or the common law;
(iii) the principles of statutory interpretation;
(iv) the evidence: reasonableness may be jeopardized if the decision maker has fundamentally misapprehended or failed to account for the evidence before it and conclusions are not based on that evidence (para. 126);
(v) the submissions of the parties: these will vary in significance depending on the context;
(vi) past practices or decisions of the tribunal or board; and
(vii) the potential impact of the decision on a party (para. 106).

m. On element l(v), the reasons must meaningfully account for the central issues and concerns raised by the parties. The legal principle rooted in the right to be heard (procedural fairness) dictates that parties affected by a decision should have the opportunity to present their case fully. Reasons must be responsive to this principle because they are the "primary mechanism by which decision makers demonstrate that they have actually listened to the parties" (para. 127). A decision maker's failure to meaningfully grapple with a central argument made by a party "may call into question whether the decision maker was actually alert and sensitive to the matter before it" (para. 128) (particularly in a case where the Board has little experience with the subject matter and has the benefit of submissions from the PI).

n. On element l(vii), "concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable" (para. 134). Recall that in this instance, the Board was told an 8.5% ROE was untenable; it represented a drastic reduction from the 2010 ROE without any explanation.

Liberty's grounds of review

[24] Liberty asserts, in its written submission, the Board's decision is unreasonable because it violates several of the *Vavilov* principles in that:

a. It applied a single model CAPM to determine the ROE, contrary to the expert evidence of both parties that multiple models must be used. At the hearing of the application before the Court, counsel for Liberty conceded the Board used an adjusted CAPM although it did not explain what the adjustment was;

b. It appears to have done a reasonableness check with the multistage growth DCFM, but it is not possible to ascertain from the reasons what it did, thereby failing to demonstrate a rational chain of analysis;

c. It failed to look at the comparable companies it had identified to assess Liberty's ROE, namely Heritage Gas Limited ("HGL") and Pacific Northern Gas ("PNG"), thereby once again failing to be rational in its reasoning;

d. It did not meaningfully account for the PI's submissions on the central issue to this review, the ROE, contrary to element l(v) above; and

e. It did not explain how an overall ROE of 8.5%, a significant reduction from the 2010 rate and now one of the lowest for a regulated gas utility in North America, could be reasonable. The Board's decision therefore demonstrated arbitrariness and an absence of transparency, intelligibility and justification.

Use of modified CAPM with a reasonableness check

[25] The CAPM calculates a rate of return by assessing the risk-free rate, a market risk premium and a beta. The expert evidence of both parties is that accepted regulatory practice requires using more than one model to calculate a rate of return. While the Board purports to have used the modified CAPM with a reasonableness check using the DCFM, again, it is not possible to discern from the reasons precisely what the Board did.

[26] To set a cost of capital, the Board is required to apply the law that governs the exercise, which includes applying the legal principles relating to the fair return standard as opposed to conducting a simple mathematical calculation using a single formula-based model. The leading authorities on point are *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia et al.*, [1923] U.S.S.C.

160; *TransCanada Pipelines Ltd. v. National Energy Board*, 2004 FCA 149, [2004] F.C.J. No. 654 (QL); and the Ontario Energy Board's *Report of the Board on the Cost of Capital of Ontario's Regulated Utilities*, EB-2009-0084, dated December 11, 2009.

[27] Although the Board professed to apply its judgment, again, it failed to explain how it made the adjustments or applied the check to the modified CAPM. Both experts testified these were required.

[28] The PI's expert, Dr. Booth, considered Enbridge, Atco and Fortis as benchmark utilities with the lowest risk, and their respective benchmark ROEs were 8.34%, 8.51% and 8.75%. The Board does not explain in its decision how using these ROEs as benchmarks for Liberty's assessment could support a figure of only 7% for Liberty.

[29] The PI's expert testified the DCFM reasonableness check is mandatory. Again, while the Board indicated it would do the check, it is not apparent from the decision that it did. If it believed it had undertaken the check, there is no explanation in the decision as to how it did so or how the reasonableness check would justify the appropriateness of adopting the 7% figure generated by using the modified CAPM for a benchmark utility. The Board says it did the reasonableness check using the "results" of the multistage growth DCFM "for the upper range of the return" when compared to the CAPM assessment (at paras. 46, 89). The confusion stems from the fact that, shortly before this, the Board reasoned Alta and Enbridge should be excluded from the Canadian proxy group of the DCFM and, with those companies excluded, that model showed benchmark ROEs for the remaining companies in that proxy group ranging from 7.33% to 9.69% plus the floatation (at paras. 44-45). The U.S. proxy group range in that model was from 7.83% to 9.25% plus the floatation. The Board did not explain whether it used the Canadian or U.S. proxy group, with or without Alta and Enbridge in the Canadian group, or whether it used a combination of both, again with or without Alta and Enbridge in the mix. Those two companies had, by far, the highest ROEs of the Canadian group and they are also the only companies in that group with large gas distribution operations.

The other three companies in the group are primarily electricity utilities. Moreover, neither expert advocated in favour of removing Enbridge from the proxy group for the purpose of conducting the analysis.

[30] This begs the question: did the Board use the highest or lowest ROEs in coming to its conclusion? Had it properly applied the established principles, it should have used an average. The U.S. average is 8.47%, and the Canadian average is 8.95% without Alta and Enbridge. The decision does not explain how using either average or an average of both the Canadian and U.S. proxies justified a benchmark rate of 7% for Liberty. Again, the Board did not explain what it meant when it said it would use the DCFM as a reasonableness check for the "upper end of the return." Its reasons do not "add up" as *Vavilov* requires them to do (para. 104).

Failure to use comparators

[31] The ROE must comply with the fair return standard, and comparable companies are examined to determine certain elements of that standard. In its reasons, the Board determined that Heritage and PNG formed the peer group for this exercise. The Board noted Liberty was a higher risk enterprise than the peer group companies because of New Brunswick's low density and dispersed population and customer base (at paras. 122-123).

[32] The global ROE for Heritage is 11%, and PNG's is 9.5%. The Board did not explain how these comparators justified an overall ROE of 8.5% for Liberty. There was no evidence before the Board on the company-specific risk premiums for Heritage and PNG. As a result, the only valid comparison the Board could make was with the overall ROE of these companies when assessing Liberty. Again, the decision does not "add up."

Failure to consider the PI's submission

[33] This is perhaps the *Vavilov* factor which most clearly exposes the shortcomings of the Board's decision on the central issue to this appeal, namely the ROE component of Liberty's cost of capital. As earlier noted, apart from Liberty, the only other participant before the Board was the PI, Ms. Heather Black. She has a legislated mandate to advocate in favour of the public interest in accordance with s. 6(5) the *PI Act*, which states:

6(5) During a proceeding of the Board, the Public Intervener shall advocate in the public interest and does not represent the interests of nor advocate on behalf of a party to the proceeding, a customer, a class of customers, a government department or agency or other interested group.	6(5) Dans le cadre d'une instance tenue devant la Commission, l'intervenant public défend l'intérêt public et ne représente ni ne défend les intérêts d'une partie à l'instance, d'un client, d'une catégorie de clients, d'un ministère ou organisme gouvernemental ou d'une autre partie intéressée.

[34] The PI fulfilled her mandate by calling her expert evidence. Under *Vavilov*, the Board must meaningfully account for the central positions advocated by the parties through its written reasons (at para. 127) and, in my view, this is particularly true when it considers the position advocated by a party with a legislated mandate.

[35] Notwithstanding that the PI's expert had opined the appropriate range for the ROE was from 7.6% to 8.34%, the PI's concluding position on this central issue was that Liberty's global ROE should be 10%. She summarized her submission to the Board as follows:

> So with that approach, using the average ROE that Concentric calculates on its Canadian ROE proxy group as a benchmark and adding the .8 percent that, in my view, is a reasonable risk premium, that gets a fair ROE for Liberty to around 10 percent. […]
>
> Also, the range around 10 percent. It is a little higher than the results of the models as I view the results should be from the models, but not grossly so which seems appropriate given that Liberty's small size should – and the

> small size amplifies their risk or the impact of the risk [it] faces, so it should warrant some amount above the output of those models. [Excerpt of Closing Submission of Public Intervener, July 22, 2021, pp. 435-436 of Hearing Transcript (Record on Application, vol. 8, at pp. 4841-4842)]

[36] In its decision, the Board referred to the PI's submissions on far less significant points no fewer than 16 times, but it completely ignored the critical submission relating to the ROE. The Board makes no mention of it without stating why it chose to ignore it, nor does it explain why the PI argued for a higher ROE than the range recommended by her expert. To quote Liberty's counsel in his submissions before the Court, "This sticks out like a sore thumb." Although the Board need not be held to a standard of perfection in decision writing, the standard set by the relevant *Vavilov* principle demanded it explain why the PI's submission should not be adopted. It did not; thus, its decision does not meet the reasonableness standard on judicial review.

[37] It is not possible to determine, in light of the Board's reasons, if any of the evidence could reasonably lead the Board to the global ROE of 8.5%. Much of that evidence could have led it to 10%. In any event, Liberty argues the rate was set too low and this has major negative financial implications on both its future business and its ability to attract future investment. One is left to wonder, in light of the *Vavilov* factor set out at para. 23(m) above, whether the Board was actually alert and sensitive to the crux of the matter before it. It did not apply the fair return standard as required by legal principles and, as a result, its decision does not pass muster on the reasonableness standard of review.

To remit or not to the Board

[38] Counsel for Liberty urged the Court not to remit the matter to the Board for rehearing arguing the 10% ROE should instead be ordered by the Court. Assuming, without deciding the issue, the Court had the sought after jurisdiction, it cannot be exercised in this case. Rehearing, with a proper application of the *Vavilov* principles, will

yield either a different outcome or a similar one, but with proper reasons. Either way, the Board has the exclusive jurisdiction to make that determination.

V. Disposition

[39] I would allow the appeal and order the matter be remitted to the Board for rehearing. As no costs were requested by Liberty, I would not order any.

CHARLES A. LEBLOND, J.A.

WE CONCUR:

KATHLEEN A. QUIGG, J.A.

RAYMOND T. FRENCH, J.A.

Version française de la décision de la Cour rendue par

LE JUGE LEBLOND

I. Introduction

[1] La Cour est saisie d'une requête déposée par Liberty Utilities (Gaz Nouveau-Brunswick) LP, représentée par son associée commanditée, Liberty Utilities (Gaz Nouveau-Brunswick) Corp., en vertu du par. 52(1) de la *Loi sur la Commission de l'énergie et des services publics*, L.N.-B. 2006, ch. E-9.18 (la *Loi*), sollicitant la révision judiciaire d'une décision rendue par la Commission de l'énergie et des services publics le 29 octobre 2021. La décision a été rendue à la suite d'une audience devant la Commission ayant pour objet l'établissement du coût du capital de Liberty, dont une partie importante exigeait l'établissement de son taux de rendement des capitaux propres (RCP).

[2] La Commission a fixé le RCP à 8,5 %. Liberty affirme que cette décision est déraisonnable lorsqu'elle est examinée à la lumière de la norme de contrôle de la décision raisonnable établie par la Cour suprême dans l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65, [2019] A.C.S. n^{o} 65 (QL).

[3] Pour les motifs exposés ci-dessous, je suis d'avis d'accueillir la requête et de renvoyer l'affaire à la Commission pour la tenue d'une nouvelle audience.

II. Contexte factuel

[4] Une partie des activités de Liberty au Nouveau-Brunswick comprend la distribution du gaz naturel. Sa prédécesseure nominale, Enbridge Gas New Brunswick Limited Partnership, a acquis la concession générale pour cette distribution en 1999. Ce secteur de ses activités est régi par la *Loi de 1999 sur la distribution du gaz*, L.N.-B. 1999, ch. G-2.11. L'article 23 de la *Loi* accorde à la Commission la compétence

d’exercer les pouvoirs qui lui sont conférés par la *Loi de 1999 sur la distribution du gaz*, dont l’art. 52 prévoit la compétence de la Commission. Selon cet article, lorsqu’elle approuve ou fixe des taux et des tarifs justes et raisonnables, la Commission peut adopter toute méthode ou technique qu’elle juge appropriée. Le coût du modèle de service adopté par la Commission pour les activités de distribution du gaz de Liberty détermine les tarifs qu’elle peut facturer à ses clients. Un élément important de l’établissement du coût du service est la fixation du coût du capital de Liberty. Il s’agissait de l’unique objet de l’audience tenue devant la Commission. Elle ne se livrait pas à la fixation des tarifs de la distribution aux clients.

[5] La Commission s’est rarement penchée sur la détermination du coût du capital. Par conséquent, la preuve d’expert présentée sur ce point est devenue particulièrement importante dans l’examen de la Commission, puisqu’elle ne pouvait pas s’appuyer sur sa propre expertise pour arriver à sa décision.

[6] Le coût du capital pour un service public est le rendement total du capital investi qui est requis afin d’encourager l’investissement de capital dans celui-ci. Le coût du capital que la Commission est tenue de fixer comprend le RCP de référence plus le coût de l’endettement et la structure du capital du service public (le ratio emprunts/capitaux propres). Encore une fois, la seule composante discutée dans la présente révision judiciaire est le RCP.

[7] Dans une décision publiée le 30 novembre 2020, la Commission a fixé le RCP global de Liberty à 10,9 %, ce taux étant composé d’un RCP de référence de 8,13 % et d’une prime de risque propre à l’entreprise de 2,75 %. En décembre 2019, conformément à son obligation permanente de contrôler la raisonnabilité continue des taux établis, la Commission a ordonné à Liberty de demander un examen de son coût du capital. L’audience devant la Commission s’est déroulée les 19, 20 et 22 juillet 2021. La preuve cruciale pour ce qui est de la présente révision judiciaire a été fournie par le témoin expert de Liberty, M. James Coyne, de Concentric Energy Advisors, Inc., et par M. Laurence Booth, le témoin expert de l’intervenante publique. Les deux experts ont été

pleinement habilités à donner un témoignage d'opinion, lequel fera l'objet d'une discussion dans l'analyse présentée ci-dessous. M. Coyne préconisait un RCP global de 11,5 % tandis que M. Booth a soutenu qu'il devait se situer entre 7,6 % et 8,34 %.

[8] Je marque ici une pause pour souligner que l'intervenant public est une personne nommée en application de la *Loi sur l'intervenant public dans le secteur énergétique*, L.N.-B. 2013, ch. 28 (la *Loi sur l'intervenant public*). Le paragraphe 6(2) de la *Loi sur l'intervenant public* prévoit que l'intervenant public « présente les observations qu'il estime relever de l'intérêt public […] » De plus, l'intervenant public « défend l'intérêt public et ne représente ni ne défend les intérêts d'une partie à l'instance […] » (par. 6(5)). Ce mandat d'origine législative est d'une importance cruciale dans le cadre de l'analyse fondée sur l'arrêt *Vavilov* effectuée ci-dessous qui traite de ce point.

III. Questions à trancher dans la requête en révision judiciaire et norme de contrôle

[9] Comme je l'ai indiqué, la décision de la Commission a réduit le RCP global de Liberty de 10,9 % à 8,5 %. Liberty affirme que cette décision est déraisonnable, tant sur le plan de son montant que de la manière par laquelle la Commission y est arrivée. En plus de soutenir que la décision est déraisonnable, Liberty demande à la Cour de ne pas renvoyer l'affaire devant la Commission, mais plutôt de déterminer elle-même un RCP raisonnable d'après la preuve. Nul ne conteste que la norme de contrôle applicable est celle de la décision raisonnable et que la révision doit se faire suivant les facteurs établis par la Cour suprême dans l'arrêt *Vavilov*.

IV. Analyse

[10] La Commission a entamé son analyse en invoquant à juste titre l'arrêt de longue date de la Cour suprême *Northwestern Utilities Ltd. c. Edmonton (City)*, [1929] R.C.S. 186, [1929] A.C.S. n^{o} 3 (QL), qui énonce le critère permettant d'établir des tarifs justes et raisonnables. La Cour suprême a conclu qu'un tarif doit être juste, non seulement pour les consommateurs, mais aussi pour l'entreprise réglementée, de sorte

qu’elle puisse obtenir un rendement raisonnable du capital investi. Elle a conclu qu’un rendement juste signifie qu’un service public a droit à un rendement du capital investi aussi élevé qu’il l’aurait été si le même montant avait été investi dans une autre sûreté dont l’attractivité, la stabilité et la certitude seraient équivalentes à celles du service public. Comme nous le verrons, il s’agit de la raison pour laquelle la preuve du RCP d’entreprises comparables devient cruciale.

[11] La Commission a ensuite jugé que le processus permettant de fixer un rendement acceptable est la norme de rendement équitable établie par l’Office national de l’énergie dans la décision *TransCanada Pipelines Ltd. (Re)*, 2013 LNCONE 2, au par. 565. L’Office a conclu que la norme doit :

a) être comparable au rendement que rapporterait une autre entreprise présentant un risque analogue (critère de l’investissement comparable);

b) aider l’entreprise réglementée à préserver son intégrité financière (critère de l’intégrité financière);

c) favoriser l’attraction de capitaux additionnels (critère de l’effet d’attraction de capitaux).

[12] Nul ne conteste que les trois exigences ont le même poids et doivent toutes être prises en compte dans l’analyse. Dans sa décision, la Commission n’a pas discuté des deuxième et troisième exigences et n’a pas expliqué pourquoi elle n’en parlait pas, et ce, malgré qu’elle a accepté que les trois doivent être respectées. La Commission a observé que la norme d’établissement de tarifs justes et raisonnables est un élément de l’établissement de tarifs justes et raisonnables [TRADUCTION] « dans le contexte d’une demande générale d’établissement de tarifs » (au par. 20). Les raisons pour lesquelles elle a dit cela ne sont pas claires étant donné qu’il ne s’agissait pas d’une demande générale d’établissement de tarifs, tel qu’il est indiqué. En fin de compte, ces propos ne semblent pas avoir eu une incidence sur la décision.

[13] La Commission a entendu des témoignages d'experts au sujet de plusieurs modèles servant à déterminer un RCP juste. Dans l'exercice de sa compétence, elle a choisi de se fier au modèle d'évaluation des actifs financiers (MEDAF) avec quelques rajustements (MEDAF modifié) et d'employer un autre modèle afin d'effectuer un [TRADUCTION] « contrôle de raisonnabilité ». L'autre modèle qu'elle a indiqué qu'elle emploierait à cette fin était celui de l'actualisation des flux de trésorerie (MAFT) de croissance à plusieurs étapes. Elle a choisi de ne pas avoir recours à ce modèle à titre de fondement principal de son analyse puisqu'elle considérait que les variables qu'il employait étaient trop [TRADUCTION] « optimistes ». Toutefois, comme nous le verrons, la décision n'explique pas comment le contrôle de raisonnabilité a été entrepris.

[14] Dans le MEDAF, le RCP est composé du total des éléments suivants :

a) un taux sans risque;

b) une prime de risque du marché multipliée par un coefficient bêta;

c) les coûts d'émission;

d) une prime de risque propre à l'entreprise.

A. *Un taux sans risque*

[15] S'agissant du taux sans risque, la Commission a retenu le taux de 3,07 % proposé par M. Booth, mais, même s'il semble qu'elle l'a rajusté, sa décision n'indique pas quel était le rajustement.

B. *Une prime de risque du marché multipliée par un coefficient bêta*

[16] La Commission a accepté une prime de risque du marché de 6,23 %, chiffre qui n'est pas contesté. Il y a lieu de noter, cependant, que ce chiffre reflète l'acceptation, par la Commission, des MAFT de croissance à plusieurs étapes à titre de contrôle de raisonnabilité, conformément aux recommandations de l'intervenante publique. Ce chiffre devait alors être rajusté au moyen du coefficient bêta.

[17] Le coefficient bêta a été conçu pour saisir le degré de risque que pose une entreprise ou un groupe d'entreprises comparativement au marché. Les calculs de M. Coyne font appel à un groupe d'entreprises canadiennes comparables, dont AltaGas et Enbridge. Les calculs de M. Booth n'ont pas tenu compte de ces deux entreprises, et la Commission a admis que leur exclusion avait généré [TRADUCTION] « un bêta plus approprié » (par. 74). En fin de compte, la Commission a maintenu le même bêta qu'elle avait établi en 2020, c'est-à-dire 0,55, lequel n'est pas contesté dans la présente révision judiciaire. Le résultat était alors une prime de risque du marché de 3,43 % (6,23 x 0,55).

C. *Les coûts d'émission*

[18] Les coûts d'émission représentent tous les coûts liés à l'émission d'actions. Pour les besoins de la présente analyse, il est inutile de se pencher davantage sur leur calcul. Les deux témoins experts ont convenu qu'un facteur de 0,5 % était raisonnable, et la Commission l'a accepté. Il n'y a aucun litige sur ce point.

[19] Cela a généré un RCP [TRADUCTION] « de référence » de 7 % (3,07 + 3,43 + 0,5) avant l'ajout de la prime de risque propre à l'entreprise. La Commission a déclaré que, pour arriver à ce RCP [TRADUCTION] « de référence », elle s'était servie, à titre de contrôle de raisonnabilité, de la liste de comparateurs du MAFT de croissance à plusieurs étapes. Pour ce faire, elle a exclu AltaGas et Enbridge de l'équation, les deux entreprises qui avaient, de loin, les RCP les plus élevés de toutes les entreprises du groupe d'entreprises canadiennes comparables. La confusion découle de l'indication de la

Commission selon laquelle elle se servirait du MAFT à titre de contrôle de la raisonnabilité pour la [TRADUCTION] « fourchette supérieure » du RCP par rapport au MEDAF (par. 46), ce qui voudrait vraisemblablement dire par rapport à [TRADUCTION] « la totalité » du RCP, une fois celui-ci calculé, et non simplement par rapport aux composants de référence pris isolément, ce qu'elle a plus tard affirmé avoir fait (par. 87 à 89). Toutefois, lorsqu'elle a indiqué qu'elle se servirait du MAFT à titre de contrôle de raisonnabilité, la Commission n'a pas déclaré qu'elle excluait AltaGas et Enbridge. En fin de compte, rien n'indique comment la Commission a réalisé le contrôle de raisonnabilité.

D. *Une prime de risque propre à l'entreprise*

[20] La Commission a traité du rajustement devant être fait au RCP [TRADUCTION] « de référence » de 7 % afin de tenir compte des risques particuliers auxquels Liberty fait face dans le cadre de ses activités néo-brunswickoises, c'est-à-dire la prime de risque propre à l'entreprise (par. 90). Encore une fois, il suffit de mentionner que ce facteur a été fixé à 1,5 % et qu'il n'y a aucun litige à ce sujet en l'espèce. Il en a résulté un RCP [TRADUCTION] « global » de 8,5 %.

[21] Le MAFT de croissance à plusieurs étapes, dont AltaGas et Enbridge étaient exclues, ont produit un RCP de référence de 7,33 % à 9,69 %, plus les coûts d'émission. Le RCP pour le groupe d'entreprises américaines comparables était de 7,83 % à 9,25 %, plus les coûts d'émission. Pour Liberty, la Commission a fixé le taux à 6,5 %, plus les coûts d'émission pour le RCP de 7 % avant l'application de la prime propre à l'entreprise, sans expliquer comment le taux de 6,5 % se rapportait aux chiffres relatifs aux entreprises comparables ou comment l'application du contrôle de raisonnabilité qu'elle a dit qu'elle appliquerait aurait donné ce résultat. On ne peut faire autrement que se demander s'il s'agissait des fourchettes que la Commission avait qualifié d'[TRADUCTION] « optimistes », ou si ce commentaire visait la fourchette pour laquelle AltaGas et Enbridge faisaient partie des entreprises comparables. Si leur exclusion avait pour but de rendre la fourchette moins optimiste, cet objectif n'a pas été

énoncé clairement. La Commission a dit qu'elle se servirait des résultats du MAFT, qui comprenaient vraisemblablement AltaGas et Enbridge, pour son contrôle de la raisonnabilité de la [TRADUCTION] « fourchette supérieure » du rendement par rapport au MEDAF préféré (par. 46). Or, encore une fois, ce que la Commission a voulu dire par cela n'est pas clair. Pourquoi n'utilise-t-on le MAFT qu'à titre de contrôle par rapport à la fourchette supérieure si AltaGas et Enbridge sont exclues? La Commission ne mentionne pas la nuance [TRADUCTION] « fourchette supérieure » dans sa décision, lorsqu'elle déclare qu'elle s'appuiera principalement sur le MEDAF et se servira d'autres modèles à titre de contrôle de raisonnabilité (par. 31).

[22] En renvoyant aux observations de l'intervenante publique à l'appui d'un RCP global de 10 % par opposition au taux de 11,5 % proposé par Liberty, la Commission était d'accord avec elle sur le fait qu'il est important d'examiner le RCP d'autres services publics, puis d'appliquer son propre jugement. Comme nous le verrons, il s'agit d'une mauvaise interprétation des propos de l'intervenante publique.

Les lignes directrices énoncées dans l'arrêt *Vavilov*

[23] Il ressort clairement de l'arrêt *Vavilov* que les décisions administratives dans leur ensemble doivent être transparentes, intelligibles et justifiées (par. 15). Les lignes directrices qui suivent se dégagent de cette décision. Une cour de révision doit les suivre lorsqu'elle effectue un contrôle de la raisonnabilité. Les voici :

a. Les motifs permettent de montrer aux parties concernées que leurs arguments ont été pris en compte et que la décision a été rendue de manière équitable et non arbitraire (par. 79).

b. Le contrôle doit s'intéresser au raisonnement suivi et au résultat de la décision (par. 83).

c. La cour de révision doit examiner les motifs du décideur et « chercher à comprendre le fil du raisonnement suivi par le décideur pour en arriver à sa conclusion » (par. 84).

d. Il y a lieu de faire preuve de déférence envers le décideur, et la cour de révision doit s'assurer de bien comprendre le raisonnement afin de déterminer s'il est raisonnable. Une décision raisonnable est fondée sur « une analyse […] rationnelle » (par. 85).

e. Un contrôle selon la norme de la décision raisonnable exige une évaluation de la décision et de sa justification. La décision doit appartenir aux issues possibles acceptables pouvant se justifier au regard des faits et du droit. Il ne suffit pas que la décision soit justifiable. Les motifs doivent être justifiés (par. 86).

f. Les motifs écrits ne doivent pas être jugés au regard d'une norme de perfection (par. 91).

g. « On ne peut pas toujours s'attendre à ce que les décideurs administratifs déploient toute la gamme de techniques juridiques auxquelles on peut s'attendre de la part d'un avocat ou d'un juge » (par. 92). Je remarque, cependant, que deux des trois membres de la Commission en l'espèce étaient des avocats.

h. En ce qui concerne la retenue dont elle doit faire preuve, la cour de révision doit garder à l'esprit que le décideur a peut-être pris sa décision en mettant à contribution son expertise et son expérience institutionnelle (par. 93). Ce facteur est moins important en l'espèce étant donné que, comme nous l'avons indiqué ci-dessus, la Commission a peu d'expérience en matière d'audiences portant sur le coût du capital.

i. Pour infirmer une décision, la cour de révision « doit être convaincue qu'elle souffre de lacunes graves à un point tel qu'on ne peut pas dire qu'elle satisfait aux exigences de justification, d'intelligibilité et de transparence ». Les lacunes doivent être « suffisamment capitale[s] ou importante[s] pour rendre [la décision] déraisonnable » (par. 100).

j. Il existe deux catégories de lacunes fondamentales :

(i) « le manque de logique interne du raisonnement »;
(ii) une décision indéfendable « compte tenu des contraintes factuelles et juridiques pertinentes qui ont une incidence sur la décision » (par. 101).

k. La première catégorie de lacunes peut se manifester de trois façons :

(i) le mode d'analyse ne pouvait pas raisonnablement amener le tribunal, au vu de la preuve, à conclure comme il l'a fait;
(ii) les motifs, lus dans leur ensemble, ne font pas état d'une analyse rationnelle ou montrent que la décision n'est pas fondée sur une analyse rationnelle;
(iii) il est impossible de comprendre, lorsqu'on lit les motifs en corrélation avec le dossier, le raisonnement du décideur sur un point central (par. 102 et 103).

l. La deuxième catégorie de lacunes exige un examen des éléments suivants :

(i) le régime législatif;
(ii) les autres lois ou la common law;
(iii) les principes d'interprétation des lois;
(iv) la preuve : le caractère raisonnable d'une décision peut être compromis si le décideur s'est fondamentalement mépris sur la preuve qui lui a été

soumise ou n'en a pas tenu compte, et si les conclusions ne sont pas fondées sur cette preuve (par. 126);

(v) les observations des parties : leur importance variera selon le contexte;

(vi) les pratiques et décisions antérieures du tribunal administratif ou de la commission;

(vii) l'impact potentiel de la décision sur une partie (par. 106).

m. S'agissant de l'élément l)(v), les motifs doivent valablement tenir compte des questions et préoccupations centrales soulevées par les parties. Le principe juridique ancré dans le droit de se faire entendre (l'équité procédurale) prévoit que les parties visées par une décision doivent avoir la possibilité de présenter entièrement leur position. Les motifs doivent être adaptés à ce principe parce qu'ils sont le « principal mécanisme par lequel le décideur démontre qu'il a effectivement écouté les parties » (par. 127). Le fait qu'un décideur n'a pas réussi à s'attaquer de façon significative aux arguments principaux formulés par une partie « permet de se demander s'il était effectivement attentif et sensible à la question qui lui était soumise » (par. 128) (en particulier dans une cause où la Commission avait peu d'expérience en la matière et pouvait tirer profit d'observations de l'intervenante publique).

n. S'agissant de l'élément l)(vii), « les préoccupations relatives à l'arbitraire sont généralement plus prononcées dans les cas où la décision a des conséquences particulièrement graves ou sévères pour la partie visée et le défaut de traiter de ces conséquences peut fort bien se révéler déraisonnable » (par. 134). Rappelons-nous qu'en l'espèce, il a été dit à la Commission qu'un RCP de 8,5 % était indéfendable; il représentait une réduction radicale par rapport au RCP de 2010, réduction qui n'avait pas été expliquée.

Les moyens de révision de Liberty

[24] Liberty affirme dans son mémoire que la décision de la Commission est déraisonnable parce qu'elle viole plusieurs des principes énoncés dans l'arrêt *Vavilov*, en ce sens qu'elle :

a. a appliqué un seul modèle (le MEDAF) pour déterminer le RCP, contrairement à la preuve d'expert présentée par les deux parties selon laquelle il faut employer de multiples modèles. À l'audition de la requête devant la Cour, les avocats de Liberty ont concédé que la Commission avait utilisé un MEDAF rajusté sans préciser toutefois ce sur quoi portait le rajustement;

b. semble avoir effectué un contrôle de raisonnabilité à l'aide du MAFT de croissance à plusieurs étapes, mais il est impossible de déterminer ce qu'elle a fait à partir des motifs, ce qui ne fait donc pas état d'une analyse rationnelle;

c. n'a pas examiné les entreprises comparables qu'elle avait relevées afin d'évaluer le RCP de Liberty, à savoir Heritage Gas Limited (HGL) et Pacific Northern Gas (PNG), ne faisant donc pas état encore une fois d'un raisonnement rationnel;

d. n'a pas valablement tenu compte des observations de l'intervenante publique sur la question fondamentale de la présente révision judiciaire, à savoir le RCP, contrairement à l'élément l)(v) énoncé ci-dessus;

e. n'a pas expliqué comment un RCP global de 8,5 %, taux qui constitue une réduction considérable par rapport au taux de 2010 et qui est maintenant l'un des plus faibles pour un service réglementé de distribution de gaz en Amérique du Nord, pourrait être raisonnable. La décision de la Commission

est donc arbitraire et manque de transparence, d'intelligibilité et de justification.

L'utilisation d'un MEDAF modifié avec contrôle de raisonnabilité

[25] Le MEDAF permet de calculer un taux de rendement par l'évaluation d'un taux sans risque, d'une prime de risque du marché et d'un bêta. Selon la preuve d'expert présentée par les deux parties, la méthode de réglementation acceptée exige l'utilisation de plus d'un modèle pour calculer un taux de rendement. Même si la Commission prétend avoir utilisé le MEDAF modifié avec un contrôle de raisonnabilité fondé sur le MAFT, il est impossible, encore une fois, de cerner avec précision ce qu'elle a fait à partir des motifs.

[26] Pour fixer le coût du capital, la Commission est tenue d'appliquer le droit qui régit cet exercice, ce qui vise notamment l'application des principes juridiques relatifs à la norme du rendement équitable, par opposition à la réalisation d'un calcul mathématique simple au moyen d'un seul modèle fondé sur une formule. Les arrêts de principe en la matière sont *Bluefield Waterworks & Improvement Co. c. Public Service Commission of West Virginia et al.*, [1923] U.S.S.C. 160; *Transcanada Pipelines Ltd. c. Office National de l'Énergie*, 2004 CAF 149, [2004] A.C.F. n^{o} 654 (QL), et le rapport de la Commission de l'énergie de l'Ontario intitulé *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities*, EB-2009-0084, daté du 11 décembre 2009.

[27] Même si la Commission a déclaré qu'elle appliquait son jugement, elle a encore une fois omis d'expliquer comment elle a fait les rajustements ou appliqué les contrôles au MEDAF modifié. Les deux experts ont témoigné qu'elle y était tenue.

[28] M. Booth, le témoin expert de l'intervenante publique, a considéré Enbridge, Atco et Fortis comme les services publics de référence présentant le risque le plus faible, et leurs RCP de référence étaient respectivement de 8,34 %, 8,51 % et 8,75 %. La Commission n'explique pas dans sa décision comment l'utilisation de ces

RCP à titre de références dans l'évaluation afférente à Liberty pouvait justifier un taux aussi faible que 7 % pour cette dernière.

[29] Le témoin expert de l'intervenante publique a témoigné que le contrôle de raisonnabilité du MAFT est obligatoire. Encore une fois, bien que la Commission ait indiqué qu'elle effectuerait le contrôle, il n'appert pas de la décision qu'elle l'a fait. Si elle croyait avoir effectué le contrôle, rien dans la décision n'explique comment elle a procédé pour le faire ou comment le contrôle de raisonnabilité justifierait l'opportunité d'adopter le taux de 7 % généré par l'utilisation du MEDAF modifié relativement à un service public de référence. La Commission affirme qu'elle a effectué le contrôle de raisonnabilité en appliquant les [TRADUCTION] « résultats » du MAFT de croissance à plusieurs étapes [TRADUCTION] « à la fourchette supérieure du rendement » par comparaison à l'évaluation du MEDAF (par. 46 et 89). La confusion découle du fait que, peu avant cela, la Commission avait indiqué qu'AltaGas et Enbridge devaient être exclues du groupe d'entreprises canadiennes comparables retenues pour l'application du MEDAF et, ces entreprises étant exclues, que ce modèle révélait des RCP de référence pour les entreprises restantes de ce groupe qui se situaient entre 7,33 % et 9,69 %, plus les coûts d'émission (par. 44 et 45). Pour le groupe d'entreprises américaines comparables, la fourchette établie d'après ce modèle se situait de 7,83 % à 9,25 %, plus les coûts d'émission. La Commission n'a pas précisé si elle utilisait le groupe d'entreprises comparables canadiennes ou américaines, si AltaGas et Enbridge étaient comprises ou non dans le groupe canadien, ou si elle utilisait une combinaison des deux groupes, et, encore une fois, elle n'a pas précisé si AltaGas et Enbridge en faisaient partie. Ces deux entreprises avaient, de loin, le RCP le plus élevé du groupe canadien et sont aussi les seules entreprises de ce groupe exerçant d'importantes activités en matière de distribution du gaz. Les trois autres entreprises de ce groupe sont principalement des compagnies d'électricité. Qui plus est, ni l'un ni l'autre des experts n'a préconisé l'exclusion d'Enbridge du groupe de comparaison en vue de l'analyse.

[30] Cela soulève la question suivante : la Commission s'est-elle servi des RCP les plus élevés ou les plus faibles pour arriver à sa conclusion? Si elle avait appliqué

comme il se doit les principes établis, elle se serait servie d'une valeur moyenne. La moyenne américaine est de 8,47 % tandis que celle du Canada est de 8,95 %, exclusion faite d'AltaGas et d'Enbridge. La décision n'explique pas comment l'utilisation de l'une ou l'autre de ces moyennes ou d'une moyenne calculée à partir des groupes d'entreprises comparables du Canada et des États-Unis justifiait l'application d'un taux de référence de 7 % à Liberty. Encore une fois, la Commission n'a pas expliqué ce qu'elle entendait lorsqu'elle a affirmé qu'elle emploierait le MAFT à titre de contrôle de raisonnabilité appliqué à la [TRADUCTION] « fourchette supérieure du rendement ». Ses motifs ne « se tien[nen]t » pas, comme l'exige l'arrêt *Vavilov* (par. 104).

Le défaut d'utiliser des comparateurs

[31] Le RCP doit être conforme à la norme du rendement équitable, dont certains éléments doivent être déterminés au moyen d'un examen d'entreprises comparables. Dans ses motifs, la Commission a jugé que le groupe d'entreprises homologues applicables à cet exercice était composé de Heritage et de PNG. Elle a noté que Liberty était une entreprise présentant un risque plus élevé que le groupe d'entreprises homologues en raison du fait que la population et la clientèle néo-brunswickoises sont moins denses et plus dispersées (par. 122 et 123).

[32] Le RCP global de Heritage est de 11 %, et celui de PNG est de 9,5 %. La Commission n'a pas expliqué comment ces comparateurs justifiaient un RCP global de 8,5 % pour Liberty. La Commission ne disposait d'aucun élément de preuve au sujet des primes de risques propres à une entreprise pour Heritage et PNG. Par conséquent, la seule comparaison valide que la Commission pouvait faire, dans son évaluation de Liberty, portait sur le RCP global de ces entreprises. Encore une fois, cette décision ne « se tient » pas.

Le défaut de tenir compte des observations de l'intervenante publique

[33] Il s'agit possiblement du facteur établi dans l'arrêt *Vavilov* qui expose le plus clairement les lacunes de la décision de la Commission quant à la question fondamentale du présent appel, à savoir le volet RCP du coût du capital de Liberty. Comme je l'ai indiqué précédemment, mis à part Liberty, la seule autre participante s'étant présentée devant la Commission était l'intervenante publique, M^me^ Heather Black. Elle a un mandat d'origine législative de défendre l'intérêt public, lequel est prescrit au par. 6(5) de la *Loi sur l'intervenant public*, dont voici le texte :

6(5) During a proceeding of the Board, the Public Intervener shall advocate in the public interest and does not represent the interests of nor advocate on behalf of a party to the proceeding, a customer, a class of customers, a government department or agency or other interested group.	6(5) Dans le cadre d'une instance tenue devant la Commission, l'intervenant public défend l'intérêt public et ne représente ni ne défend les intérêts d'une partie à l'instance, d'un client, d'une catégorie de clients, d'un ministère ou organisme gouvernemental ou d'une autre partie intéressée.

[34] L'intervenante publique a rempli son mandat en présentant sa preuve d'expert. L'arrêt *Vavilov* exige que la Commission tienne valablement compte des positions centrales adoptées par les parties dans ses motifs écrits (par. 127), ce qui est particulièrement vrai, à mon avis, lorsqu'elle examine la position préconisée par une partie ayant un mandat d'origine législative.

[35] Malgré le fait que le témoin expert de l'intervenante publique avait exprimé l'opinion qu'un RCP approprié se situait dans une fourchette de 7,6 % à 8,34 %, la conclusion de cette dernière sur cette question centrale était que le RCP global de Liberty devrait être de 10 %. Elle a résumé ses observations à la Commission ainsi :

> [TRADUCTION]
> Donc, avec cette méthode, en utilisant le RCP moyen calculé par Concentric pour son groupe d'entreprises canadiennes comparables à titre de référence pour le RCP, et en y ajoutant un taux de 0,8 % qui, à mon avis, correspond à une prime de risque raisonnable, le résultat obtenu est un RCP équitable de 10 % pour Liberty. […]

> De plus, la fourchette se situe près de 10 %. Ce taux est un peu plus élevé que celui obtenu par les modèles parce que je considère que les résultats devraient provenir des modèles, mais non de façon excessive, ce qui semble approprié étant donné que la petite taille de Liberty devrait – et la petite taille amplifie le risque ou les répercussions du risque auquel elle fait face, donc il y a lieu de fixer le taux un peu au-dessus du résultat obtenu par ces modèles. [Extrait de l'exposé final de l'intervenante publique, le 22 juillet 2021, p. 435 et 436 de la transcription de l'audience (dossier afférent à la requête, vol. 8, p. 4841 et 4842)]

[36] Dans sa décision, la Commission a invoqué les observations de l'intervenante publique au regard de questions beaucoup moins importantes à au moins 16 reprises, mais a complètement fait fi des observations cruciales ayant trait au RCP. Elle ne les mentionne aucunement sans indiquer pourquoi elle a choisi de ne pas en tenir compte et n'explique pas pourquoi l'intervenante publique a préconisé un RCP plus élevé que la fourchette recommandée par son témoin expert. Pour citer les observations que l'avocat de Liberty a présentées à notre Cour, [TRADUCTION] « cela crève les yeux ». Bien que les motifs écrits de la Commission ne doivent pas être jugés au regard d'une norme de perfection, la norme établie par le principe pertinent émanant de l'arrêt *Vavilov* exige qu'elle explique pourquoi les observations de l'intervenante publique ne devraient pas être retenues. Elle ne l'a pas fait et sa décision ne satisfait donc pas à la norme de la décision raisonnable s'appliquant aux révisions judiciaires.

[37] Il est impossible de déterminer, à la lumière des motifs de la Commission, si l'un quelconque des éléments de preuve aurait pu raisonnablement mener la Commission à fixer le RCP global à 8,5 %. Une grande partie de cette preuve l'aurait menée à le fixer à 10 %. Quoi qu'il en soit, Liberty soutient que le taux fixé était trop faible et que cela a des répercussions financières majeures, tant sur ses activités futures que sur sa capacité d'attirer des investissements à l'avenir. On peut se demander, vu le facteur établi dans l'arrêt *Vavilov* exposé ci-dessus au par. 23, élément m), si la Commission était effectivement attentive et sensible au cœur de la question qui lui était

soumise. Elle n’a pas appliqué la norme du rendement équitable, comme l’exigeaient les principes juridiques, et, par conséquent, sa décision ne satisfait pas aux critères de la norme de contrôle de la décision raisonnable.

La décision de renvoyer ou non l’affaire à la Commission

[38] Les avocats de Liberty ont exhorté la Cour à ne pas renvoyer l’affaire à la Commission pour la tenue d’une nouvelle audience, en soutenant que le RCP de 10 % devrait plutôt être ordonné par la Cour. Si nous présumons, sans toutefois trancher la question, que la Cour a la compétence recherchée, celle-ci ne saurait être exercée en l’espèce. La tenue d’une nouvelle audience et l’application des principes énoncés dans l’arrêt *Vavilov* mèneront à un résultat qui sera soit le même, soit différent, mais qui sera convenablement motivé. Quoi qu’il en soit, la Commission a compétence exclusive pour rendre cette décision.

V. Dispositif

[39] Je suis d’avis d’accueillir l’appel et d’ordonner que l’affaire soit renvoyée à la Commission pour la tenue d’une nouvelle audience. Comme Liberty n’a pas sollicité les dépens, je n’en adjugerai aucuns.

10

Transcanada Pipelines Ltd. c. Canada (Office national de l'énergie)

Jugements de la Cour fédérale du Canada

Cour d'appel fédérale

Toronto (Ontario)

Les juges Rothstein, Noël et Sharlow.

Entendu : le 16 février 2004.

Rendu : le 5 avril 2004.

Dossier A-327-03

[2004] A.C.F. no 654 | *[2004] F.C.J. No. 654* | *2004 CAF 149* | *2004 FCA 149* | *319 N.R. 171* | *130 A.C.W.S. (3d) 1044*

Entre Transcanada Pipelines Limited, appelante, et L'Office national de l'énergie, l'Association canadienne des producteurs pétroliers, Centra Gas Manitoba Inc., Coral Energy Canada Inc., l'Association des consommateurs industriels de gaz, Mirant Canada Energy Marketing, Ltd., et le ministre de l'Énergie de l'Ontario, intimés

(60 paras.)

Avocats

Alan J. Lenczner, Risa M. Kirshblum et Wendy Moreland, pour l'appelante.

Margery Fowke, pour l'intimé, l'Office national de l'énergie.

John J. Marshall, c.r. and Don Davies, pour l'intimée, l'Association canadienne de producteurs pétroliers.

Alan Mark, pour l'intimée, Coral Energy Inc.

Peter C.P. Thompson, c.r. and Vincent J. DeRose pour l'intimée, l'Association des consommateurs industriels de gaz.

Keith F. Miller, pour l'intimée, Mirant Energy Marketing Canada Inc.

John Turcnin and Sara Blake, pour l'intimé, le ministre de l'Énergie de l'Ontario

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** Traduction **

Le jugement de la Cour a été rendu par

LE JUGE ROTHSTEIN

INTRODUCTION

1 Il s'agit d'un appel d'une décision rendue au mois de février 2003 par l'Office national de l'énergie (RH-R-1-2002) conformément à l'autorisation accordée par la présente cour en vertu de l'article 22 de la Loi sur l'Office national de l'énergie, *L.R.C. 1985, ch. N-7*.

2 L'appel soulève deux questions. En premier lieu, il s'agit de savoir si l'Office national de l'énergie (l'Office) a commis une erreur en tenant compte des intérêts du client ou du consommateur lorsqu'il a fixé le taux de rendement du capital qu'il permettrait au réseau canadien de transport de gaz naturel de l'appelante (le réseau principal) de tirer. En second lieu, il s'agit de savoir si l'Office a commis une erreur parce qu'il aurait limité son pouvoir discrétionnaire en refusant de déroger au mécanisme de rajustement automatique qu'il avait utilisé pour établir le taux de rendement des capitaux propres du réseau principal.

3 Pour bien comprendre les questions ici en cause, il faut d'abord expliquer le contexte et faire l'historique procédural ayant donné lieu à la décision du mois de février 2003.

LE CONTEXTE

4 L'Office national de l'énergie réglemente les pipelines interprovinciaux de transport de gaz naturel. L'Office considère le réseau principal comme un pipeline faisant partie du Groupe 1. Les pipelines du Groupe 1 sont des pipelines importants qui font régulièrement l'objet d'une vérification de la part de l'Office et dont l'Office surveille continuellement les résultats d'exploitation.

5 L'Office réglemente les droits exigés pour le transport du gaz naturel sur le réseau principal en se fondant sur le coût du service. Cela veut dire que pour une période future, appelée une année d' "essai", l'Office, en se fondant sur la preuve dont il dispose, estime les coûts que le réseau principal engagera. Les droits que l'Office permet au réseau principal d'exiger de ses clients sont destinés à générer des recettes suffisantes pour recouvrer les coûts autorisés tout en imputant d'une façon équitable les frais aux usagers à l'égard des coûts et avantages de différents services. Le coût du capital du réseau principal est inclus dans le coût du service et constitue de fait le principal élément des coûts du réseau principal.

6 Le coût du capital d'un service public correspond au rendement global que les investisseurs doivent obtenir à l'égard de leurs placements afin de garder leurs capitaux investis dans le service public et d'investir de nouveaux capitaux dans ce service public. Ce rendement est obtenu sous la forme d'intérêts sur les titres d'emprunt ainsi que de dividendes et d'appréciation du capital à l'égard du capital-actions. Habituellement, ce rendement est défini comme étant le taux de rendement que les investisseurs exigent à l'égard de leurs placements dans des titres d'emprunt ou dans le capital-actions.

7 Le taux de rendement des titres d'emprunt ne suscite habituellement pas de controverse. Il est normalement composé du taux d'intérêt moyen pondéré pour l'année d'essai sur la dette non amortie à long terme du service public. D'autre part, le taux de rendement du capital-actions prête souvent à controverse et fait l'objet de maints débats entre les témoins-experts.

8 Alors que le taux d'intérêt payable sur les titres d'emprunt peut être directement observé, le taux de rendement du capital-actions ne peut pas être déterminé à l'avance avec exactitude. Les experts emploient diverses méthodes pour estimer le taux de rendement du capital-actions exigé par les investisseurs. La méthode adoptée par l'Office est la méthode de la prime de capital-risque, par laquelle l'Office estime un taux hors risque fondé sur les taux des obligations du gouvernement et ajoute une prime de risque afin de tenir compte du risque associé à un placement dans le capital-actions d'une société pipelinière "témoin".

9 Une fois que les taux de rendement distincts liés aux titres d'emprunt et au capital-actions sont établis, ils sont réunis en un seul taux de rendement composé du capital, fondé sur les montants relatifs de la dette et des capitaux propres dans la structure du capital du service public. Afin de tenir compte des divers niveaux de risque des sociétés pipelinières, l'Office établit la structure du capital de chaque société pipelinière, c'est-à-dire les portions relatives de la dette et des capitaux propres nécessaires pour financer les actifs acquis avec prudence et le fonds de roulement, en se fondant sur la preuve fournie par les experts. Plus le risque attribué à chaque société pipelinière est élevé, plus la composante capitaux propres de la structure du capital doit être importante, et ce, parce que les personnes qui investissent leurs capitaux dans des obligations, qui sont plus réfractaires au risque

que celles qui investissent leurs capitaux dans les capitaux propres, ne prêtent pas d'argent à une entreprise à moins que les capitaux propres investis dans l'entreprise ne soient suffisants pour leur permettre de croire qu'elles pourront recouvrer, à l'aide des actifs de l'entreprise, les capitaux investis en cas de défaut.

10 Par exemple, à supposer que le taux de rendement requis des titres d'emprunt soit de 5 p. 100, que le taux de rendement requis à l'égard du capital-actions soit de 10 p. 100 et que la structure du capital du service public, telle qu'elle est déterminée par l'Office, soit composée à 60 p. 100 de la dette et à 40 p. 100 des capitaux propres, le taux de rendement composé du capital serait le suivant : 5 % x 0,60 + 10 % x 0,40 = 7 %.

11 On multiplie ensuite le taux de rendement composé du capital par une base tarifaire fondée sur la détermination par l'Office, selon sa réglementation comptable, de la valeur comptable nette des actifs prudemment acquis du service public ainsi que du fonds de roulement. En multipliant le taux de rendement exigé par les investisseurs par cette base tarifaire, on obtient le montant total du rendement requis par les investisseurs, exprimé en dollars. Le produit est l'équivalent du coût du capital estimatif du service public pour l'année d'essai. On ajoute ce coût à tous les autres coûts pour obtenir le coût total du service. On répartit ensuite le total entre les clients du service public.

12 Même si le coût du capital est peut-être plus difficile à estimer que certains autres coûts, il s'agit d'un coût réel que le service public doit pouvoir recouvrer à l'aide de ses recettes. Si l'Office ne permet pas au service public de recouvrer le coût du capital, ce dernier ne sera pas en mesure d'obtenir de nouveaux capitaux ou de procéder à un refinancement puisqu'il ne pourra pas offrir aux investisseurs le même taux de rendement que celui qui s'applique aux autres placements comportant un risque similaire. De plus, les actionnaires existants insisteront pour que les bénéfices non répartis ne soient pas réinvestis dans le service public.

13 À long terme, une entreprise réglementée qui ne peut pas recouvrer son coût du capital, tant pour ce qui est de la dette que des capitaux propres, ne pourra pas accroître ses activités ou même continuer à exercer ses activités existantes. Elle mettra éventuellement fin à ses activités, ce qui nuira non seulement aux actionnaires mais aussi aux clients qu'elle ne sera plus en mesure de servir. Les répercussions pour les clients et en fin de compte pour les consommateurs seront encore plus sérieuses s'il n'y a pas suffisamment de concurrence sur le marché pour qu'un service de rechange adéquat soit assuré.

HISTORIQUE PROCÉDURAL

14 En 1994, l'Office a tenu une audience publique portant sur le coût du capital de certains pipelines du Groupe 1, dont le réseau principal. L'audience visait à permettre de fixer le coût du capital lié à ces pipelines à compter du 1er janvier 1995 et à établir, si possible, un mécanisme automatique permettant de rajuster le taux de rendement du capital-actions dans l'avenir afin d'éviter les frais d'un litige portant sur les modifications annuelles ou bisannuelles apportées au taux de rendement du capital-actions.

15 À la suite de cette instance, l'Office a fait connaître les motifs de sa décision (RH-2-94) au mois de mars 1995; il a fixé à 12,25 p. 100 le taux de rendement du capital-actions du réseau principal pour l'année d'essai 1995 en se fondant sur une structure présumée du capital composée à 70 p. 100 de la dette et à 30 p. 100 des capitaux propres. La structure présumée du capital établie par l'Office ne prévoyait pas expressément de capital-actions privilégié. Par conséquent, lorsqu'il sera question de capitaux propres ou capital-actions on entendra le capital-actions ordinaire.

16 L'Office a également établi un mécanisme de rajustement selon lequel le taux de rendement du capital-actions serait rajusté le 1er janvier de l'année 1996 et de chaque année civile subséquente. Ce mécanisme était fondé sur la méthode de la prime de capital-risque par laquelle :

1. un taux de rendement hors risque des obligations (du gouvernement du Canada) était prévu pour l'année à venir;
2. de ce taux de rendement prévu des obligations, on soustrayait le taux de rendement prévu des obligations utilisé pour l'année précédente;

3. on multipliait la différence par 0,75 pour déterminer le rajustement à apporter au taux de rendement du capital-actions;

4. le produit, à l'étape 3, était ajouté au taux de rendement du capital-actions déterminé par l'Office pour l'année précédente ou était déduit de ce taux;

5. la somme obtenue à l'étape 4 était arrondie aux 25 points de base près (un centième de un pour cent).

17 Le taux de rendement du capital-actions du réseau principal a été rajusté selon cette formule en 1996 et au cours des années subséquentes, mais en 1997, l'Office a cessé d'arrondir les chiffres, c'est-à-dire qu'il a abandonné l'étape 5 susmentionnée.

18 En 2001, l'appelante avait conclu que l'application de la formule sous-estimait le taux de rendement requis du capital. Aux termes du paragraphe 21(1) de la Loi sur l'Office national de l'énergie, elle a donc demandé [TRADUCTION] "la révision et la modification [de la décision rendue en 1995] afin que soit fixé un rendement équitable pour TransCanada pour les années 2001 et 2002". Le paragraphe 21(1) est ainsi libellé :

21. (1) Sous réserve du paragraphe (2), l'Office peut réviser, annuler ou modifier ses ordonnances ou décisions, ou procéder à une nouvelle audition avant de statuer sur une demande.

* * *

21. (1) Subject to subsection (2), the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it.

19 L'appelante a soutenu que l'Office devait approuver une nouvelle méthode afin de déterminer le coût du capital du réseau principal - la méthode du coût du capital moyen pondéré net d'impôt (CCMPNI). Elle a subsidiairement déclaré que si la méthode du CCMPNI n'était pas retenue, le taux de rendement requis du capital-actions du réseau principal devrait être de 12,5 p. 100 pour les années 2001 et 2002 et que, compte tenu du risque, la composante présumée des capitaux propres de la structure du capital du réseau principal devait être portée à 40 p. 100.

20 À la suite des observations de l'appelante, l'Office a tenu une audience aux mois de février, de mars et d'avril 2002. Les questions soulevées à l'audience sont ci-après énoncées :

1. Est-ce que la formule du taux de rendement du capital-actions ordinaire (RCO) que l'Office a établie suivant sa décision RH-2-94 convient toujours pour déterminer le RCO de TransCanada?

2. Est-ce que la méthode du coût du capital moyen pondéré net d'impôt (CCMPNI) constitue une méthode de réglementation convenable pour déterminer le coût du capital?

3. Si l'Office décidait d'adopter la méthode du CCMPNI, quel CCMPNI conviendrait dans le cas de TransCanada?

4. Si l'Office décidait d'adopter la méthode du CCMPNI et s'il est établi que la formule du RCO n'est plus convenable :

   a) Quelle méthode serait convenable pour la détermination du capital et de la structure du capital de TransCanada?

   b) Si la méthode établie ci-dessus était appliquée, quel rendement sur le capital et quelle structure du capital conviendrait-il d'autoriser pour TransCanada?

5. Quelle devrait être la date d'entrée en vigueur des changements au coût du capital de TransCanada? (RH-4-2001, pages 4 et 5).

21 Dans les motifs de la décision qu'il a rendue au mois de juin 2002 (RH-4-2001), l'Office :

1. a rejeté la proposition relative au CCMPNI que l'appelante avait avancée;
2. a conclu que le taux de rendement du capital-actions du réseau principal devait continuer à être fondé sur la formule de rajustement établie dans la décision de 1995;
3. a augmenté la composante présumée des capitaux propres de la structure du capital du réseau principal en la portant de 30 à 33 p. 100 afin de tenir compte du risque commercial accru.

22 Par une demande présentée à l'Office le 16 septembre 2002, l'appelante a demandé la révision et la modification de la décision rendue en 2002. Cette demande était également fondée sur le paragraphe 21(1).

23 L'article 44 des Règles de pratique et de procédure de l'Office national de l'énergie, 1995, *DORS/95-208* énonce les exigences applicables aux demandes de révision. Le paragraphe 44(2) prévoit ce qui suit :

44 (2) La demande de révision ou de nouvelle audition contient les éléments suivants :

[...]

b) les motifs que le demandeur juge suffisants pour mettre en doute le bien-fondé de la décision ou de l'ordonnance, s'il s'agit d'une demande de révision, [...] notamment :

(i) une erreur de droit ou de compétence,

[...]

* * *

44 (2) An application for review or rehearing shall contain

...

(b) the grounds that the applicant considers sufficient, in the case of an application for review, to raise a doubt as to the correctness of the decision or order ... including

(i) any error of law or of jurisdiction,

...

24 Dans la décision qu'il a rendue au mois de février 2003 à la suite de la demande de révision et de modification (RH-R-1-2002), l'Office a conclu que l'appelante n'avait pas mis en doute le bien-fondé de la décision de 2002 et il a rejeté la demande.

25 L'appelante a obtenu l'autorisation d'interjeter appel devant la Cour de la décision rendue par l'Office en 2003.

ANALYSE

1. Norme de contrôle et approche à adopter à l'égard de la décision portée en appel

26 Étant donné qu'il a été conclu que l'appel doit être rejeté, il n'est pas nécessaire de procéder à une analyse approfondie de la norme de contrôle. Même selon la norme de contrôle la plus envahissante (à savoir celle de la décision correcte), il n'a pas été démontré que l'Office avait commis une erreur de droit.

27 La question de savoir dans quelle mesure la Cour doit tenir compte de la décision rendue par l'Office en 2002, laquelle n'a pas été portée en appel, se pose également. Normalement, la Cour doit s'en tenir à l'examen de la décision visée par l'appel. Toutefois, lorsqu'il s'agit de savoir si l'Office a commis une erreur ou est arrivé à un résultat déraisonnable ou manifestement déraisonnable en concluant, dans la décision rendue en 2003, que l'appelante n'avait pas mis en doute le bien-fondé de la décision rendue en 2002, il faut tenir compte, dans une certaine mesure du moins, de cette décision antérieure. Au lieu de m'enliser dans les subtilités de la question de la portée de l'examen judiciaire, je suis convaincu, même s'il est tenu compte sans restriction des décisions rendues en 2002 et en 2003, que l'Office n'a pas commis d'erreur de droit dans l'une ou l'autre de ces décisions.

2. L'Office a-t-il commis une erreur en tenant compte des intérêts du client ou du consommateur lorsqu'il a déterminé le taux de rendement du capital du réseau principal?

28 À titre préliminaire, l'appelante a fait une distinction entre ses clients et les consommateurs ultimes. Or, cette distinction n'est pas pertinente pour les besoins de la présente décision. Selon l'appelante, le rendement du capital du réseau principal devrait être déterminé uniquement dans l'optique du réseau principal, sans qu'il soit tenu compte des autres intérêts, qu'il s'agisse de ceux des clients directs ou des consommateurs ultimes.

a) L'Office n'est pas tenu d'adopter une méthode précise en déterminant les droits

29 La Loi sur l'Office national de l'énergie ne renferme aucune disposition ou directive obligeant l'Office à déterminer le taux de rendement du capital d'une société pipelinière. La Loi exige uniquement que "[t]ous les droits [soient] justes et raisonnables". Le paragraphe 60(1) et l'article 62 se lisent comme suit :

60. (1) Les seuls droits qu'une compagnie peut imposer sont ceux qui sont :

a) soit spécifiés dans un tarif produit auprès de l'Office et en vigueur;

b) soit approuvés par ordonnance de l'Office.(a) specified in a tariff that has been filed with the Board and is in effect; or

62. Tous les droits doivent être justes et raisonnables et, dans des circonstances et conditions essentiellement similaires, être exigés de tous, au même taux, pour tous les transports de même nature sur le même parcours.

* * *

60. (1) A company shall not charge any tolls except tolls that are

(b) approved by an order of the Board.

62. All tolls shall be just and reasonable, and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

30 Le pouvoir de l'Office de déterminer des droits justes et raisonnables n'est pas limité par des directives législatives. Le pouvoir général de l'Office a été énoncé d'une façon appropriée par le juge en chef Thurlow dans l'arrêt British Columbia Hydro and Power Authority c. West Coast Transmission Company Ltd. et al., *[1981] 2 C.F. 646*, pages 655 et 656 (C.A.) :

> Il n'existe pas de dispositions semblables dans la Partie IV de la Loi sur l'Office national de l'énergie. Aux termes de cette Partie, les droits doivent être justes et raisonnables et ne peuvent être imposés qu'en conformité avec un tarif qui a été produit auprès de l'Office et qui est en vigueur. L'Office est autorisé dans les termes les plus larges à rendre des ordonnances sur tous les sujets qui s'y rapportent. Manifestement, l'Office est autorisé à rendre des ordonnances conçues pour garantir que les droits qu'imposera une compagnie de pipeline seront justes et raisonnables. Mais son pouvoir à cet égard n'est pas entravé ni limité par des règles ou dispositions légales quant à la façon dont cette fonction doit être exercée ou l'objectif atteint. Plus particulièrement, il n'existe aucune disposition légale obligeant l'Office, lorsqu'il examine si les droits qu'une compagnie de pipeline entend imposer sont justes et raisonnables, à adopter une méthode ou un procédé de comptabilité en particulier ou précisant qu'il doive le faire en déterminant le coût du service ainsi qu'une base de tarification et en fixant un revenu équitable de celle-ci.

31 L'Office a adopté une méthode fondée sur le coût du service pour déterminer les droits liés au réseau principal. Devant la Cour, les avocats d'un certain nombre d'intimés ont proposé différentes méthodes afin de déterminer des droits justes et raisonnables que l'Office pourrait employer, notamment :

1. des droits fondés sur des ententes conclues entre les sociétés pipelinières et les expéditeurs;
2. des droits fondés sur les frais exigés par les autres sociétés pipelinières;

3. le recours aux droits applicables à l'année de base, rajustés de façon à tenir compte de l'inflation;
4. des droits fondés sur des mécanismes visant à encourager les services publics à être plus efficaces.

Étant donné que la Loi sur l'Office national de l'énergie ne prévoit aucune méthode particulière, l'Office aurait pu adopter une méthode différente pour déterminer des droits justes et raisonnables à l'égard du réseau principal.

b) Étant donné qu'une méthode fondée sur le coût du service a été adoptée, les coûts déterminés par l'Office doivent être justes et raisonnables tant pour le réseau principal que pour ses usagers

32 Dans le cas du réseau principal, l'Office a adopté une méthode fondée sur le coût du service par laquelle le réseau principal doit être dédommagé, en touchant des droits, des frais qu'il a engagés avec prudence, y compris le coût du capital et en particulier le coût des capitaux propres. Cela étant, l'Office devait déterminer minutieusement les coûts du réseau principal en se fondant sur la preuve et en faisant appel à son jugement.

33 Le coût des capitaux propres pour une année future ne peut pas être directement calculé et il doit donc être fondé sur des estimations. L'Office doit choisir une estimation qui permet au réseau principal d'obtenir ce qui a été appelé un [TRADUCTION] "rendement équitable". Dans l'arrêt Northwestern Utilities Ltd. c. Edmonton (City), [1929] R.C.S. 186, pages 192 et 193, la Cour suprême a défini comme suit ce qui constitue un rendement équitable :

> [TRADUCTION] Le rôle de la régie consistait à fixer des taux justes et raisonnables, c'est-à-dire des taux qui, dans les circonstances, seraient justes pour le consommateur, d'une part et, d'autre part, garantiraient à la société un rendement équitable sur le capital investi. Un rendement équitable signifie que la société pourra retirer du capital investi dans son entreprise un rendement (net) aussi élevé que celui qu'elle aurait obtenu en investissant la même somme dans d'autres placements présentant un effet d'attraction, une stabilité et un degré de certitude comparables à ceux de l'entreprise de la société.

Les droits qui représentent un rendement équitable du capital seront justes et raisonnables tant pour le réseau principal que pour ses usagers.

34 Autrement dit, lorsque la méthode du coût du service est employée pour déterminer des droits justes et raisonnables, si l'Office ne permet pas au réseau principal de recouvrer ses coûts parce qu'il a sous-estimé le coût des capitaux propres du réseau principal, ce dernier ne pourra pas obtenir un rendement équitable à l'égard des capitaux propres. Les droits ne seront donc pas justes et raisonnables dans l'optique du réseau principal. D'autre part, les droits doivent également être justes et équitables du point de vue des clients du réseau principal et des consommateurs ultimes qui comptent sur les services du réseau. Les clients et les consommateurs ont donc intérêt à faire en sorte que les coûts du réseau principal ne soient pas surestimés. Comme les avocats des intimés l'ont souligné, un grand nombre de questions relatives au calcul des coûts peuvent être contestées. Des questions peuvent se poser au sujet, entre autres choses, de la ventilation des coûts entre le réseau principal et d'autres divisions de l'appelante; au sujet des coûts qui ont été ou qui sont engagés avec prudence; et au sujet du caractère raisonnable des programmes d'indemnisation du réseau principal. Et, dans le cas qui nous occupe, les clients et les consommateurs ont intérêt à faire en sorte que le coût des capitaux propres du réseau principal ne soit pas surestimé.

c) L'Office n'a pas tenu compte d'une façon inappropriée des répercussions pour les clients ou les consommateurs de l'augmentation des droits destinée à refléter les coûts de l'appelante

35 Dans son argumentation orale, l'appelante a concédé qu'elle ne s'oppose pas à ce que ses clients interviennent dans la détermination des coûts effectuée par l'Office et en particulier la détermination du coût du capital, à condition que les questions en litige ne portent que sur les coûts du réseau principal. Toutefois, l'appelante s'oppose à ce que l'Office tienne compte des répercussions que les droits ont pour les clients et les consommateurs lorsqu'il détermine le coût des capitaux propres du réseau principal. L'appelante affirme que le taux de rendement requis du capital-actions doit être uniquement fondé sur le coût des capitaux propres du réseau principal. Les répercussions que les augmentations de droits en résultant ont pour les clients ou les consommateurs ne constituent pas une considération pertinente dans cette détermination. En fait, l'appelante

concède que, lorsque les droits finaux sont fixés, les répercussions pour les clients et les consommateurs peuvent être pertinentes, mais elle affirme avec insistance que ces répercussions ne sont pas pertinentes lorsqu'il s'agit de déterminer le rendement requis du capital-actions.

36 Je crois que cet argument est sensé et conforme à la décision rendue par la Cour suprême dans l'arrêt Northwestern Utilities. Le coût des capitaux propres ne change pas si, du fait qu'en permettant au réseau principal de le recouvrer, il en résulte une augmentation des droits. Selon la méthode de la prime de capital-risque utilisée par l'Office, le coût des capitaux propres dépend de l'estimation du taux d'intérêt hors risque effectuée par l'Office et du niveau de risque que les investisseurs perçoivent dans la société pipelinière "témoin". Plus le risque est élevé, plus le taux de rendement exigé par les investisseurs est élevé. Il est tenu compte du niveau de risque applicable au réseau principal au moyen des rajustements apportés à sa structure présumée du capital. Par conséquent, les répercussions que les droits ont pour les clients ou les consommateurs n'influent pas sur ce qu'il en coûte au réseau principal pour procurer ce taux de rendement à l'égard de la composante capitaux propres de sa structure présumée du capital.

37 L'appelante n'a pas démontré que l'Office avait tenu compte des répercussions pour les clients ou les consommateurs en déterminant le taux de rendement requis du réseau principal à l'égard du capital-actions.

38 Il est vrai que dans la décision qu'il a rendue en 2002, l'Office a dit ce qui suit :

> Pour ce qui est de l'équilibre approprié entre les intérêts des clients et ceux des investisseurs, l'Office trouve que l'intérêt des clients, quant il est question de taux de rendement, est surtout lié à l'impact que le taux de rendement approuvé aura sur les droits. Selon l'Office, l'impact du taux de rendement sur les droits est un facteur pertinent dans la détermination d'un rendement équitable (RH-4-2001, page 12).

39 L'appelante déclare qu'elle ne peut pas dire si l'Office a tenu compte des répercussions pour les clients ou les consommateurs en déterminant le taux de rendement requis du réseau principal à l'égard du capital-actions. Les motifs prononcés en 2002 n'indiquent certes pas que l'Office a rajusté son estimation du taux de rendement requis à cet égard compte tenu de l'incidence de cette estimation sur les droits. En fait, l'Office a simplement appliqué la formule de rajustement automatique adoptée dans la décision qu'il avait rendue en 1995. Or, cette formule ne tient pas compte des répercussions que les droits ont pour les clients ou les consommateurs.

40 Il est également vrai qu'en ce qui concerne un rajustement qu'il a fait dans la structure présumée du capital du réseau principal, l'Office a dit ce qui suit dans la décision qu'il a rendue en 2002 :

> À la lumière de ce qui précède, l'Office est d'avis qu'il conviendrait d'augmenter le ratio présumé du capital-actions ordinaire du réseau principal en le portant de 30 à 33 %. L'Office constate que cette augmentation occasionne une hausse annuelle du coût du service et des droits du réseau principal d'environ 2 %. L'Office a décidé que l'augmentation des droits est justifiée par le risque commercial prospectif auquel le réseau principal est exposé et qu'elle ne constituera pas un fardeau exagéré pour les expéditeurs (RH-4-2001, pages 65 et 66).

41 Si je comprends bien les motifs de l'Office, compte tenu du risque commercial accru auquel le réseau principal est exposé, la composante capitaux propres de la structure présumée du capital a été portée de 30 à 33 p. 100. Étant donné que le taux de rendement requis à l'égard du capital-actions était plus élevé que le taux de rendement requis à l'égard des titres d'emprunt, la chose avait pour effet d'augmenter l'estimation globale du taux de rendement requis du réseau principal à l'égard du capital, de sorte que les droits augmentaient de 2 p. 100.

42 L'Office a fait remarquer que l'augmentation ne constituerait pas un fardeau exagéré pour les expéditeurs, mais il n'a pas donné à entendre que l'augmentation de la composante capitaux propres de la structure présumée du capital du réseau principal était de quelque façon supprimée par des considérations liées aux répercussions que la chose aurait pour les clients ou les consommateurs. Comme je l'ai dit, rien ne montre non plus que l'Office ait déterminé un taux de rendement requis du capital-actions du réseau principal et l'ait ensuite rajusté à la baisse compte tenu des incidences que ce taux aurait sur les droits. En l'absence d'une indication dans les motifs prononcés par l'Office, rien ne permet de faire pareille supposition.

d) L'Office peut adopter des mesures temporaires pour remédier à la "perturbation tarifaire" dans la mesure où le service public recouvre finalement ses coûts

43 J'aimerais également soulever un autre point. Je suis d'accord avec l'appelante pour dire que les répercussions pour les clients ou les consommateurs ne peuvent pas constituer un facteur dans la détermination du coût des capitaux propres, mais toute augmentation de droits en résultant peut constituer un facteur pertinent dont l'Office tient compte en déterminant la façon dont un service public doit recouvrer ses coûts. Il se peut qu'une augmentation soit si importante qu'elle entraînerait une "perturbation tarifaire" si elle était mise en oeuvre d'un seul coup et qu'elle doive donc être échelonnée sur une certaine période. L'Office peut à juste titre prendre en compte de telles considérations, à condition qu'il n'y ait, sur une période raisonnable, aucune perte économique pour le service public. En d'autres termes, les droits échelonnés devraient indemniser le service public qui a reporté le recouvrement du coût du capital. En fin de compte, lorsqu'une méthode fondée sur le coût du service est utilisée, le service public doit recouvrer ses coûts sur une période raisonnable, et ce, indépendamment des répercussions que ces coûts peuvent avoir pour les clients ou les consommateurs (voir Hemlock Valley Electrical Services Ltd. c. British Columbia Utilities Commission et al., *[1992] 12 B.C.A.C. 1*, pages 20 et 21 (C.A.)). Toutefois, dans ce cas-ci, rien ne donne à entendre que l'Office ait voulu échelonner ou sous-estimer par ailleurs le coût du capital du réseau principal.

3. L'Office a-t-il limité son pouvoir discrétionnaire?

a) Arguments de l'appelante

44 La deuxième erreur de droit alléguée par l'appelante est que l'Office a limité son pouvoir discrétionnaire. L'appelante soutient que l'Office lui a imposé d'une façon inappropriée l'obligation de démontrer que la formule de rajustement du coût des capitaux propres qu'il a établie dans sa décision de 1995, obligation qui n'est pas énoncée dans la Loi sur l'Office national de l'énergie ou dans une décision judiciaire, devait s'appliquer à moins qu'elle ne réussisse à convaincre l'Office du contraire.

45 Dans son mémoire, l'appelante affirme que la lourde obligation que l'Office lui a imposée, lorsqu'il s'agit de renverser le fardeau de la preuve, a amené ce dernier à agir [TRADUCTION] "d'une façon incompatible avec l'obligation qu'il a de se montrer impartial en sa qualité de tribunal administratif". Certains des intimés considéraient qu'il s'agissait d'une allégation de parti-pris à l'encontre de l'Office.

46 Dans son argumentation orale, l'appelante a ajouté que l'Office avait erronément rejeté la preuve qu'elle avait présentée ainsi que la preuve des intimés parce qu'il ne lui était pas loisible de réviser la formule de rajustement.

b) La durée prévue du mécanisme de rajustement automatique

47 Dans la décision qu'il a rendue en 1995, l'Office a expressément examiné "quelle procédure simplifiée devrait être mise en place en vue d'effectuer un rajustement annuel du taux de rendement de chacune des sociétés pipelinières entre les audiences sur le coût du capital" (RH-2-94, page 1). L'Office a expliqué ainsi pourquoi il cherchait à appliquer un mécanisme de rajustement automatique :

> Par la tenue de cette audience, l'Office avait l'intention de mettre en place un moyen visant à rendre plus efficace la méthode de conception des droits pour l'année d'essai 1995 et les années subséquentes. Souhaitant éliminer les audiences annuelles sur le coût du capital, il jugeait qu'un mécanisme automatique de rajustement du RCO conviendrait le mieux pour assurer que les taux de rendement approuvés demeurent équitables pour toutes les parties, tout en permettant d'éviter les dépenses liées à l'examen des modifications annuelles ou bisannuelles des taux de rendement. Par conséquent, l'Office a inclus, au nombre des questions à examiner dans le cadre de l'audience, la conception et la mise en place d'un mécanisme de rajustement prédéterminé du RCO. L'objectif visé était de mener un examen détaillé du coût du capital seulement quand les marchés financiers, le contexte commercial ou la conjoncture économique en général connaîtraient des changements appréciables (RH-2-94, page 2).

48 Après une longue audience au cours de laquelle il a examiné les prétentions des sociétés pipelinières, des expéditeurs, des gouvernements et des autres intéressés, l'Office a établi le mécanisme de rajustement

automatique par lequel le coût des capitaux propres serait déterminé. Quant à la question de savoir pendant combien de temps le mécanisme de rajustement automatique serait en vigueur, l'Office a dit ce qui suit :

> L'Office ne fixe pas de durée d'application limite pour le mécanisme et ne prévoit pas réévaluer le taux de RCO dans le cadre d'une audience officielle avant au moins trois ans. L'Office a confiance que le mécanisme de rajustement adopté assurera un équilibre approprié entre les intérêts des actionnaires des sociétés pipelinières et ceux des expéditeurs (RH-2-94, page 35).

49 Dans la décision qu'il a rendue en 1995, l'Office a également établi une structure présumée du capital pour les pipelines du Groupe 1. Comme il en a ci-dessus été fait mention, le réseau principal était réputé avoir une structure du capital composée à 70 p. 100 de la dette et à 30 p. 100 des capitaux propres. L'Office a exprimé l'avis selon lequel sa détermination de la structure du capital s'appliquerait pendant un certain nombre d'années, mais il a ajouté qu'il était prêt à envisager de réévaluer la structure du capital si une société pipelinière, ses expéditeurs ou un autre intéressé le demandait :

> L'Office s'attend aussi à ce que la structure de capital établie à la présente audience pour chaque société pipelinière soit valide pendant plusieurs années. L'Office envisagera la possibilité de réévaluer les structures de capital, probablement sur une base individuelle, si la structure de capital d'une société, l'organisation de l'entreprise ou les fondements financiers de celle-ci changent sensiblement. L'Office ne privilégie pas les réévaluations routinières de la structure de capital. C'est pour ces raisons que l'Office n'a fixé aucune date précise ni aucun critère pour la réévaluation des structures de capital. Pour les raisons indiquées ci-dessus, toute réévaluation de la structure de capital doit se faire à la demande de la société pipelinière, de ses expéditeurs ou d'une autre partie intéressée. Le cas échéant, il reviendra à l'Office d'évaluer le bien-fondé de cette requête (RH-2-94, pages 35 et 36).

50 L'Ordonnance TG/TO-1-95 de l'Office, par laquelle il était donné suite à la décision de 1995, établissait la structure présumée du capital du réseau principal et exigeait que le coût des capitaux propres du réseau principal pour l'année 1996 et les années subséquentes soit déterminé au moyen de l'application de la formule de rajustement. L'ordonnance ne prévoyait aucun délai d'exécution et elle continue donc à s'appliquer tant qu'elle ne sera pas révisée ou modifiée par l'Office.

c) L'appelante avait l'obligation de démontrer que le mécanisme de rajustement automatique ne devrait plus s'appliquer

51 L'Office a appliqué chaque année son mécanisme de rajustement automatique jusqu'en 2001, année au cours de laquelle l'appelante a présenté sa demande en vue d'obtenir un taux de rendement équitable et a cherché à obtenir la révision et la modification de la décision de 1995 ainsi que l'adoption d'une nouvelle méthode permettant de déterminer son coût du capital.

52 La position prise par l'appelante semble être que, lorsqu'elle a présenté sa demande en vue d'obtenir un taux de rendement équitable en 2001, l'Office était tenu de ne faire aucun cas du mécanisme de rajustement automatique et de recommencer à nouveau - en faisant pour ainsi dire table rase - à déterminer la méthode qu'il convenait d'employer pour estimer le coût du capital du réseau principal.

53 Toutefois, la formule de rajustement faisait partie d'une ordonnance qui continuait à lier l'appelante. Le paragraphe 23(1) de la Loi sur l'Office national de l'énergie prévoit ce qui suit :

> 23. (1) Sauf exceptions prévues à la présente loi, les décisions ou ordonnances de l'Office sont définitives et sans appel.
>
> * * *
>
> 23. (1) Except as provided in this Act, every decision or order of the Board is final and conclusive.

L'article 22 prévoit l'introduction d'appels devant la Cour d'appel fédérale, alors que le paragraphe 21(1) permet à l'Office de réviser, de modifier et d'annuler ses décisions et ordonnances. Or, ni la décision rendue par l'Office en

1995 ni l'ordonnance donnant suite à cette décision n'ont été portées en appel. La formule de rajustement continuait donc à s'appliquer tant que l'appelante ne démontrait pas à l'Office qu'elle devait être remplacée.

54 L'audience tenue par l'Office à la suite de la demande que l'appelante avait présentée en vue d'obtenir un taux de rendement équitable a duré longtemps. Des éléments de preuve écrits ont été produits et l'audience a duré plus d'un mois. La décision rendue par l'Office en 2002 comportait 73 pages. L'Office a tenu compte de la proposition de l'appelante concernant le CCMPNI et de sa proposition subsidiaire concernant l'augmentation du taux de rendement du capital-actions; il a examiné la preuve que les témoins avaient soumise et il a en fin de compte conclu que l'utilisation de la formule de rajustement automatique continuait à assurer un taux de rendement du capital-actions qu'il estimait approprié pour le réseau principal.

55 Toutefois, l'Office a dans une certaine mesure retenu l'argument de l'appelante selon lequel le risque commercial auquel était exposé le réseau principal avait augmenté. Afin de tenir compte du risque accru, l'Office a augmenté la composante capitaux propres de la structure présumée du capital du réseau principal en le portant de 30 à 33 p. 100, de façon que la structure du capital soit composée à 33 p. 100 des capitaux propres et à 67 p. 100 de la dette.

56 À mon avis, dans ses motifs, l'Office n'a pas limité son pouvoir discrétionnaire et n'a pas imposé une obligation inappropriée à l'appelante. Dans la décision qu'il a rendue en 1995, l'Office a dit que sa formule de rajustement automatique visait à assurer une procédure simplifiée permettant de déterminer les rajustements annuels à apporter aux taux de rendement des sociétés pipelinières sur le capital-actions ordinaire. Cette formule devait donc continuer à s'appliquer pour une période indéfinie. L'intéressé qui veut changer le processus doit démontrer que sa proposition est préférable à celle qui fait l'objet d'une ordonnance obligatoire de l'Office. Il ne s'agit pas d'une obligation inappropriée. Cela ne montre pas non plus que l'Office a limité son pouvoir discrétionnaire et, ce qui est encore plus important, la chose ne donne pas lieu à une crainte de partialité ou de parti-pris de la part de l'Office.

57 En révisant la décision qui avait été rendue en 2002, le comité chargé de la révision et de la modification a conclu, dans sa décision de 2003, qu'il incombait à l'appelante de démontrer que la formule de rajustement automatique ne convenait plus et que l'appelante ne s'était pas acquittée de son obligation :

> La demande concernant un rendement équitable était, entre autres, une demande de révision de la décision RH-2-94 et des ordonnances connexes, présentée en vertu du paragraphe 21(1) de la Loi. Au cours de l'instance RH-4-2001, il revenait à TransCanada de demander à l'Office que la formule de rajustement RH-2-94 ne convenait plus comme méthode d'établissement du rendement des capitaux propres du réseau principal. Il n'incombait pas aux intervenants ou à l'Office de justifier l'utilisation continue de la formule. Celle-ci était appropriée à moins que TransCanada ne persuade l'Office du contraire.
>
> TransCanada ne s'est pas acquittée du fardeau de la preuve, et la formule de rajustement RH-2-94 a donc été maintenue. L'Office, dans le cadre de la décision RH-4-2001, n'avait pas à justifier l'à-propos de la formule; cette détermination avait été faite au cours de l'instance RH-2-94 (RH-R-1-2002, page 26).

Je ne puis constater aucune erreur de la part de l'Office dans cette analyse ou conclusion.

d) L'Office n'a pas omis de tenir compte de la preuve et il ne l'a pas laissée de côté

58 Quant à l'argument de l'appelante selon lequel l'Office n'avait pas tenu compte de la preuve, je conviens que l'Office n'a pas retenu la preuve d'un témoin particulier en faveur ou à l'encontre de l'appelante. Mais cela ne veut pas pour autant dire que la preuve a été rejetée ou laissée de côté. Dans une instance portant sur le coût du capital, l'Office peut à bon droit, en se fondant sur la preuve dont il dispose et en faisant appel à son jugement, choisir une méthode pour déterminer le coût du capital et estimer le coût du capital pour une année à venir. Dans bien des cas, l'estimation faite par l'Office ne correspond pas aux estimations précises d'une partie ou d'un témoin particulier. Compte tenu de l'ensemble de la preuve, l'Office établit sa propre estimation. Dans la mesure où cette estimation fait partie de l'éventail des estimations préconisées dans la preuve et dans la mesure où l'Office démontre qu'il a tenu compte des estimations préconisées, on ne peut pas conclure qu'il a laissé la preuve de côté. De fait, même si l'estimation établie par l'Office ne fait pas partie de cet éventail, si l'Office démontre qu'il a tenu

compte de la preuve soumise et s'il fournit des motifs adéquats à l'appui, il ne sera pas conclu qu'il a laissé la preuve de côté.

59 En l'espèce, les estimations préconisées dans la preuve au sujet du taux de rendement requis du capital-actions se situaient entre 8,28 et 12,50 p. 100. Les motifs de l'Office indiquent qu'il a tenu compte des estimations préconisées. À l'aide de sa formule de rajustement automatique, l'Office a déterminé que le taux de rendement requis du capital-actions pour le réseau principal serait de 9,61 p. 100 en 2001 et de 9,53 p. 100 en 2002. Je ne puis conclure que l'Office n'a pas tenu compte de la preuve ou qu'il a laissé la preuve de côté en décidant de continuer à utiliser la formule de rajustement automatique en vue de déterminer le taux de rendement requis du capital-actions pour le réseau principal.

CONCLUSION

60 Je rejetterais l'appel avec dépens.

Traduction certifiée conforme : Suzanne M. Gauthier, trad. a., LL.L.

Fin du document

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The

PROCESS

OF

RATEMAKING

Volume I

By

Leonard Saul Goodman

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that produced those earnings in the same period. In theory, the formula for representing an experienced or forecast RR/RB is quite simple:

$$\frac{\text{Earnings}}{\text{Property value}}$$

Experienced earnings and property values may be derived from financial statements for the relevant period.

Each earned, experienced, or, for that matter, forecast rate of return requires a computation of earnings over a period of time. Such a period of earnings, typically for one year, may be an average for a lesser or longer period. Since the return figure is not derivable solely from any balance sheet, a "snap shot" rate of return is a confusion in terms. Although investment at a point in time may be relevant, each rate of return requires some consideration of earnings over a period of time and not merely as aggregated or collected or retained to a point in time.

As noted above, property values may be read from an actual or forecast balance sheet. More than one balance sheet may be needed, particularly where the regulator seeks the average property value over a period of time; the regulator for example, in lieu of a special valuation, may rely on the average of the beginning and ending balance sheets for the period in question. In any event, not all the property shown on the balance sheet will be included; and there may or may not be an added allowance for "working capital."

Allowable return. In cost of service ratemaking, the allowable return is a component of the rate. An agency may prescribe the allowable rate of return either before or at the time it prescribes the rate. A finding that a return will enable a company to attract capital at reasonable cost and assure adequate service is the equivalent of finding a just and reasonable component of the rate.[1]

Past excess earnings excluded. Under the rulings of the Supreme Court, past excess earnings cannot be used to sustain an otherwise inadequate rate for the future.[2] The regulated company is entitled to the opportunity to earn a fair return in the future period. The rule is related to the additional rule of *Arizona Grocery*,[3] that an agency may not revisit an approved past rate, whether the rate in the past is now considered too high or too low. When the agency authorizes the filing of a rate, the filing has future legal effect.[4] At the same time the agency gives no guaranty the company will realize the full amount of the revenues implied by the filing of the

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[1] Nader v. F.C.C., 520 F.2d 182, 204 (D.C.Cir. 1975). However, the additional holding of this court, that a rate is somehow "prescribed" when an agency merely decides the rate of return and allows a rate to go into effect without suspension, seems unsound. An agency finding is not tantamount to an order. *See also* p. 173 *supra*.

[2] Galveston Electric Co. v. Galveston, 258 U.S. 388, 395 (1922); Board of Commissioners v. N.Y.Tel.Co., 271 U.S. 23, 31-32 (1926); *and see* other cases discussed at p. 292, *supra*.

[3] Arizona Grocery Co. v. Atchison, T.& S.F.R.Co., 284 U.S. 370 (1932).

[4] *Compare* the definition of "rule" in the federal APA, 5 U.S.C. §551(4), which "includes the approval or prescription for the future of rates ... or practices bearing on any of the foregoing."

rate; the filing merely presents the regulated company with an opportunity to earn the return implicit in the filed rate.[1]

Summary of methodology. The computation of the allowable or reasonable RR/RB figure is far different from the depiction of the earned or actual return. Here the regulator must construct both a reasonable rate of return as well as a reasonable rate base. Rather than seek the experienced earnings over a period of time for a numerator, the regulator will ask "what earnings rate is needed to attract capital"; and the answer to that question will be found in an analysis of the "cost of capital" for each variety of capital showing up on the regulated entity's balance sheet(s) in the test year or over a number of years.

A study of the return requirement should encompass a number of years. The C.A.B., for example, early recognized the hazard of regulating rates in the short run. The airlines typically would have good years and bad ones. The board thought the industry was best served by a level of fares that reflected their "cyclical needs rather than the needs of any particular year." Otherwise, they would be required to lower their fares in times of prosperity and raise them when traffic conditions were poor, neither of which would "make business sense."[2]

The allowable return is not the investors' "expected" return, but rather their "required" return. "The return required to induce an investor to purchase equity securities may not be the return the investor expects to realize."[3]

At the same time, the regulator will derive an allowable rate base by identifying the properties that produce the service, valuing such properties (after deducting an allowance for past use of the property), and augmenting the property values typically by an allowance for "working capital," if there is a capital cost associated with such funds.[4]

The resulting formula for the allowable RR/RB again may be summarized simply in an expression that in form is quite different from the earlier one for the experienced or forecast return. If we allow the letter "R" to represent the Allowable Rate of Return and the letter "B" to represent the Allowable Rate Base, the foregoing formula becomes "R × B." The "R" in the above formula will be a percentage. The "B" will be in dollars. The result of the multiplication will be the dollars of return (or "cost of capital") that the regulated company will be allowed to earn in addition to all other costs of its providing the regulated service.

The RR/RB calculation results in a dollar amount that can then be translated into units of revenue that the regulated company may charge the users of its service. The RR/RB is particularly suited to the regulation of companies that have significant

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[1] *See also* p. 31, *supra*.

[2] *GPFI* Order No. E-7376, Apr. 23, 1953, discussed further in Redford, Emmette S., The Regulatory Process, Univ. of Tex. Press, Austin, Tex., pp. 156-57 (1969). The board, however, in early 1958 accepted a downward "trend" in business conditions over but three months as evidence of airline inability to continue normal growth, and granted a fare increase. Redford, *supra*, at 222-23.

[3] Re U.S. West Communications, Inc., 165 PUR4th 235, 282 (Utah PSC, 1995). For the consequent relevance of the market-to-book ratio, *see* p. 607, *infra*.

[4] In companies that collect customer revenues prior to producing the service, there may be no capital cost associated with so-called working capital. *See* p. 829, *infra*.

Computation—in general. The standard method for reaching a fair rate of return involves, 1) an estimation of the capital attraction rates for each component of the regulated company's capital; and 2) a combination of the various costs of capital into one overall rate of return in accordance with the percentage each component bears to the overall capitalization. The rate of return will equate to the combined cost of capital, as set forth in the table in the accompanying box.

Formula for Combined Cost of Capital

Capital Component (1)	*Portion of Tot. Capital (2)*	*Cost (in Percent) (3)*	*Rate of Return (4)*
1. Debt.....	% of total	Cap.attraction rate	Col. 2 × Col. 3
2. Equity.....	% of total	Cap.attraction rate	Col. 2 × Col. 3
3. Total	100.0%		Line 1 + Line 2

Combined Airline Cost of Capital—1971

Capital Component (1)	*Portion of Tot. Capital (2)*	*Cost (Percent) (3)*	*Rate of Return (Col. 2 × Col. 3) (4)*
1. Debt.....	.45	6.2%	2.79%
2. Equity	.55	16.75	9.21%
3. Total.....	100		12.00%

For example, in 1971 the C.A.B. found that a 12 percent rate of return would be reasonable for the larger (trunkline) airlines, which it constructed from the computation of the overall trunkline cost of capital shown in the box to the left .[1] The C.A.B. relied on its 12 percent rate of return finding throughout the 1970s.

The basic premises of the cost of capital computation are that the regulated company should be allowed the opportunity to earn revenues, as the Supreme Court stated in *Hope*, "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed."[2]

Relation to opportunity cost. Each rate of return based on cost of capital is an "opportunity" cost in the sense that once the rate of return has been established, unless there are express statutory guarantees,[3] the rate of return finding a) provides the regulated company but an opportunity to earn the established return;[4] and b) the opportunity is equivalent to other opportunities for investing capital at a fair level. The regulator does not guaranty the return will in fact be earned, nor that the regulated company will attain any particular bond rating.[5] Several consequences follow from this opportunity cost principle.

First, the regulator does not make a series of rate of return findings based on differing hypothetical facts to better ensure the regulated company will earn the fair rate of return. It makes but one ultimate rate of return finding based on all the facts then known at the time of its decision.

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[1] C.A.B. Order No. 71-4-58, Apr. 9, 1971, *DPFI*, pp. 673, 675.

[2] 320 U.S. at 605.

[3] For many years under the Civil Aeronautics Act of 1938, 52 Stat. 973, and later under the Federal Aviation Act of 1958, 72 Stat. 731, the C.A.B. computed the federal subsidy payable to the (generally smaller) airlines that showed past losses. Payments were made in the form of additional revenues for the carriage of mail (so-called "mail pay").

[4] For a more narrow use of the phrase "opportunity cost" to refer to the comparative earnings test, *see* p. 625, *infra*.

[5] Re Oklahoma Gas and Elec.Co., 150 PUR4th 33, 44 (Okla.CC, 1994).

Second, once the rate of return finding has been made, and the regulated company has attempted to earn such a return and failed, there is no second chance. Past losses are not allowable expenses for setting the next rate of return.[1]

Comparative risk. In the *Hope* case, the Supreme Court stated that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks."[2] It is quite generally accepted that this test does not require either, 1) a judgmental comparison of the specific risks of the regulated enterprise vis-a-vis other regulated or unregulated enterprises; or 2) any analysis beyond the cost of capital of the regulated enterprise; that is if the rate of return allows the debt to be serviced and provides for cost of equity, the comparative risk requirement is fully satisfied.

The requirement of a comparison of risks originated as an independent supplementary doctrine to the *Smyth* v. *Ames*[3] fair value rate base. Its purpose was apparently to serve as a rough check and guide through the morass of reproduction costing. The Supreme Court may also have inserted a reference to comparative risk in *Hope* to respond to Justice Douglas' dissenting opinion in which he questioned the relevance of "investment" in the regulation of the natural gas industry. Justice Douglas' position was that "investment and capacity to serve" as well as investment and profit to be realized, are irrelevant phenomena in this industry, "being more erratic and irregular and unpredictable in relation to investment than ... any other utility business."[4]

As a guide to rate-making theory today, the restatement of comparative risk in the *Bluefield* case[5] is usually preferred:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

Earlier the Supreme Court had said in another often-quoted passage,[6]

> There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and

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[1] Discussed at p. 292, *supra*.

[2] 320 U.S. at 603.

[3] 169 U.S. 466 (1898).

[4] 320 U.S. at 647, 649.

[5] Bluefield Water Works & Improvement Co. v. PSC of the State of W.Va., *et al.*, 262 U.S. 679, 692, 693 (1923). *Cf.* Smyth v. Ames, *op.cit.supra*, at 529 *et seq*.

[6] Willcox *et al.* v. Consolidated Gas Co., 212 U.S. 19, 48-49 (1909).

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The

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By

Leonard Saul Goodman

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Although clearly related, agency investigations of "used and useful" properties have already been discussed as rate base issues. I will also disregard here obvious indicia of dishonesty or inefficiency, such as excessive entertainment expenses, gambling debts, and other profligate expenses occasionally found among the regulated companies. Such items cause little alarm if they are charged to the stockholders rather than the users of the regulated service, and rarely are of sufficient consequence to affect the rates paid by the users of the service.

A commission may act to protect the ratepayers even if a pattern of unlawful conduct has no direct monetary effect on rates. On the basis of evidence that the company management had engaged in criminal activity that "lessened the efficiency of management in providing electric service," the Florida commission reduced the allowed return on equity by 50 basis points from 12.55 percent to 12.05 percent as "a penalty for corporate mismanagement."[1] The commission noted that the final return was still within the parameters (11.75 percent to 13.5 percent) established as fair and reasonable by the expert testimony of record.

REASONABLE MANAGEMENT PRESUMED. In 1879, the state of Georgia adopted legislation for the regulation of rail rates, including the appointment of three commissioners by the governor of the state. In defending their earliest decision on a general revision of the rail rates in Georgia, the commissioners stated that their standard for reasonable profit was subject to "average economy of management":[2]

> This profit should be the excess of earnings over expenses with average economy of management. If the road is managed with superior skill it is entitled to the gain thereby effected; if without proper economy, the profits must be reduced, the loss and waste to fall where it belongs, on the poor management.

Unless there is direct evidence of mismanagement, regulatory agencies will presume that management has properly performed its duties.[3] The presumption can be overturned with evidence of extravagance or of needless expenditure of money, waste, or enormous salaries. Actual cost may far exceed present value of the properties used and useful in the public service; or the company may simply have been unwisely built, in localities where there is insufficient business. In the absence of any satisfactory showing along one of these or similar lines, the company's evidence, that over a reasonable period earnings above operating expenses have been insufficient to pay capital charges on money invested in the enterprise, will sustain a finding that forced rate reductions are unjust and unreasonable.[4]

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[1] Re Gulf Power Co., 120 PUR4th 1, 16-21, 29 (Fla.PSC, 1990), citing Re Public Service Comm'n of N.H., 57 PUR4th 563, 594 (N.H. 1984). The Florida commission, however, did not reduce the return on equity in computing the proper level of interim rates and ordering a rate reduction from the earlier level (120 PUR4th at 30).

[2] Quoted in S.Report 46, Senate Select Committee on Interstate Commerce (Cullom Report), 49th Cong., 1st Sess., p. 81 (1886), which led to the enactment of the Act to Regulate Commerce in 1887 and the creation of the I.C.C.

[3] West Ohio Gas Co. v. PUC, 294 U.S. 63, 72 (1935); Mountain States Tel. & Teleg. Co. v. F.C.C., 939 F.2d 1021, 1034 (D.C.Cir. 1991); Re Consolidated Edison Co.of N.Y., Inc., 151 PUR4th 130, 137 (N.Y.PSC, 1994).

[4] Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 411-13 (1894).

A record may indicate, although no specific findings to that effect have been made by the agency, that the regulated company was "unwisely built" and the company simply "unprofitable"; still the regulator may not under the just and reasonable standard "reduce the rates as to increase the amount of that loss."[1]

The exceptional case occurs when an agency revisits a past period to provide the company with an award or subsidy. In the 40-year period in which the C.A.B. regulated the nation's airlines, it also administered a subsidy program, which paid a federal subsidy in the form of higher mail pay to airlines needing such support. Subsidy was awarded after the board revisited a past period of an airline's operations to determine the revenue need. The C.A.B. early decided that the program provided airline management with an incentive to be less efficient than if subsidy were not available. The Court of Appeals sustained the board's policy of "strict scrutiny of carrier management decisions which affect subsidy awards,"[2] a policy not followed in its economic regulation of passenger fares, air freight rates, and unsubsidized service mail pay.

Early I.C.C. cases. The I.C.C. in its long history undertook very few investigations into the efficiency of railroad management.[3] It believed that relative efficiency could not be deduced from the relative levels of operating ratios among the railroads.[4] It further thought that the consideration of managerial efficiency basically "presents a great difficulty in assigning a definite weight to this element in appraising either cost or revenue need."[5]

Later I.C.C. cases. A divided commission said in at least one early case that any inquiry into economic and efficient operations must of necessity be directed to operations of a railroad as a whole unit.[6] In its later years, the I.C.C. stressed this point nearly to the exclusion of any more specific inquiry and with the practical effect of its avoiding nearly all inquiry into economy and efficiency.

Congress required the I.C.C. to ensure that railroads earn adequate revenues "under honest, economical, and efficient management."[7] However, the burden of showing inefficiency, such as by showing that certain traffic was carried below a variable cost level, was so heavy that no such showing would convince the commission unless it

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[1] Reagan v. Mercantile Trust Co., 154 U.S. 418, 419 (1894). However, a relatively recent Court of Appeals decision refers to the new burden of the regulated company to come forward with information and reports showing its efficient operations. *See* Trans World Airlines v. C.A.B., 385 F.2d 648, 657 (D.C.Cir. 1967), cert. denied, 390 U.S. 944 (1968).

[2] Trans World Airlines, Inc. v. C.A.B., *supra*.

[3] In New York, N.H.& H.R.Co. Investigation, 220 ICC 505, 616 (1937), the I.C.C. merely recommended a statutory amendment requiring subsidiary and affiliated companies to become subject to the I.C.C.'s jurisdiction over accounting and the issuance of securities. In Investigation of Practices, Norfolk S.Ry.Co., 291 ICC 575, 638 (1954), the I.C.C. again recommended more detailed reporting and accounting by rail subsidiaries.

[4] Official-Southern Divisions, 287 ICC 497, 525-26 (1953).

[5] Akron, C.& Y.R.Co. v. Atchison, T.& S.F.Ry.Co., 321 ICC 17, 59 (1963). The I.C.C. thought it lacked power to enforce efficient or economical management, such as by order requiring a railroad to reroute traffic or otherwise to conduct business in a more economical manner. New Mexico C.Ry.Co. v. Atchison, T. & S. F. Ry.Co., 81 ICC 718, 722 (1923); Missouri-Kansas-Tex.R.Co. v. Kansas City Term.Ry.Co., 104 ICC 203, 223-24 (1925).

[6] PSC of Nev. v. Southern Pac. Co., 73 ICC 240, 246 (1922).

[7] 49 U.S.C. §10704(a)(2).

the disallowance the ratepayer costs per kilowatt were now reduced to the level for a comparable coal-fired plant.[1]

The Massachusetts commission in 1984 announced a change in policy; after July 31, 1984, if any electric plant on which construction was begun was thereafter canceled or abandoned, "the utility will bear the entire risk of loss" under the used and useful test.[2]

Michigan follows a "prudent investment" test for inclusion or exclusion of abandoned plant from rate base, rather than adhere to a "used and useful" standard.[3] Most states will not automatically disallow canceled or abandoned plant due to the presumption, considered next, which supports the prudence of management decisions.[4]

Presumption favors utility management. A legal presumption that utility management has acted prudently surrounds their investment decisions. In the absence of specific evidence of imprudence, the investment, including related AFUDC or IDC, must be included in rate base. Justice Brandeis, for example, carefully constrained his definition of prudent investment:[5]

> Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

Three court decisions involving the former C.A.B. illustrate this presumption. Some of the work of the former C.A.B. involved airline subsidy determinations for past periods, and its fixing maximum reasonable rates for those periods. In one such case the board disallowed all losses incurred by an airline in a strike of airline pilots on the grounds that allowing any such losses would tend to favor airlines in their labor disputes. The Court of Appeals reversed and remanded, holding that such considerations were outside the agency's enabling statute. The court required, "that the figures past or prospective, of the carrier in question be used unless some item or items are due to dishonest, inefficient or uneconomical management."[6]

Later, when the C.A.B. disallowed a portion of strike losses in another airline subsidy proceeding on the grounds management had imprudently prolonged the strike by its intransigence, the Court of Appeals sustained the decision. This time the court held that the agency employed a "standard ... not fundamentally different from that applicable in conventional utility rate regulation where the commission may disregard waste and improvidence but must not usurp the role of management" although it necessarily "reflects a view of how business should be conducted."[7]

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[1] Re Cincinnati Gas and Elec. Co., 135 PUR4th 208 (Ohio PUC, 1992).

[2] In re Western Mass.Elec.Co., Mass.DPU Order 84-25 (Mass.DPU 1984).

[3] Discussed further at p. 818, *supra*.

[4] Where canceled or abandoned plant costs are prudently incurred and recovered from ratepayers, the commissions typically divide the costs between investors and ratepayers. Most commissions allow amortization of the costs as a utility expense over a period of years while removing the costs from rate base, and some disallow recovery of any AFUDC. *See* p. 819.

[5] Missouri ex rel. Southwestern Bell Tel. Co. v. PSC, 262 U.S. 276 (1923).

[6] American Overseas Airlines v. C.A.B., 254 F.2d 744, 749 (D.C.Cir. 1958).

[7] Trans World Airlines, Inc. v. C.A.B., 385 F.2d 648, 655-56 (D.C.Cir. 1967), cert.denied, 390 U.S. 944 (1967).

On the other hand, where a specific consideration, such as depreciation, is "peculiarly within the decisional province of the ratemaking authority," the agency may adopt a totally different test of revenue need from that proposed by the company:[1]

> There is more than one method of depreciation which may be honest, economical and efficient.... The Board may prescribe a different method from that used by the carrier without finding that the carrier's method was due to dishonest, uneconomical or inefficient management. Such a difference is not a 'management' difference.

An allegation of imprudence must be supported by evidence that creates a serious doubt regarding the prudence of the investment.[2] The mere existence of a serious construction cost overrun for a nuclear power plant is some evidence of imprudence;[3] as well as the timing of decisions to abandon or cancel a plant;[4] but a comparison of construction costs with the costs of other comparable units is hardly conclusive given the wide acceptance in the past of a custom-made construction plan for each such power plant in this country.[5]

When evidence is presented that a computer model, substituting a combustion turbine for the electric utility's share of a pumped storage plant, shows that ratepayers would have saved $140 million, a commission is justified in ordering the utility to prove, a) that the pumped storage project was economically justified when construction began; and b) that cancellation at a later time would not have been justified, before including the project in the utility's rates.[6]

Once the presumption of prudent management has been overcome with a *prima facie* case of imprudence, then the burden of going forward with evidence shifts to the utility. The utility must set forth appropriate evidence that management acted with care and diligence in controlling the project. Agencies here often employ outside consultants to provide an objective evaluation of management's control and direction of the project.

Irrelevance of hindsight. The prudence test is not based on hindsight, but rather on whether the decisions at the time they were made were reasonable in the circumstances. As Prof. Bonbright suggests, the term "prudent" in relation to rate base,[7]

> imports the requirement that the investment, in order to gain recognition in the rate base, must have been prudently incurred in the light of foresight rather than of hindsight.

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[1] Northwest Airlines, Inc. v. C.A.B., 340 F.2d 789, 791 (D.C.Cir. 1964).

[2] Minnesota Power and Light Co., 11 FERC ¶61,312 (1980).

[3] Where a plant should have been abandoned sooner than management acted, costs beyond the time of prudent action will be disallowed. *E.g., see* In re Commonwealth Elec.Co., 47 PUR4th 229 (Mass.DPU 1982); In re Houston Light & Power Co., 50 PUR4th 157 (Tex.PUC 1982).

[4] In re Detroit Edison Co., 24 PUR4th 326 (Mich.PSC, 1978).

[5] Discussed further at p. 879, *infra*.

[6] Re Georgia Power Co., 164 PUR4th 113, 118, 121, 122 (Ga.PSC, 1995).

[7] Bonbright, Principles, p. 238 (1988); Bonbright, Principles, p. 174 note 2 (1961).

quantities" of natural gas "as available here would hardly be profitable except interstate."[1]

Deference to market ordinarily inconsistent with regulatory goals. An agency is not required, indeed is rarely justified, in simply deferring to the market price for the regulated service. It may consider market price as one factor in deciding the just and reasonable rate; but total deference to the existing market in broad based regulation of an industry is tantamount to abdication of regulatory responsibility. The experience of the former F.P.C. in its commencing the regulation of independent natural gas producers illustrates these principles.

Broad based regulation. During the long-running effort of the F.P.C. to establish maximum reasonable rates for independent natural gas producers,[2] the producers argued that the just and reasonable rates should be derived solely from the prevailing field or contract prices negotiated in the competitive market for natural gas. The Court of Appeals rejected the producers' efforts to require rates be set at market prices, or to allow the market price to govern the just and reasonable standard of the statute.[3]

The Court of Appeals continued to approve the F.P.C.'s refusal to discard costs entirely even to promote supply. The court relied on principles of economics:[4]

> In the last analysis, as we understand the matter, the underlying principle of economics requires that the determination of price needed to induce desired supply levels requires both some premise of profit necessary to spark management investment and effort, and also some determination or assumption of cost ...

In Order No. 455, the former F.P.C. adopted an "Optional Procedures for Certificating New Producer Sales of Natural Gas" under which sellers could negotiate contract prices for gas in excess of rates established in the area rate proceedings, and the contracts could be reviewed in commission proceedings under the just and reasonable test. The courts sustained the agency's combining the certification and ratemaking procedures into one proceeding.[5]

The Supreme Court sustained the Court of Appeals' line of decisions regarding the deference to be paid the market. It held "the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act,"

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[1] Atlantic Refining Co. v. PSC, 360 U.S. 378, 393-94 (1959).

[2] The F.P.C.'s efforts to regulate producers that were unaffiliated with any gas pipeline, commenced only after the Supreme Court ruled in 1954 that the independents were "natural gas companies" subject to the agency's jurisdiction under the Natural Gas Act, 15 U.S.C. § 717a(6). Phillips Petrol. Co. v. Wisconsin, 347 U.S. 672 (1954).

[3] PSC, State of N.Y. v. F.P.C., 487 F.2d 1043, 1057 (D.C.Cir. 1973) ("so long as the legislature has assigned the agency the function of regulation of rates, it cannot legitimately execute that function in a fashion which, in fact, is tantamount to total deregulation or non-regulation"); Texaco, Inc., *et al.* v. F.P.C., 474 F.2d 416 (D.C.Cir. 1972) ("we cannot hold that *non*-regulation is the statutory equivalent of regulation" (emphasis theirs)).

[4] 487 F.2d at 1057.

[5] Moss v. F.P.C., 502 F.2d 461 (D.C.Cir. 1974) (reversing the agency on other grounds), rev'd in part, 424 U.S. 494 (1976) (sustaining the agency on all grounds).

relying on the legislative history of the Natural Gas Act where Congress had considered the natural gas industry to be "heavily consent rated" where "monopolistic forces were distorting the market price for natural gas."[1]

It was only much later, when the Court of Appeals could agree with the F.E.R.C. that "sufficient competition" was present in a given market, that the just and reasonable standard could be equated to market price.[2]

Wherever the legislature rests on a standard of rate reasonableness, or "zone of reasonableness," as the Court of Appeals has held, "presumed market forces may not comprise the principal regulatory constraint":[3]

> Departures from cost-based rates must be made, if at all, only when the non-cost factors are clearly identified and the substitute or supplemental ratemaking methods ensure that the resulting rate levels are justified by those factors.

Thus, where an oil pipeline seeks to free itself from the cost-based ratemaking standards of the F.E.R.C.,[4] it bears the burden of proving "that it lacks significant market power in each market in which it seeks light-handed regulation."[5]

Introduction of new competitors. An agency's authorizing new competition does not necessarily remove all need for maximum rate regulation. As the Florida commission found in allowing competition in the pay telephone market, the pay telephone was an important ingredient of universal telephone service, and the agency's allowing in new competition did not remove the need for price caps to protect ratepayers who depended on such service from exorbitant rates. It found the pay telephone market is "quasi-competitive" and that the primary beneficiaries of the new "competition" have been the location owners. Many instances of captive users remained. Rate caps had become a necessary mechanism to protect end users.[6]

Regulation as a surrogate for negotiation. Perhaps the most complete deference to the market occurs when the regulator perceives its task to serve merely as a surrogate for negotiation between private parties. This occurred in some of the work of the former Copyright Royalty Tribunal, an agency established by Congress to adjust the payments between holders of licenses for non-dramatic musical copyrights and the authors.[7] Before its own demise the tribunal showed both the appropriate way to go about such a task, and the risk of becoming redundant in performing it.

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[1] F.P.C. v. Texaco, Inc., 417 U.S. 380, 397-98 (1974), citing and relying as well on F.P.C. v. Sunray DX Oil Co., 391 U.S. 9, 25 (1968).

[2] Elizabethtown Gas Co. v. F.E.R.C., 10 F.3d 866 (D.C.Cir., 1993).

[3] Farmers Union Central Exchange v. F.E.R.C., 734 F.2d 1486, 1530 (D.C.Cir., 1984), cert.denied, 469 U.S. 1034 (1984).

[4] Cost-based standards were adopted by the F.E.R.C. for oil pipelines in Williams Pipe Line Co., 31 FERC ¶61,377, 67 PUR4th 669 (1985); *and see id.*, 33 FERC ¶61,327 (1985).

[5] Re Buckeye Pipe Line Co., L.P., 55 FERC ¶61,084, 123 PUR4th 129, 137 (1991).

[6] Re Rates and Charges Paid By Pay Telephone Service Providers to LECs, 120 PUR4th 530, 542-43 (Fla.PSC, 1991).

[7] 17 U.S.C. §§801-810.

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FUNDAMENTALS OF ENERGY REGULATION

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In memory of

Shimon Awerbuch

Colleague, Mentor, Friend

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CHAPTER 3
THE ROLE OF THE REVENUE REQUIREMENT

3.1 Introduction

No firm can operate as a charity and withstand the rigors of the marketplace. To survive, any firm must take in sufficient revenues from customers to pay its bills and provide its investors with a reasonable expectation of profit, while fending off competitors. Regulated firms are no exception. They face the same constraints, with the exception that, typically, their competitors are limited either by economics or by statute.[1]

A basic concept underlying all forms of economic regulation is that a regulated firm must have the *opportunity* to recover its costs. Privately held firms must be able to obtain a "reasonable" return on *prudent* investments, two loaded words that have been, and continue to be, key areas of regulatory disputes. Without the opportunity to recover all of its costs and earn a reasonable return, no regulated private company can attract the capital necessary to operate. And if an investment is not prudent, it is not likely to be made.

Regulatory regimes in all countries and all political jurisdictions, at least those that wish to have well-functioning electric and natural gas industries, rely on this cost recovery plus investment return concept, which underlies all of the different forms of rate regulation we will encounter. Depending on the jurisdiction, the concept is called variously: *allowed revenues, value added of the regulated activity* (such as distribution or transport), *permissible revenues, rate base, regulated revenues, tariff base,* or *total revenue.* We use the term *revenue requirement.*[2]

Two primary components make up the revenue requirement: *operating costs* and *capital costs.* Operating costs include such diverse categories as administrative and general costs (rent, employee salaries, etc.), fuel costs (e.g., for generating electricity and operating natural gas

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1 Even for a pure monopolist, at some price there will always be a "competitive" alternative.

2 The literature in regulatory economics has referred to the same concept widely. *See, e.g.*, Charles F. Phillips, *The Regulation of Public Utilities* (Arlington, VA: Public Utilities Reports, Inc., 1993), 176

2.10 Chapter Summary

Fundamentally, economic regulation is about ensuring efficient outcomes that mimic a competitive market outcome when the underlying markets are not competitive. As we discuss in the rest of this book, the regulatory complexities we encounter all boil down to that. If a firm is a natural monopoly, or if a market is not workably competitive, a key goal of economic regulation is to prevent market power abuse either by restructuring the market to make it competitive or by regulating firms' behavior. In an ideal world, this is straightforward to accomplish. Regulators can set a firm's prices in such a way as to mimic the competitive market, while ensuring the firm remains financially viable. Regulators can also create new markets and new participants where none have existed.

Alas, reality often intrudes. Measuring firms' costs is not an exact science, especially measuring concepts such as a firm's cost of capital or the physical and economic lifetimes of its capital assets. Firms may have an incentive to inflate their true costs, and regulators may have incentives to lower them. Regulators can also have multiple objectives that extend beyond economic efficiency. Fairness and equity, for example, can lead to far different regulatory outcomes than what strict economic efficiency would lead to. And, regulators, like most of us, can have their own "agendas" and seek to establish specific policies. Additionally, regulatory jurisdictions can overlap and conflict. Energy regulators and environmental regulators, for example, often have vastly different goals. Not only can the firms they regulate be caught in the middle, but such conflicts can also exacerbate inefficiency and uncertainty.

In the next chapter, we begin to explore the process by which regulated prices are established, and we look first at revenue requirements. We show why determining a firm's revenue requirement forms the basis of all types of regulation, including traditional cost-of-service regulation and more recent incentive-based approaches.

Note also that FERC's definition specifies *reasonable judgment* based on the information the utility possesses at the time of its actions. Thus, *Good Utility Practice* implies neither perfection nor clairvoyance.

When a utility's actions do not conform to *Good Utility Practice*, the firm's actions may not be in the public interest, and regulatory disputes are unavoidable. Since the vast majority of these disputes ultimately affect regulated prices (i.e., *tariffs* or *rates*), a clear set of principles must be followed in order to determine what can or cannot be included in those prices. These principles underlie all revenue requirement estimates and the methodologies used to develop them.

3.3 Key Regulatory Principles

Ideally, *Good Utility Practice* incorporates three regulatory principles that determine whether utilities will be allowed to recover their costs and earn a return on their capital investments. These principles combine regulatory "carrots and sticks" to encourage utilities to make disciplined economic operating and investment decisions. In determining the revenue requirement, costs and investments are examined as to whether they are (1) "prudent," (2) "used and useful," and (3) "known and measurable."[5]

Allowed expenses, whether capital or operating, must satisfy these principles to be part of a firm's revenue requirement. Those that do are called *above-the-line* expenses, and they can be included in the firm's revenue requirement. Those that fail to satisfy any of the three principles are called *below-the-line* expenses, and they cannot be included in the revenue requirement. In essence, below-the-line expenses cannot be charged to ratepayers. Of course, the regulated firm that wishes to lard its executives with luxurious cars and lavish offices is still free to do so. However, the associated expenses should be borne by the company's shareholders alone.

[5] Some regulators include the "just and reasonable" standard as a fourth principle. However, the just and reasonable standard really applies to rates and tariffs, not costs

pipeline compressors), depreciation expenses, and taxes. Capital costs are primarily a return on the undepreciated value of capital assets (power plants, transmission lines, pipelines, etc.) and a return on *working capital.*[3]

3.2 Meeting the Regulatory Challenge

In Chapter 1, we noted that the U.S. electric and natural gas industries were at first unregulated. They eventually were regulated because of industry consolidation and, in the United States, competitive abuses prior to passage of PUHCA. But the other driving force for regulation by government agencies was a determination that electric and natural gas utilities (as well as some other industries) provided services that were either (1) determined to be "affected with the public interest," (2) considered to be natural monopolies, or (3) both.

Electric and natural gas utilities are required to follow a set of basic standards and practices, which together constitute *Good Utility Practice.* FERC defines *Good Utility Practice* for regulated electric utilities as follows:

> Any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of *reasonable* judgment in light of the facts known *at the time the decision was made,* could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.[4]

Good Utility Practice covers a wide range of actions, from billion-dollar investments in new transmission and generating facilities, to maintenance that ensures trees are not constantly flopping onto high-voltage power lines. We will discuss these actions in detail and examine how regulators determine whether utilities are in compliance with *Good Utility Practice.*

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3 In some jurisdictions, the return is calculated on equity plus the costs of debt financing. Working capital refers to the day-to-day capital needed to keep the firm operating, and is generally based on the time when a firm pays its bills and the time when it receives payments from its customers. We define working capital in Section 3.5, *infra*

4 FERC, Pro Forma Open Access Transmission Tariff (OATT), Appendix B (emph. added), 72 Fed Reg. 12,266–12,531 (March 15, 2007) (to be codified at 18 C.F.R. pts. 35 and 37)

In the 1980s, the used and useful principle was expanded by some regulators, and controversially so, to include an economic component. For example, Phillips notes a 1986 case before the Massachusetts Department of Public Utilities.[9] In that case, the regulator found that the electric utility's investment in new generating capacity would be used and useful only if the net cost of that capacity was less than alternative investments. As we discuss in Chapter 5, the problem with an economic used and useful principle is that it replaces a reasoned judgment standard, as defined under *Good Utility Practice.*[10]

Known and Measurable

To be included in a regulated firm's revenue requirement, costs must be *known and measurable.* That is, the regulated firm must justify with documentation, facts, and methodology those costs it wishes ratepayers to reimburse. Typically, a regulated firm is required to prove that all of the costs it is requesting to recover are legitimate expenditures. For example, the firm should be able to describe the details of the duties and obligations for the services provided by its employees. Essentially, all of the costs the regulated firm wishes to recover from captive ratepayers must be realistic. Moreover, the firm should provide enough information to show that those costs are a necessary part of its operations.

The Regulatory Compact and the "Just and Reasonable" Principle

There is also a long-standing, but unwritten, rule that governs cost recovery and lies at the heart of establishing *regulated* prices. This rule is known as the *regulatory compact.* Under the regulatory compact, the regulator grants the company a protected monopoly, essentially a franchise, for the sale and distribution of electricity or natural gas to customers in its defined service territory. In return, the company commits to supply the full quantities demanded by those customers at a price calculated to cover all operating costs plus a "reasonable" return on the capital invested in the enterprise.[11] The first half of this "compact" protects the company from would-be competitors and secures for the public the substantial

9 *Re Western Mass. Elec. Co.*, 80 PUR4th 479, at 520 (Mass. D.P.U. 1986)

10 For a much more detailed discussion, see Jonathan Lesser, "The Economic Used and Useful Test: Implications for a Restructured Electric Industry," *Energy Law Journal* 23, no. 2 (2002): 349–81.

11 In other cases where rates are regulated, such as a wholesale generator that is not allowed to sell power at market rates because of market power concerns or an interstate natural gas pipeline owner that is considered a bottleneck facility, there is no regulatory compact per se, since there is no obligation to serve.

Prudence and Prudent Management

Under *Good Utility Practice*, a regulated firm's operating and investment decisions are typically considered prudent unless proven otherwise.[6] In other words, utility management is given the benefit of the doubt, and management's decisions are presumed reasonable unless the facts show otherwise. For example, the regulator would need to establish that providing luxurious cars and lavish offices to the regulated firm's executives was not a necessary part of providing electric service. Moreover, the prudence of managerial decisions must be judged on their reasonableness at the time those decisions were made and based on information then available. Prudence is not meant as an exercise in hindsight regulation. In essence, a prudent decision is one that a reasonable person could have made in good faith, given the information and decision tools available at the time of the decision.

In the early 1960s, several economists identified the possibility that regulated utilities would engage in imprudent behavior by *gold-plating* investments.[7] Gold-plating occurs when a utility spends excessively on equipment to provide services that could be provided more efficiently or that are not necessary. Gold-plating leads to artificial increases in regulated rates.[8]

Used and Useful

A second regulatory principle states that an asset should be "used and useful" in order to be included in the rate base for calculating regulated tariffs. The only criterion that is tested as "used and useful" is whether the assets are used in providing services and are useful to the ratepayers. For example, suppose a nuclear plant investment was prudent at the time construction began, but that construction was never completed because of cost overruns. As a result, the unfinished plant would not be used and useful, since it would not be generating any electricity.

---

6 For example, U S Supreme Court Justice Brandeis referred to the prudence of investments as follows: "Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown," *Missouri ex rel. Southwestern Bell Tel Co v Mo PSC*, 262 U S. 276 (1923).

7 *See* Harvey Averch and Leland Johnson, "Behavior of the Firm under Regulatory Constraint," *American Economic Review*, December 1962, 1052–1069. *See also*, Stanislaw Wellisz, "Regulation of Natural Gas Pipeline Companies: An Economic Analysis," *Journal of Political Economy*, February 1963, 30–43. These authors argued that utilities had an incentive to increase capital costs so as to maximize the return on their investments.

8 Although less common, even expenditures to improve safety can be considered gold-plating if the safety levels exceed minimum requirements established by the government.

than or equal to $25 per MWh ($45 ÷ 1.8) for the investor to walk away from the investment immediately. What this means is that the value of the option to wait increases, and the value of investing immediately decreases, as shown in Figure 10-3.

Decision Trees and the Value of Information[10]

In George Orwell's bleak novel of the future, *1984*, one of the sayings in the government's language "Newspeak" was "Ignorance is Strength." Yet, intuitively, we know that more information is usually preferred to less. For example, as we will discuss in Chapter 11, information, or the lack of it, can be a crucial component affecting environmental policies and regulation. For example, knowing more about the precise economic impacts of global warming can help policymakers develop more appropriate policy instruments. It may also reduce the temptation for well-intentioned, but ill-considered, "we must do something" regulatory responses, such as a state legislature ordering the immediate closure of all coal-fired power plants to reduce greenhouse gas emissions without first considering the costs of blackouts.

Decision trees are useful tools for making good decisions and determining the value of new information. As an aside, good decisions are often equated with good outcomes. Alas, in the presence of uncertainty, good decisions can still have bad outcomes, a situation that can have important regulatory impacts.[11] Insuring yourself against accidental death may be a very good financial decision, but you will probably not consider your dying a good outcome. Rather than focusing on such a macabre subject, we illustrate the concepts with a gentler example.

Suppose you are deciding whether to walk to work tomorrow or ride the bus. You prefer walking in good weather, but you do not relish walking or, unlike Gene Kelly, singing in the rain. Suppose the local weather forecaster, with typical assertiveness, states there is a 50:50 chance of rain tomorrow. Now, since the cherry blossoms are in bloom, if you walk tomorrow and it does not rain, you will greatly enjoy yourself. So, on a scale of 1 to 10 points, we can assign that outcome as a "10." On the other hand, if you walk and it rains, your new suit will be ruined. We can assign that outcome a "0." Finally, if you take the bus, you will arrive to work safe, dry, and bored. So, let's assign that outcome a value of "6."

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10 For an introduction to decision trees and the broader field of "decision analysis," see Robert T. Clemen, *Making Hard Decisions: An Introduction to Decision Analysis*, 2nd ed. (New York: Duxbury Press, 1996).

11 Recall from Chapter 5 our discussion on prudence and used and usefulness that regulatory prudence reviews are supposed to be based solely on what was known at the time. Whereas prudence is not an *ex post* concept, used and usefulness is. Thus, it is possible for a regulated firm to make a prudent decision that, because of a bad outcome, is not deemed used and useful

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Gas Regulation for a Decarbonized New York

Recommendations for Updating New York Gas Utility Regulation

Prepared for Natural Resources Defense Council

June 29, 2020

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EXECUTIVE SUMMARY

In recent years, New York has taken important steps to promote clean and efficient energy, reduce greenhouse gas emissions (GHG), and mitigate disproportionate environmental burdens. The 2019 Climate Leadership and Community Protection Act (CLCPA) calls for ambitious, economy-wide clean energy and climate targets. It requires all sectors of the state's economy to collectively achieve 40 percent emissions reductions from 1990 levels by 2030 and net zero emissions by 2050. To meet these goals, New York will need to drastically reduce fossil fuel use and shift how it regulates all energy sources—including conventional natural gas (fossil gas).

The state's current gas planning process is not up to the task of getting the state to net zero emissions.

While the New York Public Service Commission (PSC) has been a national leader in electric utility regulation reform, on balance there has been more emphasis on transformation of the electricity sector than on reforming gas utility regulation.[1] The state's current gas planning process is not up to the task of getting the state to net zero emissions. This process lacks transparency and other elements that help ensure outcomes are broadly aligned with state policy and are in the public interest. The good news is that the Commission is posed to redress the limitations of existing gas utility regulatory processes. Responding to several recent gas utilities' claims that gas infrastructure constraints prevented them from offering new firm service, the PSC opened a new proceeding to improve the transparency and inclusiveness of the gas utilities' planning processes, supply and demand analysis, moratoria on new connections, and use of demand-reducing measures (e.g., energy efficiency, electrification, demand response, non-pipe solutions) to address supply constraints.

The CLCPA sets a high bar for the state, and meeting its targets will require having a plan to achieve them in an affordable manner. Given that gas use must decline to meet New York's climate targets, gas utilities' existing and new assets are at risk of becoming stranded. Stranding is when a change in policies, markets, economics, or other factors results in the utility being unable to recover the value it expected at the time of its investment. If gas pipelines or other assets are depreciated over their engineering lives—typically 50 to 70 years—many of them will not be fully depreciated by 2050. Assets that are not fully depreciated and cease to be used and useful will certainly prompt the question of whether and how to allow investors to recover their investment (or a portion thereof).

The confluence of the CLCPA, gas moratoria, and the Gas Planning Order presents an opportunity to redress the limitations of existing gas utility regulatory processes on planning, gas connections, retirement, cost recovery, and future business models. The time is ripe for doing so, as gas companies

[1] Throughout this white paper, the term "fossil gas" refers to conventional natural gas, while "gas" refers to conventional (fossil) gas, biomethane, and synthetic natural gas.

(and possibly their customers) will increasingly face challenges associated with balancing the need to replace aging, leaky infrastructure with the need to maintain rates that are low enough to avoid mass, unmanaged defection away from gas service and stranding vulnerable customers with unaffordable rates.

RECOMMENDATIONS FOR GAS REGULATION REFORM	
	More critically examine conventional gas investments
	Require open and integrated energy planning
	Modernize and standardize gas load forecasting
	Develop a comprehensive framework for non-pipeline alternatives
	Revisit obligation to provide gas service in light of socialized costs
	Require data reporting to inform legislation to minimize the socialized costs of new connections to the gas system
	Stakeholders should discuss and develop plans for strategic retirement of existing assets
	Provide regulatory guidance as soon as possible on how cost recovery for both new and existing stranded assets will be treated
	Require utilities and stakeholders to explore alternative business models and regulated return on investment for gas utilities

We recommend the Commission use this opportunity to explore and make reforms to address both short- and long-term challenges facing the gas utilities, their investors, regulators, and customers. Within the planning process, the Commission should more critically examine conventional gas investments, require open and integrated energy planning, modernize and standardize gas load forecasting, and develop a comprehensive framework for non-pipeline alternatives. Given that electric alternatives to gas-consuming equipment are readily available, the obligation to provide gas service should be revisited in light of gas's high costs to health, the environment, and other customers (in terms of socialized connection costs). Further, the utilities should be required to report data that will help inform legislation to minimize the socialized costs of new connections to the gas system. Stakeholders should discuss and develop plans for strategic retirement of existing assets. The Commission should provide regulatory guidance as soon as possible on how cost recovery for both new and existing stranded assets will be treated. Finally, utilities and stakeholders, including potential competitors, should explore appropriate alternative business models and regulated return on investment for gas utilities.

1. BACKGROUND

1.1. Climate and energy goals

In recent years, New York has taken important steps to promote clean and efficient energy, reduce greenhouse gas emissions (GHG), and mitigate disproportionate environmental burdens. In 2014, Governor Cuomo launched Reforming the Energy Vision (REV), a broad initiative to "reorient both the electric industry and the ratemaking paradigm toward a consumer-centered approach that harnesses technology and markets."[2] The 2015 State Energy Plan (SEP), which serves as a roadmap for REV, included energy-sector GHG reduction targets of 40 percent from 1990 levels by 2030 and 80 percent by 2050.[3] Surpassing the 2015 SEP goals for GHG reductions, Governor Cuomo signed into law the Climate Leadership and Community Protection Act (CLCPA) in July 2019. The CLCPA calls for ambitious, economy-wide clean energy and climate targets—requiring all sectors of the state's economy to collectively achieve 40 percent emissions reductions from 1990 levels by 2030 and 85 percent emissions reductions by 2050, as well as achieve net zero GHGs by 2050 (meaning sectors must offset any remaining emissions). The CLCPA also requires 70 percent renewable electricity by 2030 and 100 percent carbon-free electricity by 2040.[4]

CURRENT NEW YORK CLIMATE LAW

- 40% emissions reduction economy-wide by 2030
- 85% emissions reduction economy-wide by 2050
- Net zero emissions by 2050
- 70% renewable electricity by 2030
- 100% carbon-free electricity by 2040

In order to meet these goals, New York will need to drastically reduce fossil fuel usage and shift how it regulates all energy sources—including gas. The New York Public Service Commission (PSC) has been a national leader in electric utility regulation reform, yet its attention to reform of gas regulation has lagged. While the PSC has adopted aggressive targets for gas energy efficiency savings,[5] on other gas-related regulatory topics it has not shown the same progress.

[2] NY PSC 2015. Order Adopting Regulatory Policy Framework and Implementation Plan. February 26, 2015. Case 14-M-0101.

[3] The SEP also established goals that 50 percent of electricity will come from renewable energy resources and that energy efficiency savings will increase to 600 trillion Btu statewide. (https://www.nyserda.ny.gov/Researchers-and-Policymakers/New-York-State-Energy-Plan).

[4] S 6599/A 8429, available at https://www.nysenate.gov/legislation/bills/2019/s6599.

[5] The PSC's January 16, 2020 Order in Case 18-M-0084 built on earlier targets under the New Efficiency New York framework and adopted ambitious electricity and gas efficiency savings targets on par with states leading in energy efficiency achievement. As a key component in a strategy to reduce fossil fuel use in buildings, this Order establishes targets for heat pumps and adopts a novel framework to promote building electrification and set future heat pump targets.

1.2. Gas constraints and moratoria

Claiming that gas infrastructure is constrained, two New York utilities have levied moratoria on new gas connections in the past few years.

In September 2017, Con Edison filed a petition for approval of its Smart Solutions program to address its projected growing shortfall of peak day[6] pipeline capacity in Westchester county—resulting in Case 17-G-0606. The Smart Solutions program filing contained several initiatives, including an enhanced gas energy efficiency program, a gas demand response pilot, a non-pipeline alternative (NPA) portfolio,[7] and shareholder incentives. These initiatives were not, according to Con Edison, sufficient to entirely eliminate the unmet need within the timeframe of the projected shortfall.[8] The Commission approved the Company's proposal for NPAs with modifications. On March 15, 2019 the Company began a moratorium on new gas connections in Westchester County to temporarily avoid the need to build new gas infrastructure. At the time of this writing, the moratorium is still ongoing.[9]

National Grid also implemented and then lifted a moratorium on new gas hook-ups in its service areas in Brooklyn, Queens, and Long Island. Based on its identification of future needs for firm peak gas supply capacity, National Grid signed a precedent agreement for the development of a proposed pipeline project known as the Northeast Supply Enhancement (NESE) project.[10] The NESE project would have involved installing approximately 24 miles of underwater pipeline to transport gas from Pennsylvania to downstate New York.[11] When the NESE's pipeline project application was denied without prejudice by

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[6] Peak day, also known as design day, is the day of a year with the expected highest demand for gas under extreme cold weather conditions. Design day demand, which represents the utility's projection of the demand on the peak day going forward, is an input to the analysis of need for new capacity (either new gas infrastructure or new alternatives).

[7] NPAs are also called non-pipeline solutions. Discussed in more depth in Section 4.5, NPAs are collections of measures, commonly at the premises of end-use customers, that can meet the reliability need without new gas infrastructure investments. The Gas Planning Order states that "[n]on-pipeline solutions, which include temporary supply, energy efficiency, electrification, and clean demand response, can reduce or eliminate the need for gas infrastructure and investments" (Gas Planning Order, p. 7).

[8] Con Edison found that "the Enhanced Gas EE Program, the Gas DR Program, and the Gas Innovation Program may provide relief to meet approximately 3 percent of the Company's overall pipeline capacity needs by 2023. Assuming a gas supply portfolio that would include up to 10 percent of Delivered Services, the Company still anticipates a shortfall of approximately 9 percent of peak day gas needs in 2023, prior to the impact of the Non-Pipeline RFI" (Con Edison. 2017. Petition of Consolidated Edison Company of New York, Inc. for Approval of the Smart Solutions for Natural Gas Customers Program, Case No. 17-G-0606 (September 29, 2017), page 26).

[9] Con Edison. About the Westchester Natural Gas Moratorium. https://www.coned.com/en/save-money/convert-to-natural-gas/westchester-natural-gas-moratorium/about-the-westchester-natural-gas-moratorium, accessed May 28, 2020.

[10] Takahashi, Kenji, et al. 2020. *Assessment of National Grid's Long-Term Capacity Report: Natural gas capacity needs and alternatives.* Synapse Energy Economics. Available at https://www.synapse-energy.com/sites/default/files/Synapse-final-report-for-EELC-%28April-15-Revision%29-20-023.pdf.

[11] Balaraman, Kavya. November 25, 2019. "National Grid lifts gas moratorium following deal with New York." *Utility Dive*. https://www.utilitydive.com/news/national-grid-lifts-gas-moratorium-following-deal-with-new-york/568044/.

the New York Department of Environmental Conservation (DEC) for the second time in May 2019, National Grid placed a moratorium in May 2019 on all new gas service connections.[12] Pursuant to an agreement with the state in November 2019, National Grid resumed connecting gas service to downstate customers for a roughly two-year period and was assessed $15 million in penalties to compensate customers impacted by the moratorium, and/or fund energy efficiency projects for them.[13] The settlement order also requires National Grid to pay $20 million to support new conservation and clean energy technologies and companies in New York to reduce reliance on fossil fuels.[14] National Grid will implement initiatives for gas energy efficiency, heat pumps, and other NPAs going forward, to reduce or eliminate the threat of shortfalls and associated new moratoria on gas connections. As of this writing, New York regulators have not yet directed National Grid to implement a specific set of solutions for any supply shortfall that might be identified based on robust modeling of future demand.

1.3. Order Instituting Proceeding on Gas Planning Procedures

Responding to several recent gas utilities' claims that gas infrastructure constraints prevented them from offering new firm service, the PSC opened a new proceeding to consider the gas utilities' planning processes.[15] The PSC's March 19, 2020 Order Instituting Proceeding (the Gas Planning Order) called for an examination of these issues:

- Locational constraint analysis
- Transparent and comprehensive information on utility planning
- Consideration of alternatives to minimize costs, preserve reliability, and advance state policies (including carbon reduction) in gas planning
- Framework for incorporating non-pipe alternatives into the planning process
- Criteria for reliance on peaking services
- Standards governing moratoria
- Demand response and rate design
- Criteria pollutant reduction
- Tariff and rule revision

[12] Takahashi, Kenji, et al. 2020. *Assessment of National Grid's Long-Term Capacity Report: Natural gas capacity needs and alternatives*. Synapse Energy Economics. Available at https://www.synapse-energy.com/sites/default/files/Synapse-final-report-for-EELC-%28April-15-Revision%29-20-023.pdf.

[13] Office of Governor Andrew M. Cuomo. November 25, 2019. "Governor Cuomo and National Grid Announce Agreement to Lift Moratorium Immediately." Available at https://www.governor.ny.gov/news/governor-cuomo-and-national-grid-announce-agreement-lift-moratorium-immediately.

[14] State of New York Public Service Commission. Order Adopting and Approving Settlement. November 26, 2019. Case 18-G-0678.

[15] State of New York Public Service Commission. Order Instituting Proceeding, March 19, 2020. Case 20-G-0131.

The Gas Planning Order requires each gas utility to file supply and demand analysis for areas with known supply constraints by June 17, 2020 and for their entire service area by July 17, 2020.[16] Also in July, the utilities are required to present a proposal on criteria for relying on peaking services and management of moratoria.[17]

The Gas Planning Order also called for utilities to file a status report on the extent to which the utility uses or anticipates using demand reducing measures (e.g., energy efficiency, electrification, demand response, NPS) to address supply constraints, as well as proposals for so doing. The PSC Staff are charged with developing and issuing a proposal to modernize the gas system planning process.[18] Both of these filings are due in August 2020.

1.4. The opportunity

The confluence of the CLCPA, gas moratoria, and the Gas Planning Order presents an opportunity to update gas utility regulation. New York has a wealth of experience to draw on for this endeavor: in recent years, the state has made major advances in electric utility planning. REV initiated the transition from a unidirectional, centralized electric system serving inelastic demand to a more dynamic system that values and increasingly relies on distributed and demand-side resources.[19] New York has an opportunity to refresh its approach to gas utility regulation on the heels of the reforms put in place on the electric side through REV.

2. GAS UTILITY PLANNING AND BUSINESS MODELS MUST BE ALIGNED TO ACHIEVE STATE ENERGY AND CLIMATE GOALS

The CLCPA gave the state ambitious targets that necessitate careful planning. But relying on the traditional business and planning practices currently in place is inadequate to reach net zero emissions by 2050. To get a different result, the state needs to look at planning in a new way.

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[16] The Order called for the utilities to file supply and demand analyses for locations known to be vulnerable to supply constraints by June 17, 2020 and to file supply and demand analyses for each local distribution company's entire service territory by July 17. The utilities requested and were granted an extension on both of these analyses to July 17, 2020 and July 31, 2020, respectively. (State of New York Public Service Commission, Case 20-G-0131 – Proceeding on Motion of the Commission in Regard to Gas Planning Procedures, June 17, 2020.)

[17] State of New York Public Service Commission. Order Instituting Proceeding, March 19, 2020. Case 20-G-0131.

[18] State of New York Public Service Commission. Order Instituting Proceeding, March 19, 2020. Case 20-G-0131.

[19] State of New York Public Service Commission 2016. Order Adopting Distributed System Implementation Plan Guidance. Case 14-M-0101. Issued and Effective April 20, 2016.

2.1. Gas reduction has an important role in meeting GHG goals

Consumption of fossil gas must fall substantially to meet the GHG levels required by the CLCPA. In the relatively mild winter weather of 2016, gas combustion in New York's buildings and industry was responsible for emissions equal to 19 percent of the state's 1990 GHG emissions.[20] Even if the only emissions that remain in the state in 2050 are from fossil gas, sales would have to fall more than 20 percent to meet the 85 percent reduction requirement. In reality, the percentage will likely be much higher than 20 percent, as it will probably be more difficult to reduce the emissions from other sectors to zero.

Given that gas use needs to decline to meet the climate targets, gas utilities' existing and new assets are at risk of becoming stranded. Stranding is when a change in policies, markets, economics, or other factors results in the utility being unable to recover the value it expected at the time of its investment. If New York gas pipelines or other assets are depreciated over typical 50- to 70-year lifetimes, reflecting their engineering life, many of them will not be fully depreciated by 2050. This is especially true of recent capital investments, many of which were driven by legitimate concerns about pipeline safety and leaks. Meanwhile, declining gas consumption will mean that many of these assets will be increasingly underutilized or entirely unused leading up to 2050. Stranding creates hardship both for the gas companies' investors and, potentially, for their customers.

If assets that are not fully depreciated cease to be used and useful[21]—a regulatory standard for informing which assets' costs can be passed on to customers—regulators will certainly face the question of whether and how to allow investors to recover their investments (or a portion thereof). The remaining value of assets that are no longer used and useful would either be written off as losses by the gas utility (with the potential for leading to bankruptcy if they are large enough) or recovered in some way. In the case of electric utility restructuring across the country, for example, customers paid transition charges that provided compensation to utility investors for the stranded assets that resulted from that change in policy. Climate policy could result in similar effects for the gas system. However, it may be more complex in the gas case because many of the assets would be retired rather than sold, and there may be very few if any gas utility customers to bear this transition cost.

2.2. Achieving climate targets cost-effectively requires planning

Accomplishment of the state's energy and climate goals in the most cost-effective manner will likely draw on a mix of programs, policies, and processes from all sectors—including transportation and residential, commercial, institutional, and industrial buildings and processes. At the same time, it is likely

[20] NYSERDA. July 2019. *New York State Greenhouse Gas Inventory: 1990–2016*. https://www.nyserda.ny.gov/-/media/Files/EDPPP/Energy-Prices/Energy-Statistics/greenhouse-gas-inventory.pdf.

[21] The used and useful principle means that only plants currently providing or capable of providing utility service to customers should be included in rate base (Bryant PhD, Mark. 2009. Ratemaking in the U.S. July 23-24, 2009. Available at https://pubs.naruc.org/pub.cfm?id=53768A01-2354-D714-517A-DC3B4EC72920).

that sources of emissions from other sectors will be technically harder or more expensive to eliminate than those from fossil gas. Responsibility should be spread across fuels and across sectors in a way that best reflects state policies, the characteristics of each sector, and the costs and benefits of the unique measures.

While the price and limited supply of biomethane and hydrogen are prohibitive to large-scale use, other alternatives are available, cost-effective, and environmentally superior to fossil gas. Gas efficiency, electrification, clean demand response, and other alternatives can help avoid new investments in gas infrastructure that are at risk of becoming stranded in the mid-term.[22] In order to limit the risk of creating additional stranded assets, avoiding investments in unnecessary new gas delivery infrastructure will be essential if New York is to cost-effectively meet its GHG targets. Identifying and prioritizing approaches to decarbonize the state that align with the state's multiple objectives requires a robust, integrated planning framework.[23]

2.3. Substantially different gas utility role requires a new business model

In a CLCPA-compliant future with declining fossil gas consumption, gas utilities will simultaneously face two potentially competing challenges:

- Maintaining rates that are low enough to avoid accelerating defection away from gas service—which, if unmanaged, could leave remaining customers shouldering tremendous costs; and
- Aging pipes that leak or pose safety risks.

Classic utility approaches to addressing these challenges individually include maximizing sales through existing pipes to lower the per-therm cost of distribution service (such as by adopting rate designs intended to induce customers to retain gas connections or use more gas) and investing in pipe replacement programs. Using either of these strategies could put the state on a collision course with the CLCPA. Actions to increase sales of fossil gas are not going to be CLCPA-compliant, and pipeline replacement would increase revenue requirements without increasing sales—thus driving rates up and exacerbating the competitiveness challenge.

In the future, gas companies could provide biomethane, renewably produced hydrogen, and/or synthetic natural gas to customers with end-uses for which economically viable alternatives do not yet exist. In setting New York's path to net zero (rather than absolute zero) GHG emissions, policymakers chose to reflect the fact that some emissions may be very difficult to eliminate, and that some kind of

[22] NY PSC. 2019. Order Approving with Modification the Non-Pipeline Solutions Portfolio. Case 17-G-0606. Issued and effective February 7, 2019.

[23] The CLCPA calls for a climate action council (CAC) to be convened to develop a plan for attainment of the statewide greenhouse gas emissions limits. The CAC process will consider a range of policies and programs, including beneficial electrification (ECL §75-0103(11) to (13)). Nonetheless, the PSC should not wait for the CAC to provide guidance to the gas utilities, given the long-term impacts that decisions made today will have. Rather, the PSC should provide guidance that is flexible enough to accommodate the CAC's recommendations.

offsets or sequestration may be necessary. Some of the emissions that are very difficult, late, or expensive to eliminate may include fossil gas system emissions from industrial processes and combined heat and power. Gas utilities may serve a necessary purpose as the providers of pipelines to bring non-fossil gas to these customers. Due to the cost of these commodities, this future presents a much smaller opportunity than the fossil gas market of today.[24]

However, as gas utilities' traditional business of delivering fossil gas through pipelines shrinks, they will likely also consider alternative lines of business. Some may be regulated, and some may be unregulated. Some may be gradual changes from existing models, while others may involve sharp breaks. Not all gas utilities are likely to choose the same path forward—in particular the path forward for joint gas and electric utilities that serve the same customers may be different from standalone gas companies. Joint companies have the potential for greater coordination of fuel-switching actions and paired infrastructure investment and retirement (see the discussion of integrated planning, below). In each case, however, regulators and other stakeholders must be prepared to engage with a wide range of options and implications and to provide the needed regulatory structure.

Whichever direction each utility decides to pursue, this end state should be used to inform each of the subsequent decisions and actions.

3. EXISTING GAS PLANNING PROCESS IS INADEQUATE

The current gas planning process is not up to the task of getting the state to net zero emissions. Documentation of the current process is scattered and sparse. We understand that, under the current process, the Commission opens a docket to review the gas utility's supply plans each year. Although the Commission has broad discretion in these dockets,[25] the process lacks transparency and other elements that help ensure that outcomes are broadly aligned with state policy and are in the public interest.

Traditionally, claims of confidential data have allowed little insight into the gas plans and their underlying assumptions.[26] In the case of Con Edison, redacted information included the logic behind capacity expansion decisions, pending system expansions, requests for conversion to gas, consideration

[24] Borgeson, Merrian. 2020. "A Pipe Dream or Climate Solution? The Opportunities and Limits of BioGas and Synthetic Gas to Replace Fossil Gas." https://www.nrdc.org/experts/merrian-borgeson/report-renewable-gas-pipe-dream-or-climate-solution.

[25] Testimony of Gregory Lander on behalf of CLF, p. 37.

[26] Hodgson Russ LLP. 2020. "NYS Aligning Long-Term Planning for Gas Utilities with Carbon Neutrality Mandate." JDSupra: https://www.jdsupra.com/legalnews/nys-aligning-long-term-planning-for-gas-92596/.

of the impacts of electric markets on gas and vice versa, and other critical data. These pieces of information are fundamental to understanding and assessing the reasonableness of the supply plan.[27]

The plethora of redactions make stakeholder participation in the process difficult. Moreover, intervenors have historically not had discovery rights in these proceedings.[28] The process lacks formal records of technical conferences, and there are no evidentiary hearings.[29] The Commission has not made public its findings on the supply plans in these proceedings. In short, the current process lacks transparency, representation by affected interests, and accountability. Without these elements, it is unlikely that this process would put the gas sector and the state as a whole on track to meet CLCPA targets.

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4. RECOMMENDATIONS FOR GAS UTILITY PLANNING UPDATES

New York needs to bring its gas interconnection, forecasting, planning, and new investment approval processes into alignment with its long-term climate change targets under the CLCPA. Below we discuss several key elements that need to be addressed in order to meet these targets as they relate to investments in new gas infrastructure. These elements include weighing the obligation to serve against other policy objectives, setting a higher threshold for approving new gas investments, requiring integrated resource planning, modernizing gas load forecasting methodology, developing a comprehensive framework for screening alternatives to gas infrastructure, and reforming gas connection rules. We discuss regulatory treatment and replacement of existing gas infrastructure in Section 6.

4.1. Weigh the obligation to serve in light of socialized costs to customers, health impacts, and policy goals

In New York, the obligation to serve dictates that customers can be asked to pay for new gas service connections only if the connection is over 100 feet long.[30] This obligation can put other customers on the hook for the risk that some portion of the costs of new main and service lines not be recovered.

[27] Testimony of Gregory Lander on behalf of CLF, p. 34.

[28] Id., p. 37.

[29] Id., p. 37.

[30] PSL Section 31.

Conversely, the customer or utility currently has no obligation to evaluate whether gas is the right choice or whether other power sources may be preferable.

Lawmakers should reconsider the obligation to serve in light of gas's high costs to health and the environment, as well as the socialized costs to customers. As electricity is now able to serve almost all of the functions that gas does with lower emissions rates, the social and equity imperative to provide access to gas is simply no longer valid. It is time to divorce the obligation to provide electric service from the obligation to provide gas service, and to consider the cost of new gas service in terms of the other policy goals that it jeopardizes.

It is time to divorce the obligation to provide electric service from the obligation to provide gas service, and to consider the cost of new gas service in terms of the other policy goals that it jeopardizes.

4.2. Set a higher threshold for approving new gas investments

In general, the role of utility regulation is to encourage natural monopolies to act as if they were subject to competition and market forces. When policies or other external circumstances change, businesses in competitive markets can thrive, struggle, change approach, or even go bankrupt or dissolve. It was true of regulated telecommunications monopolies with the changes in policy and technology that ushered in a different paradigm. In competitive markets, imprudent business decisions result in falling market share and/or falling profit, as other firms take advantage.

State action on climate change is such an external change in circumstances, and utility management must make prudent decisions in this evolving context in order to be assured of the chance to earn its allowed return. The need for rapid change in the energy sector, including in the gas utility business, to meet the urgent imperative to reduce GHG emissions has been clear for many years. And now the CLCPA represents a definitive state climate policy mandate and should force a step change in gas utility management. As the Commission stated in the order on Con Edison's Smart Solutions proposal, "Gas utilities will need to maintain safe and reliable service, accommodate economic development, and improve affordability, all while carbon emissions are dramatically reduced, sales of fossil fuels decline over the longer term, and traditional infrastructure solutions become infeasible. These challenges will certainly occupy the Commission for years to come, as decarbonization policies move forward."[31] There is now a higher bar to clear for investment in new assets to be considered "prudent."

This Gas Planning docket is focused on gas utility planning and decisions to invest in new gas system infrastructure. This is but one aspect of utility management, and only one aspect that is clarified by the CLCPA. (Later in this white paper we will address a wider range of utility management issues and decisions that are also implicated and are closely related to utility planning.) When new assets are considered, the "book lives" used to assess the economics of new and existing gas resources should assume that the existing or new gas resources will be retired by a date consistent with meeting state

[31] NY PSC, Order Approving with Modification the Non-Pipeline Solutions Portfolio, February 7, 2019, Case 19-G-0606, p. 35.

GHG targets. The shorter book lives will result in a more accurate representation of the costs of new gas resources and will help mitigate the creation of stranded gas assets.

The state should take steps to raise the standard for conventional gas investments. As discussed below, the state should require all the gas utilities to demonstrate that they have considered non-pipeline alternatives before proposing conventional gas assets. In addition, such proposals should include quantitative analysis of the risks associated with each alternative.

Where utilities do pursue investments in conventional gas assets, they should be required to demonstrate how any proposal for such investment complies with state energy and climate goals. The PSC, with feedback from stakeholders in this proceeding, should provide guidance on conditions or circumstances under which investment in traditional gas assets might be a reasonable approach, for example to serve industrial processes that lack a viable electric alternative to gas. To demonstrate compliance with this requirement, utilities should provide analysis using standardized assumptions vetted by stakeholders in the current proceeding.

If the utility decides to move ahead with investment in new conventional gas infrastructure, this asset should be subject to accelerated depreciation. Depreciation lifetimes should reflect the time period over which an asset is expected to be used and useful given the state's energy and climate goals, rather than its engineering life. We discuss accelerated depreciation in Section 7.

4.3. Require integrated gas and electric planning

Meeting the CLCPA mandates will likely require extensive electrification of heating and transportation end uses. Other market and policy forces are also pushing for electrification of end-uses currently fueled by combustion of fossil fuel. For example, New York City's Local Law 97 (LL97) and the electric utilities' New Efficiency: New York programs call for ramping up heat pumps and other electrified loads.[32] In light of these pressures, it is critical to consider electric and gas consumption, prices, and impacts in an integrated manner.

In the REV proceedings, the state has made leaps forward in electric utility planning. REV initiated the transition from yesterday's grid—a unidirectional electric system serving inelastic demand—to a more modern grid—a dynamic system that increasingly relies on distributed resources and dynamic load management as alternatives to conventional, centralized power supply infrastructure.[33] Through Distributed System Implementation Plans (DSIP), the Commission required electric utilities to jointly identify and develop the tools, processes, and protocols to analyze, plan, and operate a grid capable of dynamically managing distribution resources and supporting retail markets.[34] The DSIP process

[32] NY PSC. 2020. Order Authorizing Utility Energy Efficiency and Building Electrification Portfolios Through 2025.

[33] State of New York Public Service Commission 2016. Order Adopting Distributed System Implementation Plan Guidance. Case 14-M-0101. Issued and Effective April 20, 2016.

[34] Id., p. 3.

considers capacity constraints and the potential for deployment of distributed energy resources to alleviate those constraints. REV has moved the state toward more consistent, statewide electricity planning.

REV has also promoted transparency in electricity planning. In the order adopting DSIP guidance, the Commission explained how transparency is vital for innovation, private investment, and utility planning:

> In the context of the DSIP, improved information means greater transparency and visibility of electric system planning and operations. Greater transparency to market participants, both of system needs and of operational modes that can meet those needs, will encourage innovation and will support efficient private capital investments. Improved visibility is also critical on the utility-facing side of planning and operations to improve efficiency and resilience.[35]

The gas side of energy planning has historically seen less attention to transparency, representation by affected interests, and accountability in the planning process. As noted in the Gas Planning Order, claims of confidentiality impede transparency and participation in the planning process.[36] Increased transparency and inclusiveness in the gas planning process is critical to enable stakeholders to meaningfully participate and to ensure alignment of gas planning with state policy priorities.

The Gas Planning Order holds promise for making vast improvements in the planning process. It seeks to improve gas planning, operational practices, transparency, consideration of alternatives, and alignment with policy. It seeks a criteria-driven, data-based approach to demonstrating need and consistent standards for declaring and implementing moratoria.

While the Gas Planning Order seeks consistency in when and how moratoria are declared, it does not appear to contemplate more consistency in gas planning and methodology statewide. Aspects of gas regulations—for example, on peak forecasts and evaluation of NPAs—provide incomplete guidance to utilities on methodologies for planning, and as a result planning may be inconsistent across utilities. Yet there are many factors that do not vary from gas utility to gas utility. These include alignment with policy goals, as well as methodology and criteria for identifying and responding to locational supply constraints and for handling the uncertainty inherent in load forecasting. All of these call for a more coordinated, integrated framework and a decision-making process common to all of the gas utilities in the state. These integrated planning processes should provide a venue for the analysis of strategic retirement, discussed in Section 6 below.

It is also important that both gas and electric utilities are involved in the gas planning process, given the interrelated issues with gas and electric supply, demand, infrastructure, and emissions. Stakeholders representing a range of sectors should also be involved, including potential interveners in energy

[35] State of New York Public Service Commission 2016. Order Adopting Distributed System Implementation Plan Guidance. Case 14-M-0101. Issued and Effective April 20, 2016, p. 2.

[36] State of New York Public Service Commission. Order Instituting Proceeding, March 19, 2020. Case 20-G-0131, p. 5.

planning and rate case proceedings. Stakeholders could include representatives of consumer advocacy groups, the attorney general, the environmental community, real estate developers, housing and economic development organizations, labor organizations, energy and environment departments, affordable housing groups, low-income advocates, environmental justice organizations, and other interested groups.

New York should consider developing an independent or collaborative planning committee that would vet forecasts, screen for NPAs, and provide transparency to the infrastructure planning process. The information yielded by this group should inform the higher-level activities of the CAC. As an example of such a committee that New York could emulate, Vermont's System Planning Committee is described below.

Vermont System Planning Committee

Just as New York is now wrestling with gas planning issues that had previously not been seen as pressing, the Vermont System Planning Committee (VSPC, https://www.vermontspc.com) was created in the aftermath of the permitting of an electricity transmission line that could likely have been avoided if there had been better planning processes in place. In 2005, the Vermont legislature required VELCO, the state's electric transmission system operator, to regularly develop a long-range transmission plan, and the Vermont Public Service Board (VPSB) opened Docket 7081, an "Investigation into Least-Cost Integrated Resource Planning for Vermont Electric Power Company, Inc.'s Transmission System." The MOU that settled the issues in that docket established the VSPC, which met for the first time in 2007.

The founding purpose of the VSPC was to review VELCO's long-range transmission plan, to undertake studies necessary to be ready to seriously consider alternatives to transmission lines, and to identify opportunities for cost-effective non-transmission alternatives. As the VSPC has shown its value as a venue that convenes critical stakeholders and provides a transparent and rigorous vetting of electric utility planning issues, the VSPC's members and PUC have expanded its purview. In addition to examining potential non-wires alternatives, it now reviews distribution utility forecasts and infrastructure plans and has served as a venue for stakeholders to analyze a new kind of transmission issue for the state: a region with export constraints due to renewable generation.

This flexibility—and the trust that Vermont policymakers and stakeholders place in the group—are a result of the VSPC's structure and spirit of collaboration. The VSPC's success depends on the fact that it has been explicitly charged by the state's regulators to undertake its tasks, and its conclusions are given substantial weight by the regulators. The formal membership of the VSPC includes transmission and distribution utilities, public representatives (residential, commercial/industrial, environmental, and land-use planning), and representatives of entities that can develop supply and demand resource alternatives to utility wires investments. Policymakers attend meetings but are not formal members. By convening the same group quarterly to examine practical issues, members have developed mutual trust and understanding. Non-technical members have developed a working understanding of distribution and transmission planning, while utility representatives get a chance to address stakeholder concerns in an informal setting.

4.4. Modernize gas load forecasting methodology

One of the most critical elements of a gas planning reform is reformulating gas load forecasting to align with climate objectives.

Load forecasts serve multiple purposes. For the purpose of near-term supply planning (making sure there is enough capacity for the next few winters) utilities, regulators, and stakeholders need a different kind of forecast than the forecast used to make a long-term capital investment decision. Different horizons for forecasting should reflect different drivers and reality regarding the policies and programs. A business as usual (BAU) forecast is used for the purpose of near-term supply planning. This forecast includes the impacts of the existing policies and programs and is used to ensure there is enough capacity to meet the expected loads over the next several years and identify any capacity gaps. A long-term load forecast is used for the purpose of meeting the state's long-term policy requirements, such as GHG targets.

In order to help avoid building unnecessary gas infrastructure, the gas utilities in New York now need to develop a more credible gas load forecast based on the best available information, including the impacts of state and local decarbonization policies and market trends. A business-as-usual, historical gas consumption trend is unlikely to continue into the future due to new market trends and policies. A modernized approach to load forecasting would allow the gas utilities to accurately assess capacity constraints and the magnitude of the need for new infrastructure investments or non-pipeline alternatives. It would also ensure that gas utilities' forecasts and planning are subjected to additional scrutiny from more angles, which may not have been adequate in the past given how closed the process has been.

In order to help avoid building unnecessary gas infrastructure, the gas utilities in New York now need to develop a more credible gas load forecast based on the best available information, including the impacts of state and local decarbonization policies and market trends.

Utilities often develop their gas load forecasts for peak day and annual gas use based on econometric models which rely on long-term historical trends. This approach works fine as long as the long-term historical trends continue into the future. However, as mentioned above, the changes in markets that we are seeing now or are expecting to see are clearly different from past trends. This means that the conventional gas load forecasts need to be modified to capture these changes. Further, the state has aggressive economy-wide GHG reduction targets for 2030 and 2050, but the gas utilities are not yet prepared to meet those targets. The gas utilities need to develop long-term gas forecasts in order to find ways to meet the targets. Long-term load forecasts leading to the long-term targets will allow the gas companies to find policy and program gaps that they need to address for meeting the emission targets.

Gas load forecasting modernization requires several key updates to the utilities' gas load forecasting methodology, including:

- Use the most up-to-date assumptions on market trends for new gas connections and fuel switching

- Fully incorporate the expected impacts from existing state and local policies, especially on building electrification
- Look out far enough and in sufficient temporal and geographic detail that there is time for developing and implementing NPAs
- Develop long-term gas load forecasts that are compatible with long-term state and local climate mandates

The following subsections present in detail how the gas utilities can incorporate these updates into their load forecasts.

Use the most up-to-date assumptions on market trends and policy implementation for new gas connections and fuel switching

A business-as-usual, historical gas consumption trend is unlikely to continue into the future due to new market trends and policies. Over the past decade or more, many consumers converted to gas heating equipment from oil heating equipment because of low gas commodity prices (resulting from hydraulic fracturing—or "fracking"—and horizontal drilling) and also because gas was viewed as a cleaner fuel. This has the effect of driving up gas consumption. Now however, there are market trends pushing consumption in the other direction: efficient electric heat pumps that can reliably work in cold climates were introduced in the U.S. market several years ago and now have become a popular choice among consumers.

Econometric forecasts usually require at least a decade of past data to create a forecast. However, markets for heating fuels and technologies have changed within the last decade and will continue to change. Accounting for these changing trends in the econometric modeling will require innovation. Recent data are more representative of the future state of markets and consumer behavior than older data. Thus, utilities should put more weight on the recent data in predicting a business-as-usual trend.

For example, gas utilities often use a regression model to predict future customer counts based on a historical trend. In the future, gas utilities could use the recent conversion rates or the recent changes in customer conversion rates (from delivered fuels—mainly oil—to gas) as the basis for customer-count growth rates. Alternatively, utilities could attempt to explicitly model the changing trend and drivers (e.g., by modeling the increased customer interest in heat pumps driven by greater availability and cost-competitiveness, modulated by the relative prices of gas and electricity).

Fully incorporate the expected impacts from existing state and local policies, especially on building electrification

New policy trends have emerged in New York where the state and local governments have implemented new policies to reduce building-related GHG emissions. Such policies either set targets that specifically promote building electrification or set GHG emission targets that are strict enough to make electrification the most viable option.

For example, the NY PSC issued an order on January 16, 2020, under the New Efficiency: New York (NENY) framework set by the state, that established energy efficiency and electrification and heat pump targets for investor-owned utilities for 2020 through 2025.[37] The state's gas utilities need to fully incorporate the expected impacts from these mandates in their load forecasts.

While it is straightforward to estimate the impact from gas energy efficiency programs, it is more challenging to assess the impacts of the electric utilities' electrification programs in the gas service territories. One reasonable approach is to assess the overlaps of the electric utility programs in gas territories, based on geography, population, and/or commercial floor space. The gas utilities also need to consider whether and to what extent heat pump installations convert gas or fuel oil (or other fuels). All heat pumps that displace gas will impact gas use. On the other hand, if heat pumps displace fuel oil, utilities need to consider (a) the current saturation of oil heating customers in a given area and (b) the extent to which the oil heating customers would have had access to and considered switching to gas without the heat pump program.[38] Gas infrastructure investments are usually driven by peak winter days, so it is critical to capture whether heat pump installations will supplement gas systems that remain in place and are likely to be used, at least to some extent, on the coldest days, or if gas heating will be removed.

As another example, New York City's LL97 requires buildings larger than 25,000 square feet to meet certain carbon dioxide (CO_2) emissions limits based on building type. This regulation is relevant for Con Edison (electric, steam, and gas) and National Grid (gas) as they serve customers in New York City. The compliance period of LL97 begins in 2024, and even stricter guidelines are set for 2030. While energy efficiency measures will be vital to meet these targets and may be sufficient for the first phase of the regulation, switching to heat pump systems is likely to be a crucial and cost-effective strategy for many buildings to meet the increasingly strict 2030, 2035, and beyond thresholds. (Due to CLCPA mandates that 70 percent of electric sector generation be renewable by 2030, low grid emission rates will make electrification an even lower-carbon option in the future.) In order to estimate the expected impacts on gas use from LL97, utilities should first assess how many buildings (and how much floor area) would not meet the 2030 standards and how much emission reduction would be needed from such buildings to meet the standards, based on the current emission profiles of each building subject to LL97.[39] Secondly, utilities should determine which of the buildings would likely need to electrify their heating systems based on the estimated emission reductions required for meeting LL97.

[37] NY PSC. 2020. Order Authorizing Utility Energy Efficiency and Building Electrification Portfolios Through 2025.

[38] An example of this analysis is found in Takahashi et al. 2020. *Assessment of National Grid's Long-Term Capacity Report*, page 27 to 29. Available at https://www.synapse-energy.com/project/assessment-national-grids-long-term-capacity-report.

[39] 2018 Energy and Water Data Disclosure, available at https://www1.nyc.gov/html/gbee/downloads/excel/nyc_benchmarking_disclosure_2017_consumption_data.xlsx.

As the state and other municipalities adopt further policies and programs that change customer behavior with respect to fuel choice and gas consumption, utilities must continue to adjust forecasts to account for their impacts.

Use a study horizon and provide sufficient temporal and geographic detail to allow NPAs to be developed and implemented

Nearly any growth-related gas pipeline investment could in theory be avoided with fuel switching, because cold climate heat pumps are now available for consumers and can technically replace all of fossil gas consumption for space and water heating for most buildings. However, it could take some time for the cumulative impacts of electrification as an NPA to be large enough to match the total amount of the expected capacity need.

Thus, it is critical for gas utilities to develop long-term gas load forecasts and identify where load might be projected to grow and when capacity thresholds of existing infrastructure might be reached. We recommend that the gas utilities develop at least a 20-year demand forecast, but ideally through 2050, and couple that forecast with the known limits of the existing gas system.[40]

Load forecasts need to be location-specific so that they can match to the location for any expected capacity gaps and needs. National Grid recently developed a load forecast specific to its Downstate New York territory consisting of its service territories in Brooklyn (KEDNY) and Long Island (KEDLI), where it presented and analyzed its expected gas supply gap for serving this area in the long term.[41] Gas utilities should develop forecasts focused on more specific locations than this when capacity constraints are a result not of the supply capacity, but of the gas distribution infrastructure. Such location-specific forecasts will allow the gas utilities to identify NPAs that can target specific locations to relieve constraints at the distribution level.

Examine the gap between long-term gas load forecasts that are compatible with climate mandates and current load trajectories

Prudent utility planning requires (a) developing a long-term gas demand forecast that reflects the full impacts of the new policies and market trends and (b) developing a long-term forecast that is consistent with recent trends (which may or may not be consistent with the future gas consumption necessary to meet state and local GHG reduction mandates). The difference between these forecasts can inform policymakers regarding the gap yet to be filled with policy or market actions. While state and local mandates do not yet specifically require the gas utilities to take further actions to reduce gas use and GHG emissions from their customer base to the level compatible with the long-term state and local GHG

[40] At least one utility in the state currently uses a 20-year period for its gas plan. See, Con Edison 2019. Gas Long-range Plan: 2019-2038. Available at https://www.coned.com/-/media/files/coned/documents/our-energy-future/our-energy-projects/gas-long-range-plan.pdf.

[41] National Grid, February 2020, *Natural Gas Long-Term Capacity Report;* and National Grid, May 2020, *Natural Gas Long-Term Capacity Supplemental Report*. Available at https://ngridlongtermsolutions.com.

targets, it is reasonable to assume that the gas utilities need to take their equal share to meet the long-term GHG reduction targets (i.e., 40 percent by 2030 and 85 percent by 2050 under CLCPA). Thus, it is a prudent business practice to develop such a forecast so that the gas utilities can understand the magnitude of the changes that are expected to meet the long-term targets. More importantly, this practice will enable the gas utilities to prepare to develop and implement further actions (in the market, and in their own business models) in case the state and local governments implement new regulations that require the gas utilities to further reduce gas use and the associated GHG emissions.

4.5. Develop a comprehensive NPA screening framework

While gas infrastructure is in service, customers count on it to operate reliably. When reliability concerns arise, such as due to local demand growth, a traditional response is to build new infrastructure. However, avoiding making these investments where possible will reduce the risk of stranded costs and could reduce total customer costs. The underlying reliability concern that would have driven the need for the investment must nonetheless be cost-effectively addressed.

Energy efficiency, demand response, and heating electrification (e.g., using heat pumps instead of gas furnaces, boilers, or water heaters) are generally clean energy resources[42] that can work as effective NPAs to help meet gas supply and infrastructure capacity needs.[43] Building envelope improvements and heating electrification also save energy and emissions throughout the year. However, NPA analysis and design should have a higher threshold for supporting long-lived investments in gas-consuming equipment, even if the investment increases gas efficiency. For example, upgrading from a traditional gas heating system to an efficient gas furnace may reduce gas, but at the same time it prolongs reliance on gas and may represent the only opportunity to replace this equipment between now and 2050. Thus, the NPA screening process should carefully evaluate whether gas efficiency NPA measures are the only viable measure or whether other clean NPA measures that do not rely on gas equipment are available to defer gas infrastructure investments.

Other NPA measures include local biogas and local gas storage such as compressed gas. However, any new small-scale fossil gas system that could defer large gas investments should be viewed as a temporary solution as it is not compatible with CLCPA. Any biogas measure should be carefully assessed for its emission impacts as it is not correct to simply assume that biogas is emission-free on a lifecycle basis. For example, if agricultural methane emissions would be mitigated by other policies (such as requiring flaring), processing biogas to pipeline quality and using it in buildings may not reduce

[42] Some traditional gas demand response measure such as using a back-up oil boiler can result in an increase in air emissions. However, other types of demand response that shift loads, such as a storage water heater or a pre-heating a building, are clean demand response options.

[43] Con Edison proposed a portfolio of NPAs on September 28, 2018 which included targeted gas energy efficiency programs for low-income customers and government buildings and residential geothermal heat pumps and air-source heat pumps for multifamily buildings. This application was approved by the Commission's February 7, 2019 order in Case 17-G-0606.

emissions.[44] Further, processes that consider these alternative gases should explicitly and transparently account for their indoor air quality impacts (similar to fossil gas) and the potential for methane leaks.[45]

The Gas Planning Order calls for transparent and comprehensive gas utility planning that incorporates "a full range of practical alternatives so that it can serve to minimize total lifetime costs, while ensuring reliable solutions for consumers, and also while advancing state policies."[46] This order also calls for NPAs to be "integrated into gas utilities' planning processes, both in the context of specific avoidable projects in a particular area of distribution system, and system-wide to reduce overall demand and the need for infrastructure investment."[47] Further, the Gas Planning Order requires the use of the following criteria in this NPA integration process: "reliability, practicality, environmental impact, avoided need for infrastructure investments, cost allocations over the appropriate time frame, emissions, and local community impacts."[48]

The Gas Planning Order set these high-level directions but did not provide details on how exactly NPA measures should be incorporated into the gas planning process. To meet this need, this section provides a broad NPA screening framework that the gas utilities can adopt so that they can appropriately engage in an NPA screening and integration process.

This NPA framework includes the following:

- Include all available NPA measures and evaluate their cost-effectiveness at the portfolio level;
- Evaluate cost-effectiveness from the societal perspective;
- Account for lifetime impacts from NPA and demand-side measures over their measure lives;
- Consider including option value—value of flexibility; and
- Annually update the assessment of the capacity shortfalls and evaluate the status and performance of each NPA.

Gas utilities can approach the evaluation of NPA measures in two different ways. The first approach is the approach National Grid used in its recent Long-Term Capacity Report where it estimated net costs of multiple options to address the expected capacity shortfalls—including NPA, hybrid, and large infrastructure build-out options—relative to a base case (or "no action" case).[49] This approach, when conducted well, estimates net costs of the proposed options by incorporating the expected benefits

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[44] Grubert, Emily. 2020. "At scale, renewable natural gas systems could be climate intensive: The influence of methane feedstock and leakage rates." *Environ. Res. Lett.* in press. DOI 1748-9326. https://doi.org/10.1088/1748-9326/ab9335.

[45] Borgeson, Merrian. 2020. "A Pipe Dream or Climate Solution? The Opportunities and Limits of BioGas and Synthetic Gas to Replace Fossil Gas." https://www.nrdc.org/experts/merrian-borgeson/report-renewable-gas-pipe-dream-or-climate-solution.

[46] NY PSC. 2020. Page 5.

[47] Ibid.

[48] Ibid.

[49] National Grid. 2020. *Long-Term Capacity Report*.

from each option (e.g., avoided costs of gas, emissions, and avoided health impacts) and determines which option is most preferable. There is no avoided cost of any gas infrastructure option in this approach, because the gas infrastructure options are among the options being compared.

The second approach is a more traditional benefit-cost analysis used to evaluate energy efficiency and other distributed energy resources. The PSC's January 21, 2016 Order established the Benefit Cost Analysis Framework (BCA Framework) for evaluating cost-effectiveness of distributed energy resources. In this approach, NPA measures or a portfolio of NPA measures are evaluated for their cost-effectiveness (typically based on benefit-cost ratios and net benefits) against a single gas infrastructure build-out option. As required in the BCA Framework, this approach should include all benefits and costs associated with NPA measures, including the avoided costs of the gas commodity and the gas infrastructure option. In addition, NPAs should be credited with avoided emissions, avoided gas leaks, and avoided negative health impacts as benefits. The process to develop a solution to one reliability concern could use both approaches—for example by using the all-option approach to narrow the evaluation down to two options (one the traditional infrastructure solution, one the NPA), then using the BCA Framework to compare the options in detail. The BCA approach may be better suited to ongoing tracking and adjusting once an NPA is being implemented because it stays focused on the performance of the set of NPA measures relative to the base case.

Regardless of the approach taken, the above-mentioned principles for the NPA framework need to be incorporated in gas utilities' NPA evaluation process.

Include all available NPA measures and evaluate their cost-effectiveness at the portfolio level

NPA portfolios make sense when they provide net benefits relative to the pipeline or other infrastructure investment.

Given the time-sensitive and geographically limited nature of NPAs, generic program designs may not be sufficient, and programmatic innovation may be required to build cost-effective portfolios. Some measures may not be cost-effective on their own, but such measures could still be included if the overall NPA portfolio is cost-effective and those measures are essential to meet the NPA goals. Under the BCA Framework, the cost-effectiveness analysis of distributed energy resources should "assess portfolios rather than individual measures or investments (allowing for consideration of potential synergies and economies among measures).[50] Ultimately, an NPA portfolio that is less expensive than a proposed gas infrastructure investment saves customers money and helps meet the state and local clean energy targets. That said, investments in long-lived gas-consuming equipment should be

Investments in long-lived gas-consuming equipment should be required to pass a higher threshold, even if the investment increases gas efficiency, to avoid prolonging reliance on gas.

[50] NY PSC. 2016. Order Establishing the Benefit Cost Analysis Framework. CASE 14-M-0101. January 21, 2016, page 2.

required to pass a higher threshold, even if the investment increases gas efficiency, to avoid prolonging reliance on gas.

Evaluate cost-effectiveness from the societal perspective

The BCA Framework set the societal cost test (SCT) as the primary test for assessing the cost-effectiveness of distributed energy resources. As a primary reason for this decision, the PSC states that "New York's clean energy goals are set in recognition of the effects of pollutants and climate change on society as a whole, and only the SCT would both properly reflect those policies and create a framework for meeting those goals."[51]

Based on this perspective, the utilities in New York must include costs and benefits for society when evaluating cost-effectiveness of NPA measures. NPA costs under the societal perspective typically include the full incremental costs of NPA measures (net costs beyond the cost of standard equipment) and the cost of implementing and administering the NPA program. Key benefits from the societal perspective include avoided costs of carbon and GHG emissions, including from methane leaks from gas systems, and health damage costs. We discuss each of these benefits below.

Avoided costs of carbon. The BCA Framework requires the utilities to use the social cost of carbon developed by U.S. Environmental Protection Agency. This framework supports the aggressive CLCPA goals by appropriately valuing resources for their expected or estimated reductions in GHG.

The methodology for assessing cost-effectiveness of NPA measures should be consistent with the BCA Framework and use the same avoided cost of carbon. Both Con Edison and National Grid appropriately include the cost of carbon in their benefit-cost analysis handbooks (BCA Handbook).[52] When Con Edison filed an application for approval of its non-pipeline solutions portfolio in 2019, it included the benefit of avoided carbon values using a $50 per ton carbon value according to its BCA Handbook.[53] However, when National Grid recently evaluated demand-side investments as NPAs along with various gas infrastructure options, it initially failed to consider and quantify this benefit from the NPAs.[54] In its

[51] NY PSC. 2016.

[52] Con Edison. 2018a. *Interim Benefit Cost Analysis Handbook for Non-Pipeline Solutions*. Case 17-G-0606. September 28, 2018. http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A7C3D0CD-E2B3-4B42-807C-82B553AE63F9}. National Grid. 2018. National Grid *Version 2.0 Benefit-Cost Analysis Handbook*, Case 14-M-0101, Case 16-M-0411.July 31, 2018, http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B95DCC733-8863-4A52-9DE5-CF5238F40BC3%7D.

[53] Con Edison. 2018a; Con Edison. 2018b. *Request for Approval of Non-Pipeline Solutions Portfolio in The Smart Solutions for Natural Gas Customers Program*. Case 17-G-0606. September 28, 2018, available at, http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=17-G-0606&submit=SearchCon.

[54] National Grid. February 2020.

Supplemental Report, National Grid calculated the avoided societal carbon cost, although it provided the results as a supplemental (rather than core) result.[55]

Avoided cost of methane emissions. Numerous studies have revealed that the gas production and delivery process results in substantial methane leakage. Methane has a much higher global warming potential than CO_2, so even small leak rate assumptions can be substantial in the overall GHG balance between options. A 2018 study published in the journal *Science* found that the current emission leak rate from the U.S. oil and gas system is 2.3 percent, or 60 percent higher than the current leak rate of 1.4 percent used by U.S. EPA.[56] A more recent study published in April 2020 evaluated methane leaks from the Permian Basin located in New Mexico and Texas and found that 3.7 percent of gas produced in this basin is leaked into the atmosphere.[57]

Because methane leaks occur throughout the gas production and delivery process, from the extraction to the burner tips, gas use reductions through gas energy efficiency measures and other NPAs could help reduce methane leaks. Thus, a cost-effectiveness analysis of NPA measures should account for the benefits of reducing methane leaks. Utilities and the PSC should develop and use a standardized approach to methane leak rates (such as a common value for avoiding upstream emissions paired with utility-specific values for avoided distribution system leaks). This approach should be based on the latest scientific evidence and monetize the avoided methane value based on the cost of methane emission established by the Interagency Working Group (IWG) on Social Cost of Greenhouse Gases and the U.S. EPA under the Obama administration.[58] As a reference, the cost of methane is estimated to be $1,200 per ton ($2007) for 2020 at a 3 percent discount rate, according to the IWG.

Avoided cost of health damage. Gas appliances emit pollutants, in particular nitrogen dioxide (NO_2), when gas is burned in buildings. Numerous studies found links between indoor NO_2, such as NO_2 emitted from indoor gas appliances, and serious health problems such as increased respiratory symptoms, asthma attacks, and hospital admissions in people with asthma.[59] The Gas Planning Order requires the gas utilities to account for environmental and local community impacts in the NPA evaluation. (Thus, the avoidance of the potential health damages should be accounted for as a critical

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[55] National Grid. May 2020.

[56] Alvarez et al. 2018. "Assessment of methane emissions from the U.S. oil and gas supply chain," *Science.* 13 Jul 2018. Vol. 361, Issue 6398, pp. 186-188 https://science.sciencemag.org/content/361/6398/186.

[57] Storrow, Benjamin. 2020. "Methane Leaks Erase Some of the Climate Benefits of Natural Gas" E&E News on May 5, 2020. Available at https://www.scientificamerican.com/article/methane-leaks-erase-some-of-the-climate-benefits-of-natural-gas/.

[58] A website of the U.S. EPA. under Obama Administration, "Social Costs of Carbon" https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon_.html; Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. 2016. Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866. Table 1. Available at https://19january2017snapshot.epa.gov/sites/production/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf.

[59] Seals, Brady, and Andee Krasner. 2020. *Health Effects from Gas Stove Pollution*, Rocky Mountain Institute, Physicians for Social Responsibility, Mothers Out Front, and Sierra Club. https://rmi.org/insight/gasstoves-pollution-health.

benefit of clean NPA measures.) Utilities and the PSC should establish methodologies to quantify and monetize avoided costs of health damage from gas use reductions with help from key stakeholders in the state.

Account for lifetime impacts from NPA measures over their measure lives

The BCA Framework requires that a cost-effectiveness analysis "address the full lifetime of the investment."[60] NPA measures such as building energy efficiency, electrification, and demand response generally provide energy and peak load demand savings benefits for many years over the course of their measure lives, while the program costs and incentives for such measures are often paid upfront. Analyses of NPA measures or demand-side measures sometimes erroneously or inadvertently truncate their analysis period in a future year even though some of the measures assumed to be implemented would still operate and save more energy beyond the future year. A careful and comprehensive NPA analysis avoids such an oversight and fully accounts for the benefits and costs of NPAs over the life of the measures.

Consider including option value—value of flexibility

An option value is generated when postponing a decision on something large and expensive by implementing a small-scale and less expensive measure buys time to gain more certainty into the future and help make a better decision. An NPA can provide such option value. More specifically, cost-effective NPA measures that are individually or in combination large enough to meet near-term capacity shortfalls could allow decisions on building costly large gas infrastructure to be deferred. This would allow the state and utilities to examine how the actual gas loads develop and how long-term load forecasts change. This would then allow the state and utilities to make a better decision on infrastructure investments.

For example, a new, revised load forecast may turn out to be significantly lower than previously estimated and the need to build expensive gas infrastructure may shrink or disappear. This situation may allow the utility to cancel the construction plan entirely and save a substantial amount of customer money. However, if instead a utility built large-scale infrastructure at the beginning without examining NPA measures and later found out the infrastructure is not needed (because the expected load increase did not show up), the facility cannot be unbuilt. This would lead to a stranded asset.

NPA measures could help avoid this situation by buying time to see more accurate information on capacity shortfalls. Thus, it is important to incorporate the value of optionality when evaluating the benefits of NPA measures. Because there has not been an industry standard on the quantification of option value for NPA measures, we recommend the PSC, stakeholders, and gas utilities together investigate and develop a standardized methodology to quantify and monetize the option value to be

[60] NY PSC. 2016, page 2.

attributed to NPA portfolios. Utilities in the region have historically used option value when analyzing resource planning decisions and parties could develop a similar approach for NPAs.[61]

Annually update the assessment of the capacity shortfalls and evaluate the status and performance of NPA measures

Load forecasts change every year as new data on gas usage and other key economic and demographic factors become available. Thus, it is important to update load forecasts every year and reevaluate capacity shortfalls. This will enable gas utilities to reassess the magnitude of the capacity need for NPA measures each year. Further, as utilities implement NPA measures, new data about the performance of NPA measures become available. For example, certain NPA measures (or a combined portfolio) may perform better or worse than expected, or new NPA measures may become available. A periodic evaluation of load forecasts and the performance of NPA measures will allow the utilities to adjust their current NPA implementation plan and implement a new NPA procurement plan that reflects the latest information on the capacity shortfalls and existing and potential NPA measures.

5. RECOMMENDATIONS ON GAS CONNECTION RULES

New gas services should be subject to similar rigorous review and analysis as other kinds of new gas infrastructure. Typically, customers seek connection to the gas system for newly constructed or gut renovated buildings, or to switch from other fuels such as oil or propane. In all of these cases, while the buildings already have or will have connections to the electric system, gas services are additional and optional. Today, electric heating and appliances—and all-electric homes—are very accessible and highly cost-effective. They draw on an electric grid that is increasingly powered by renewable energy and offer a cleaner indoor environment because they do not combust fuel.

In New York, state law dictates that customers can be asked to pay for new gas services only if the connection is over 100 feet long.[62] For lines that are 100 feet or less, the costs are socialized—i.e., are paid for by utility customers collectively. If customers requesting services buy gas in sufficient quantities and over a long enough period of time, the utility can recover these costs through their bills. Given the timeframe of the CLCPA and the need to decarbonize the building stock, it is likely that many of the socialized costs incurred today will not be recovered from customers before the end of the systems' useful lives, and for some classes of customers it is not clear that the costs are ever fully recovered.

[61] Lowell, Jonathan B., 1994. "Applying Financial Option Theory to Utility Resource Planning." *Proceedings of the ACEEE Summer Study.* New England Electric. Available at https://www.aceee.org/files/proceedings/1994/data/papers/SS94_Panel7_Paper12.pdf.

[62] PSL Section 31.

The 100-foot rule effectively shifts gas costs and risks away from new customers and onto existing customers. This works against state clean energy goals, creates a barrier to electrification, and misaligns costs and benefits to customers, utilities, and society.

State lawmakers and regulators should consider several reforms to gas interconnection laws and regulations, including:

- Requiring standard definitions of and consistent reporting on drivers of interconnections across all utilities statewide;
- Disclosing the costs of gas connections to new customers;
- Minimizing socialized costs of new gas connections; and
- Reconsidering obligation to serve in light of socialized costs to customers, health impacts, and policy goals.

Require statewide, standard definitions and consistent reporting on interconnections

Gas connections costs are not transparent. Further, methodologies for calculating them are not consistent across the different utilities.[63] The incomplete and inconsistent data result in widely varying estimates of the cost of the 100-foot rule. New York Geothermal Energy Organization (NY-GEO) found that reported costs range from a low of $3,500 per customer in Niagara Mohawk's service area, to an order of magnitude higher cost of $37,000 in Orange & Rockland's territory.[64]

The lack of such information makes it difficult for policymakers to weigh and balance the state's competing goals (e.g., reduction in GHG emissions and environmental hazards, improved energy affordability, and accessibility). The state should require standard definitions of, and consistent reporting on, interconnections across all utilities statewide. Such data collection would allow reconsideration of how the many line extensions are socialized and at what cost.

Remove incentives to gas connections by minimizing socialized costs of new connections

As noted above, the statute governing new connections, the 100-foot rule (PSL Section 31.4, part 230 of 16 NYCRR), distorts incentives to customers. Reform of this rule is critical if the state is to achieve the CLCPA targets. Recommendations for revising this rule include:

- Remove or reduce the allowance of "free" line extension costs to new customers;
- Consider shifting the risk of under-collection of line costs from the customers as a whole to the new customer; and

[63] New York GEO 2020. NY-GEO Request of the Commission in Proceeding 20-G-0131.

[64] New York GEO 2020. NY-GEO Request of the Commission in Proceeding 20-G-0131.

- Weigh the obligation to serve in light of socialized costs to customers, health impacts, environmental impacts, and policy goals.

Remove or reduce the allowance of "free" line extension costs to new customers. This would require the customer who wants to extend the gas system to pay some/a greater share or the entire cost. If policymakers wish to keep some portion of the line extension free to new customers, the decision about how much to support should be informed by an analysis of societal costs and benefits, and the costs and benefits of available alternatives, over a timeline consistent with the phase-out of gas as required by the CPCLA targets.[65] This analysis should incorporate a social cost of net lifetime GHG emissions, including both combustion CO_2 and methane leakage (upstream and on-site).

When assessing how much of the extension costs to socialize, depreciation times should be consistent with state GHG mitigation targets. Moreover, the assumed expected lifetime consumption should be reduced to reflect the potential for early retirement or less use than historically expected. Both of these will also reduce the risk of stranded costs down the road.

Consider shifting the risk of under-collection of the line costs from customers as a whole to the new customer. The utility could require these customers to pay the entire cost of the extension up front and credit the customer bill over time for any socialized portion of costs. Doing so reduces risk to both the utility and to existing customers that the new customer exits gas service before the line costs are recovered in rates.

Weigh the obligation to serve in light of socialized costs to customers, health impacts, and policy goals. One implication of the obligation to serve—as codified in the 100-foot rule—is that new customers can burden other customers with the risk that some portion of the costs of new main and service lines will not be recovered. Conversely, the customer or utility currently has no obligation to evaluate whether gas is the right choice or whether other power sources may be preferable. Lawmakers should reconsider the obligation to serve in light of socialized costs to customers, health impacts, and policy goals.

6. RECOMMENDATIONS FOR UPDATING GAS UTILITY REGULATIONS FOR EXISTING ASSETS

While New York's current proceeding on gas planning is focused on planning for new investments, as discussed above, building a path forward for the state's gas utilities and service in the context of the

[65] The assumption for useful life is important in this analysis. If the pipe lifetime included in the calculation of "economic" line extensions is longer or the usage is lower than the actual lifetime or usage, then some portion of the costs has been mis-assigned, and there is a risk of stranded costs.

CLCPA also requires addressing the utilities' existing assets (that is, the results of past investments). We believe that the New York PSC and stakeholders should engage with these existing asset issues as necessary context and next steps for resolving the immediate questions of planning for new gas assets that the PSC has raised in this proceeding.

Gas utilities' existing assets are at risk of becoming stranded, which would create hardship for the gas companies' investors and, potentially, for their customers. To the extent that assets that are not fully depreciated cease to be used and useful, the question will arise of whether and how to allow investors to recover their investment (or a portion thereof). Before New York allows the situation to get to that point, however, it is reasonable to allow a prudently managed utility the opportunity and time to change its approach to asset retirement and depreciation.

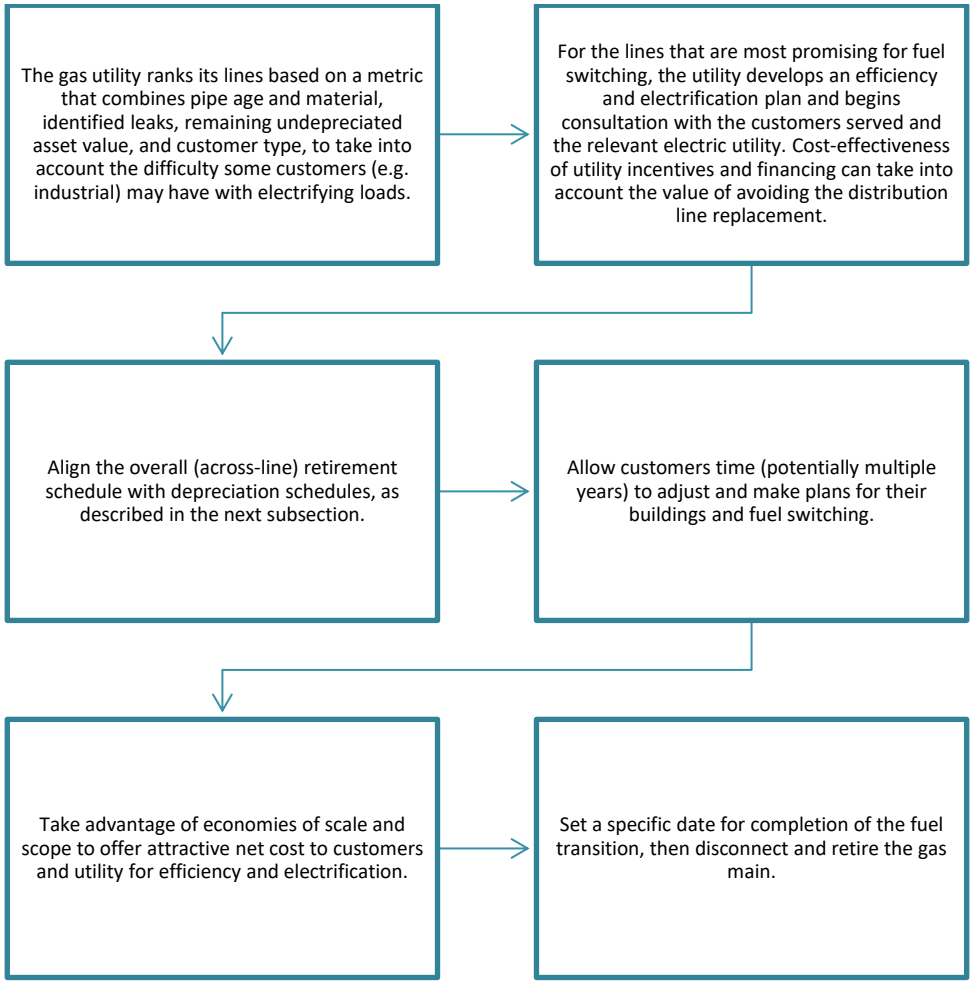
Shareholders and bondholders should have a reasonable opportunity to recover their investments, provided that their utility acts prudently and responsibly in managing the new policy context. This section identifies challenges which New York should begin to address and describes potential approaches to resolving them.

6.1. Strategic asset retirement

In a CLCPA-compliant future with declining fossil gas consumption, gas companies (and possibly their customers) will increasingly face challenges associated with balancing the need to replace aging, leaky infrastructure with the need to maintain rates that are low enough to avoid mass, unmanaged defection away from gas service—likely stranding vulnerable customers with unaffordable rates. As discussed in Section 2, classic utility approaches to addressing these challenges individually are no longer viable because they would increase sales, emissions, and revenue requirements. An alternate approach would entail strategic and planned retirement of portions of the gas distribution system. In this approach, rather than losing sales gradually on average across the service territory—and thus needing to maintain the network to serve each street—the utility would take a geotargeted approach to electrification and switch customers served by a particular distribution line, then retire that line. This approach should be particularly favorable where the gas lines in question are aging, leaking, or otherwise due to be replaced. This reduces net emissions, minimizes the asset value to be recovered through special means (see the next subsection), addresses actual leaks or the risk of leaks (reducing methane emissions and increasing safety), and opens opportunities for new business models including those built around new kinds of shared heating infrastructure (see Section 7).

Clustering electrification should also allow the electric utility to better match and pace any necessary investments in the electric system to serve new loads in the area. Rather than investing to raise the distribution capacity on an ad hoc basis driven by scattered electrification (which risks needing to rebuild as further electrification occurs) the utility could adjust the distribution network for a known new long-term load in a given area, then move to the next.

Here is an example of how this process could work:



This process could draw inspiration from that used in abandonment proceedings when a utility makes an economic case for retiring a portion of its system.[66] There are many unresolved questions about this approach, and utilities, stakeholders, and the PSC should prepare to wrestle with them. A few critical questions include:

- What is the appropriate metric to rank lines for potential retirement?
- How does planned pipe retirement relate to the utilities' obligation to serve?
- Does the obligation to serve require service in the fuel (e.g. gas) and via the mechanisms (e.g. pipeline) of the customer's choice? Or could it be generalized to oblige a utility to enable services (such as space heat and hot water)?

[66] See, for example, Pennsylvania PUC Docket A-2011-2239521, in which NRG Energy Center Harrisburg proposed to abandon steam service to specific portions of its service territory, and the NRG Energy Center Harrisburg "Transition Service" tariff (pages 20a-20b), available at https://www.nrg.com/assets/documents/legal/overview/energy-center-rules-and-regulations/12112017-nrgh-complete-current-tariff.pdf.

- What is a fair contribution to expect from customers who are forced to switch fuels and receive new heating equipment, appliances, etc.?
- Can the gas or electric utility balance sheet be effectively used to finance the investments in each building?
- How is this process different if the customer's gas and electric utility are the same vs. different companies?
- Is it reasonable to leave unused gas mains and service lines in situ indefinitely, and save the cost of removal?

There are surely other approaches to the asset-retirement challenge, each with advantages and disadvantages. We look forward to proposals and additional discussion from utilities and other stakeholders.

7. RECOMMENDATIONS ON COST RECOVERY

Even the best planned strategic retirement plan would not be able to retire a gas utility's plant in service without leaving some stranded assets.[67] While assets may not officially become stranded (e.g., no longer used and useful) for many years, the Commission should provide regulatory guidance on how stranded assets will be treated as soon as possible, i.e., in this docket.[68] This will allow utilities to take steps immediately to address this long-term issue. Clear and early guidance from the Commission is important for three reasons:

- Better decisions regarding existing and new gas investments. Utilities will be able to make the most economic gas investment decisions as soon as possible once they are given the appropriate regulatory guidance on how stranded costs will be treated.

- Smaller and smoother rate impacts.[69] Smaller rate impacts are particularly important for managing the impact of competition between electric and gas heating, and for avoiding runaway fuel switching that leaves stranded costs with no or few customers to pay them.

[67] For example, areas which have already been replaced with plastic piping will generally not be ready for strategic retirement before 2050.

[68] The 2019 Environmental Defense Fund publication *Managing the Transition: Proactive Solutions for Stranded Gas Asset Risk in California* (https://www.edf.org/sites/default/files/documents/Managing_the_Transition_new.pdf) addresses similar issues to this section, in the California context.

[69] "Any delay in commencing accelerated recovery of depreciation expense would only mean that the same dollars would have to be collected over a shorter period with a greater impact on rates. Accordingly, it would be prudent to start recovery as soon as possible." – Testimony of Firouzeh Sarhangi, February 27, 2020, 20-G-0101, pages FS-7 and FS-8.

- Improved distributional equity. There is a high risk that customers least able to switch away from the gas system will be the customers left to pay for the stranded system. Fairness for low-income households and renters demands a solution that equitably distributes the cost of the gas system over all of its users, which means a system that distributes that cost over the appropriate period of time.

- Better inter-temporal equity. Early actions from the utility will allow for costs to start being borne in the short term to reflect the fact that today's policies and decisions are driving the costs.

The most straightforward approach to mitigating stranded cost risk is to accelerate depreciation of the assets that are likely to become stranded. Depreciation lifetimes should reflect the time period over which an asset is expected to be used and useful, rather than its engineering life. Accelerating depreciation lowers the dollar value of total shareholder returns on their investments (because their funds are not earning a return for as long). However, the investors also get the return of their capital faster, which allows them to invest those funds on other investments and earn an appropriate return. In this way, accelerating depreciation is fair to shareholders, while reducing the stranded asset risk.

New York utilities have begun to make this shift in their practice, as is prudent in light of the CLCPA. In Case 20-G-0101, Corning Natural Gas proposed to depreciate any asset classes with average remaining life that extends 2050 over a 30-year period (2020 to 2050). As Corning Gas Chief Financial Officer Firouzeh Sarhangi testified:

> Over time, this legislation [the CLCPA] will reduce gas use, revenue and access to external capital. It is critical that new mandated capital expenditures be financed with internally generated funds (principally depreciation) and that depreciable lives match the expected economic lives of utility assets. The Company believes that either systematic replacement capital expenditures have to be curtailed or the depreciable lives of assets have to be reduced. It is imperative that depreciable lives are reconciled with the expectations of the CLCPA in this case, rather than delaying such action…
>
> The new law effectively shortens the effective life of the Company's existing and future investment in infrastructure. As a consequence of these impacts of the CLCPA, we are proposing that the service lives of the Company's fixed assets be reduced to 30 years for purposes of calculating depreciation expense.[70]

Notably, Con Edison is conducting a depreciation study now that will consider these issues.

A depreciation schedule is shaped by three features: the remaining lifetime over which the asset is depreciated, the amount to be recovered, and the shape of the depreciation curve. Regarding the lifetime, once a plan is in place for the retirement of each asset, the remaining lifetime can be adjusted to ensure recovery. For new investment assets, addressing stranded asset risk means setting an

[70] Testimony of Firouzeh Sarhangi, February 27, 2020, 20-G-0101, p. FS-5 – FS-6.

appropriate depreciation lifetime when the new resource is assessed for cost-effectiveness, consistent with the results of the planning processes described earlier in this white paper. For existing assets, changing to a new depreciation schedule is possible but must be done carefully.

Typical utility practice recovers not just the initial investment in the asset, but also the end of life disposal or salvage value. (An asset that would serve some purpose for a few years and then have substantial resale value, for example, is depreciated only to the level of its resale value. The investor gets the rest of their investment back when they sell the asset.) Gas utilities may need to adjust the disposal or salvage value of their pipes depending on what the fate of these assets will be. For example, if current depreciation schedules recover some of the cost of digging up pipes to replace them at end of life, but the state decides it is suitable for gas pipes to be abandoned in place, the end of life costs may be reduced. Each utility's depreciation experts should make clear how these costs are currently calculated, and then make appropriate adjustments, subject to regulatory approval.

Utility assets are typically depreciated on a straight-line basis (e.g. for an asset with a 20-year lifetime, 5 percent of the net investment is recovered each year). However, this approach presumes that an asset will be equally used and useful for each year throughout its life. In the context of strategic recovery of the gas system, however, a faster-than-linear depreciation may be fairer. For example, if sales are projected to fall over time as customers switch to other fuels, the depreciation in each year could be proportional to the expected sales in that year.[71] This is fair because the recovery of the asset is divided over its useful service provided. Front-loading recovery to align with the time when customers are still connected could avoid leaving a small number of customers to pay the full depreciation cost late in an asset's lifetime, while creating a more stable rate trajectory.

In addition to or instead of accelerated depreciation recovered through standard rates, other options that New York stakeholders, utilities, and regulators could consider include securitization and the use of exit fees. Securitization is a process in which the utility or regulator would issue a bond and use the proceeds to pay the shareholders for the value of their current investment. Customers would then pay only the cost of the bond (and save money due to its lower cost of capital), while shareholders would receive the return of their funds and be able to make other investments. Securitization theoretically offers additional flexibility because the bond could be paid off by sources of capital other than gas rates (e.g. it could in theory be repaid through electric rates or tax revenues, after what would surely be extensive stakeholder and political process), and over a different period of time than the asset lifetime. Securitization has been used as part of the retirement of coal power plants,[72] where there is a large stranded asset whose finances can be separated from the rest of the utility. This approach is untested

[71] The projected sales trajectory could be established by the NY PSC and should be consistent with the Climate Action Council Scoping Plan.

[72] See, for example, Trabish, H. May 28, 2019. "Securitization fever: Renewables advocates seize Wall Street's innovative way to end coal." *Utility Dive*. https://www.utilitydive.com/news/securitization-fever-renewables-advocates-seize-wall-streets-innovative-w/555089/.

for the slow accumulation of early-retired assets that would accrue over the strategic retirement of the bulk of a gas utility's ratebase.

Another way to recover funds from customers leaving the gas system (and avoid leaving the last customers with the full costs of the system) would be to charge customers an exit fee as they disconnect from the gas system. We do not favor this approach for several reasons: it is gameable (customers could retain a single gas appliance to avoid paying the cost, unless a rising monthly fixed charge drives them to abandon the system); it would work directly counter to the strategic geotargeted retirement approach we described above; and more fundamentally, it would create a substantial financial barrier for customers to take actions consistent with the CLCPA.

8. RECOMMENDATIONS FOR BUSINESS MODEL TRANSITION FOR GAS UTILITIES

8.1. New business models

Utilities are structured to make long-term capital investments in natural-monopoly contexts. The natural monopoly for gas delivery, which gave gas companies a corner on the space heating market, is eroded both by the increasing cost-competitiveness of electric heat pump options and policies that remove the long-term certainty as part of addressing climate change. The utilities, as businesses, may have advantages that allow them to either shift into new regulated services or compete well in unregulated spheres. For example, New York's gas utilities are already exploring providing shared ground-source heat pump infrastructure.[73] Decarbonized district heat presents another related option. Although its steam-based system could be challenging to decarbonize, Con Edison is already a district heat utility and it may be able to transition in this direction more easily than other gas companies. Shared infrastructure to provide heating service presents a potential for natural monopolies if it can result in significant cost reductions to customers due to economies of scale (albeit in the form of islands of service, rather than contiguous service territories). As such, these systems would require some form of regulatory oversight. Incumbent gas utilities and the Commission should recognize that there may be competitors to own and operate such systems, however.

[73] New York State Energy Research and Development Authority (NYSERDA). October 19, 2017. "National Grid and NYSERDA Announce Clean Heating and Cooling Demonstration Projects for Long Island Residents." https://www.nyserda.ny.gov/About/Newsroom/2017-Announcements/2017-10-19-National-Grid-and-NYSERDA-Announce-Clean-Heating-and-Cooling-Demo-Projects.

Further from today's model is "comfort as a service," where a company could own heating, cooling, and hot water infrastructure within a customer's home and collect payments for the comfort provided.[74] This would align the provider's incentives with increased efficiency of both equipment and building shells, but would require a fundamental reworking of the business model and is likely not a natural monopoly.

8.2. Consideration of competition issues

Inherent in consideration of new business models is the question of direct competition between regulated utilities selling different fuels (gas and electricity) that can provide the same service (comfort, cooking, etc.). One of the purposes of regulation is to play the role of the competition that a regulated monopoly does not naturally face.

However, the competition between two regulated utilities is not enough competition that regulators could consider some kind of deregulation (akin to telecommunications). In addition, the competition is one in which policy is very much favoring one of the market actors, so it would not be a fair contest.

Regulators should begin to grapple with how to manage the competition between fuels in a way that advances the public interest, rather than what is necessarily in the interest of either utility.

Therefore, regulators should begin to grapple with how to manage the competition between fuels in a way that advances the public interest, rather than what is necessarily in the interest of either utility. In the case where the electric and gas companies are part of the same parent company, and shifts in staff, investment, and management attention could, in theory, execute a planned transition, regulators must remain vigilant to ensure that utilities will not take advantage of customers during the transition. Where the electric and gas utilities have different owners, regulators' role will be different and likely to be more focused on harnessing competition while overseeing business model transitions.

8.3. Return on equity

The risks to the existing gas utility business model from the policy-driven changes and the urgent need to address climate change are only going to grow. New business models are likely to be risky as well, if only due to their novelty. In a typical utility regulatory construct, investors have the opportunity to earn a return commensurate with the risk of their investment. This would imply that the allowed return on equity (ROE) for gas utilities might need to be higher. Higher allowed ROE generally corresponds to higher rates, but in the competitive context it is not clear that higher rates are sustainable.

[74] Two United Kingdom utilities are piloting this approach. See "Industry's first: UK utilities pilot selling heat-as-a-service." February 26, 2020. Smart Energy International. https://www.smart-energy.com/industry-sectors/new-technology/industrys-first-uk-utilities-pilot-selling-heat-as-a-service/.

Changes in capital structure or value of equity may be required to address this, and it may make raising new capital challenging. It may be that a planned and managed transition for the gas company lowers risk and allows the company to maintain reasonable access to capital markets for the limited investments it needs to make as the ratebase is strategically retired. We recommend that the Commission address this important issue in depth, with diligence, innovation, and flexibility—and with input from utilities, state policymakers, and other stakeholders.

15

ENERGY LAW AND POLICY

Gordon Kaiser and **Bob Heggie**, Editors

CARSWELL®

The Fair Return

Kathleen McShane and Michael Cleland

I. Introduction

In the world of the economic regulation of Canadian energy utility companies, there is nothing quite as contentious as the debate over what constitutes a fair return to the companies who invest in and operate natural gas utility franchises.

As regulated monopolies, these entities have the return on their investments determined not by the open market, but in hearing rooms with lawyers and a variety of experts testifying before a panel of energy regulators. While most of the costs of operating the utility can be observed and verified by reference to the financial accounts and expenses of the organization, the return that the utility's investors should have an opportunity to earn is singularly unobservable.

It is not surprising then that the utility and its customers rarely see eye to eye on the matter.

This article looks at the current process and result of setting allowed returns for Canadian gas utilities from the investor's point of view. It examines various ways by which allowed returns can be determined, discusses their strengths and weaknesses, and concludes that there is a growing problem with Canada's current formula-based process and its results. In short, investors are no longer being awarded the fair returns that they are entitled to have an opportunity to earn.

The article goes on to look at some of the common arguments put forth to counter this conclusion and provides reasons why such "red herring" arguments are both misguided and incorrect.

Finally, the article then makes some specific recommendations on where to go from here and discusses a process by which improvements could be made.

II. The Fair Return as a Component of Revenue Requirement

The fair return represents the component of a utility's revenue requirement that provides compensation to investors for committing their funds, or capital, to finance utility assets devoted to public utility service, or rate base. A fair return on rate base comprises the weighted average return required on all forms of investor-supplied capital, where the weights reflect the proportions of rate base financed by different types of capital, primarily debt and equity.

The regulatory compact entitles the utility to the opportunity to earn a fair return on rate base in exchange for the obligation to provide service. It is the regulator's obligation to establish the fair return, which becomes, in the context of the revenue requirement, the allowed return on rate base.

III. The Fair Return and the Cost of Capital

The fair return represents a real cost to the utility, no less real than the costs the utility incurs to pay wages or acquire materials and supplies. Investors require a

return on the capital they commit to finance utility assets for two basic reasons:

1. Committing funds to a long-term investment means investors are deferring current consumption for the opportunity to enhance future consumption. The return investors demand on the capital committed represents the compensation they require to put off current consumption to a later date.

2. Investors are assuming the risk that the actual return on the capital they have committed will be less than the return they expect or less than the return they could have earned if they had invested their funds elsewhere.

The compensation that investors require on the different types of capital used to finance utility assets depends on the relative risks that investors are bearing and on the returns that are available on alternative investments of similar risk. A fair return is synonymous with the opportunity cost of capital, which, in turn, represents the aggregate return investors require to keep their capital invested and to invest new capital in the utility.

IV. The Fair Return and the Opportunity Cost Principle

"Opportunity cost" is defined as the return foregone by investors by not investing in an alternative investment. In other words, in order to commit funds to an enterprise, investors require a return on those funds equal to what they could earn in an alternative investment of comparable risk. Implicit in the term "opportunity cost" is the recognition that investors have choices and that, given a choice of investments of similar risk, they will direct their available capital to the investment that offers the highest return for a given level of risk. If the return allowed by the regulator does not meet the opportunity cost principle, investors will seek to divert their capital elsewhere, that is, to investments of comparable risk that offer a higher return.

A fair return is one that respects the opportunity cost principle and provides a utility the opportunity to earn a return equivalent to that available to comparable risk companies. Thus, adherence to the opportunity cost principle requires that comparable risk companies be identified and the returns available to those companies be taken into account in the determination of a fair return.

V. Benefits of Returns Consistent with Opportunity Cost Principle

Adherence to the opportunity cost principle in setting the allowed return benefits the utility's customers as well as its ratepayers in several ways.

- A fair return provides the utility the ability to access the capital it requires at reasonable cost and on reasonable terms and conditions. Allowing a return that is lower than the opportunity cost of capital or the fair return will have the perverse effect of raising the actual cost of capital to the utility, which customers will ultimately bear.
- Allowing a fair return will ensure the utility has the means to provide safe and reliable service at the levels required by customers. Allowing a fair return will provide the proper incentives to undertake the levels of capital investment required for optimal levels of system efficiency, customer service, and environmental performance.

- A fair return provides for the efficient allocation of resources. By correctly pricing utility services, a fair return provides for an optimal level of consumption. An inadequate return in the revenue requirement will result in below-full-cost rates that will promote overconsumption of scarce resources. Further, allowing a fair return will provide the underpinning for the optimal level of utility infrastructure required to grow and sustain the economy in which a utility operates.[1]

VI. Legal Principles of a Fair Return

The fair return standard, and the principles which define it, are enshrined in legal precedents that have been echoed in numerous Canadian and U.S. regulatory decisions. North American jurisprudence[2] has given rise to three requirements that must be met for the fair return standard to be satisfied. The three requirements were summarized by the National Energy Board as follows:

> The Board is of the view that the fair return standard can be articulated by having reference to three particular requirements. Specifically, a fair or reasonable return on capital should:
>
> - be comparable to the return available from the application of the invested capital to other enterprises of like risk (the comparable investment standard);
> - enable the financial integrity of the regulated enterprise to be maintained (the financial integrity standard); and
> - permit incremental capital to be attracted to the enterprise on reasonable terms and conditions (the capital attraction standard).[3]

The legal precedents make it clear that the three requirements are separate and distinct. Moreover, none of the three requirements is given priority over the others. The fair return standard is met only if all three requirements are satisfied. In other words, the fair return standard is only satisfied if the utility can attract capital on reasonable terms and conditions, if its financial integrity can be maintained, *and* if the return allowed is comparable to the returns of enterprises of similar risk.

VII. The Fair Return Refers to the Overall Cost of Capital

The determination of a fair return must take into account all of the elements of the cost of capital, including the capital structure (proportions of debt and equity financing the rate base) and the cost rates for each of the types of financing. It is the overall return on capital that must meet the requirements of the fair return standard.

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1 James C. Bonbright, Albert L. Danielsen and David R. Kamerschen, *Principles of Public Utility Rates*, 2nd ed. (Arlington, VA: Public Utilities Reports, Inc., 1988) [Bonbright *et al.*], pp. 93 and 203.

2 The five key court and/or board decisions that established or confirmed the fair return standard in North America include: *Bluefield Waterworks Co. v. Public Service Commission*, 262 U.S. 679 (1923); *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186, 1929 CarswellAlta 114; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *TransCanada PipeLines Ltd*, RH-2-2004, Phase II (2005) (NEB) [*TransCanada*].

3 *TransCanada*, *ibid.*, at p. 17.

Essentially, this is the case because the various elements of the cost of capital are inextricably linked; it is impossible to determine, for example, if the return on equity is fair without reference to the capital structure of the utility.

An understanding of why the fair return standard must refer to the overall cost of capital starts with the recognition that the utility's cost of capital is largely a function of its business risks. Business risks comprise the risks associated with the assets of the utility. Business risks reflect the fundamental characteristics of the utility's operating environment (demand for the utility's services, competition, supply factors, operating risks) that can lead to the failure to recover a compensatory return on the investment and/or a failure to recover the capital. Business risks also include the regulatory framework under which the utility operates. The prevailing regulatory framework effectively represents the allocation of the fundamental business risks between investors and ratepayers. The higher the business risks, the higher the utility's cost of capital.

While the overall cost of capital depends, in the first instance, on business risk, it is also a function of the utility's financial risks. The financial risks are dependent on the proportion of the assets that are financed by debt. As a utility increases the proportion of debt (which has fixed legal obligations) in its capital structure, the higher are the risks that (a) it will not be able to fulfill obligations to debt investors; and (b) equity investors, which do not receive any return until all other obligations of the utility have been fulfilled, will not achieve the return they require. Thus, the higher the proportion of the assets that is financed by debt, the higher the financial risks. As the proportion of debt in the capital structure rises, the cost rates of individual components of the capital structure (debt and equity) increase.

The specific impact of increasing the proportion of debt in the capital structure on the costs of debt and equity and on the overall cost of capital will depend on the resulting level of financial risk. However, from the basic financial principles discussed, the following conclusions can be drawn:

- The capital structure and the cost rates of debt and equity are interdependent. A fair return on equity cannot be determined independently of the capital structure.
- If two groups of utilities face similar business risks, their overall costs of capital should be similar, assuming that they operate in a similar capital market environment.
- If two groups of utilities face similar business risks but different financial risks (i.e., one group of utilities has a higher proportion of debt than the other), the group of utilities with the higher proportion of debt in their capital structure (higher financial risks) will have a higher cost of equity.[4]
- In order for the fair return standard to be satisfied, specifically the comparable return requirement, the overall costs of capital of the two groups of utilities adopted for revenue requirement purposes must be similar. If

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4 Stewart C. Myers and Richard A. Brealey, *Principles of Corporate Finance*, 6th ed. (Boston: McGraw-Hill, 2000), pp. 228-9, lays out the basic relationships among cost of capital, capital structure, and cost of equity.

> Group A has higher financial risks than Group B, the return on equity adopted for Group A needs to be higher than Group B's for their overall costs of capital to be comparable. Alternatively, the financial risks for Group A need to be reduced so that its financial risks and thus cost of equity are equivalent to those of Group B.

VIII. The Capital Structure in the Fair Return Equation

Capital structure, that is, the proportion of the rate base financed with debt and equity, is one of the two most critical cost of capital issues in Canadian public utility regulation. Cost of equity, discussed later in this article, is the other.[5] The focus on capital structure in Canadian utility regulation arises for two reasons. The first reason, which was noted earlier, is that debt is less expensive than equity because debt is less risky than equity. Second, in Canada (and the U.S.), interest on corporate debt is deductible for corporate income tax purposes. The more debt a utility takes on, the lower is its income tax bill.

Canadian public utility regulation implicitly proceeds on the premise that an optimal capital structure can be identified. Under the concept of an optimal capital structure, a utility can add debt to its capital structure to a point at which the overall (weighted average) cost of capital is minimized. In practice, there exists a range of capital structures over which the weighted average cost of capital does not change materially. Within this range, an increase (decrease) in the debt ratio will be offset by increases (decreases) in the costs of debt and equity, with the result that the overall cost of capital does not change. Outside of this range, the debt ratio can be neither lowered nor raised without the cost of capital increasing. In other words, if the debt ratio were raised further, the increase in financial risk would be reflected in higher cost rates of debt and equity that would more than offset the substituting of equity with debt.

While there is considerable controversy surrounding the very existence of an optimal capital structure, the practice of deeming (or prescribing) capital structures for ratemaking purposes presumes that it does. However, because the optimal capital structure, if it even exists, cannot be identified, the practice of deeming capital structures invites the adoption of the lowest possible common equity component that can be justified without causing financial distress.

The Canadian practice of deeming hypothetical capital structures contrasts with U.S. practice, where the utility's actual capital structure is typically used in the ratesetting process. In the U.S., hypothetical or deemed capital structures are used only when the utility's actual capital structure is determined to be outside the range of reasonableness.[6] From a philosophical perspective, in the U.S., absent a clearly

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5 In contrast to the cost of equity, the cost of debt a utility incurs can be directly observed. As a result, the cost of debt is typically subject to limited controversy.

6 For example, the Federal Energy Regulatory Commission (FERC), in *Transcontinental Gas Pipe Line Corporation*, Opinion 414-A, 84 FERC ¶61,084 (1998), held that:

> Traditionally, the Commission has preferred to utilize the applicant's own capital structure and will continue to do so if the applicant issues its own non-guaranteed debt and has its own bond rating. But the Commission will utilize an imputed capital structure (most often that

unreasonable capital structure, the appropriate financing of utility assets remains within the purview of management. A comparison of Canadian and U.S. regulated capital structures reveals materially thicker equity ratios in the U.S., indicating lower financial risks for the U.S. utilities. The average common equity ratio adopted for ratemaking purposes for electric and gas utilities in the U.S. since the beginning of 2007 has been just under 50% compared to less than 40% in Canada.[7]

IX. Estimation of the Fair Return on Equity

The fair return on equity, like the cost of debt, represents a real cost to the utility. However, unlike the cost of debt, the return on equity does not entail a legal obligation to investors. Also, the cost of equity, in contrast to the cost of debt, is not an observable number. It is a forward-looking cost that must be estimated. The estimation of the fair return is not an arithmetic exercise; there is no single formula that produces *the* cost of equity. Instead, ultimately, while there are various models that provide quantitative insight, the determination of a fair return on equity requires more than technical skill. It requires significant informed judgment.

The importance of informed judgment has been widely recognized by regulators. For example, the National Energy Board underscored the importance of judgment in determining the fair return on equity, stating:

> Many tests and techniques for assisting the process of reaching a just decision have been used, but no single test is conclusive nor is any group of them definitive: whatever tests may be used, in the last analysis the adjudicating body cannot escape the responsibility of exercising judgment as to what, in a stated set of circumstances, is a just and reasonable return or rate of return, or what is a range of justness and reasonableness of return or rate of return.[8]

The predecessor to the Alberta Utilities Commission similarly highlighted the critical role of judgment:

> As pointed out in previous Decisions of the Board, there is no mathematically or scientifically precise approach or method for the fixing of the Fair Return on Rate Base which the Board can use, particularly with respect to the fair return on that portion of the Rate Base which is assumed to be financed by Common Equity Capital. Any approach or method is largely dependent upon subjective judgments. The testimony adduced by expert witnesses is helpful to the Board in the exercise of its judgment. Any one approach, method or technique that is used by expert witnesses is not necessarily better than another. The weight given to each by the Board does, and should, vary depending on the circumstances at the time of making the judg-

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> of the corporate parent) if the record in a particular case reveals that the pipeline's own equity ratio is so far outside the range of other equity ratios approved by the Commission and the range of proxy company equity ratios that it is unreasonable.

7 Regulatory Research Associates, *Major Rate Case Decisions — January–September 2008*, October 3, 2008.

8 National Energy Board, *Reasons for Decision In the Matter of the Application under Part IV of the National Energy Board Act of Trans-Canada Pipelines Limited*, RH-1-70, December 1971.

> ment. The Board considers the use of several "tests" is helpful for the purpose of fixing the Fair Return on Rate Base, particularly in relation to the fair return on that portion of the Rate Base which is assumed to be financed by Common Equity Capital.[9]

The importance of the application of judgment in setting a fair return cannot be underestimated. Regulators should be skeptical of any single approach or model that purports to produce a value which pinpoints the cost of equity. Moreover, in assessing evidence in support of the fair return, regulators need to keep in mind that the end result must satisfy *all* three pillars of the fair return standard: capital attraction, financial integrity, and comparable returns.

1. Tests for Estimating the Fair Return on Equity

The key to determining the fair return on equity (i.e., ensuring that all three requirements of the fair return standard are met) is reliance on multiple tests. There are three different types of tests that have traditionally been used to estimate the fair return on equity: equity risk premium, discounted cash flow, and comparable earnings tests. Each of the tests is based on different premises and brings a different perspective to the fair return on equity. None of the individual tests is, on its own, a sufficient means of estimating the fair return; each of the tests has its own strengths and weaknesses. Individually, each of the tests can be characterized as a relatively inexact instrument. No single test can pinpoint the fair return.[10] Moreover, different tests may be more or less reliable depending on prevailing economic and capital market conditions.[11] These considerations not only emphasize the importance of reliance on multiple tests, but also of benchmarking, or testing the reasonableness of the test results themselves against other relevant information.

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9 *Centra Gas Alberta Inc., Re* (January 5, 1996), Doc. U96002, 1996 CarswellAlta 1254 (Alta. E.U.B.).

10 See, for example: Bonbright *et al.*, *supra* note 1, p. 317: "No single or group test or technique is conclusive. Therefore, it is generally accepted that commissions may apply their own judgment in arriving at their decisions." And see Roger A. Morin, *New Regulatory Finance* (Vienna, VA: Public Utilities Reports, Inc., 2006), p. 18:

> The return on equity is inevitably determined by judgment, enlightened by the implementation of a vast arsenal of techniques, models, and theories, each with its own set of assumptions, simplifications, premises, and problems.

11 For example, see Federal Communications Commission, Report and Order 42-43, CC Docket No. 92-133 (1995):

> Equity prices are established in highly volatile and uncertain capital markets . . . Different forecasting methodologies compete with each other for eminence, only to be superseded by other methodologies as conditions change . . . In these circumstances, we should not restrict ourselves to one methodology, or even a series of methodologies, that would be applied mechanically. Instead, we conclude that we should adopt a more accommodating and flexible position.

i) Equity Risk Premium Tests

The term "equity risk premium test" is a generic term for cost of equity methodologies that estimate the premium required in excess of bond yields to compensate investors for the higher risk of equities relative to that of bonds. The most commonly used form of the equity risk premium test is the Capital Asset Pricing Model (CAPM). The CAPM measures the cost of equity as:

$$\text{Risk–Free Rate} + \text{Beta} \times \text{Market Risk Premium}$$

The equity risk premium test as formulated above has been the predominant model relied upon by Canadian regulators since the mid-1990s. It is effectively the foundation of the automatic adjustment formulas that govern the annual establishment of the allowed return on equity in most of the major regulatory jurisdictions throughout Canada.

The CAPM has common sense appeal. The model posits that equity investors require a return equal to what they could earn on a risk-free investment plus a premium that compensates them for the risk of the specific investment. The risk premium attributable to the specific investment is a proportion of the risk premium associated with an average risk investment, or "the market". In other words, if an investment is half as risky as the market, that investment requires half the risk premium of the market.

The model is, on the surface, easy to apply as it comprises only three components: the rate of return on the risk-free investment, the risk premium required for the market, and the measure of the specific investment's risk relative to the market. Data to estimate all three components are easily accessible. The typical proxy for the return on the risk-free investment, the yield on a long-term government bond is directly observable. Historic achieved risk premiums for the equity market are widely available and are frequently used to estimate the risk premium required for the market. Betas, the model's relative risk measure, are frequently published and can also be easily calculated from available data.

Despite the common sense appeal of the model and its apparent ease of application, the validity of the model itself is not without controversy as the empirical tests have produced mixed results.[12] Further, the application of the CAPM is not nearly as easy as its simple formulation would suggest. The model assumes that investors require only compensation for the risks that are systemic to the capital markets and thus cannot be diversified away. Moreover, it assumes those systemic risks can be, and are, captured in a single risk variable: beta. The model is a simplistic formulation of how investors should behave, and tests of the model's validity are mixed.

Empirical tests of the model have shown that the CAPM underestimates the returns for low beta (e.g., regulated companies) and overestimates returns for high beta stocks. Less simplistic variants of the CAPM (e.g., the Empirical CAPM and the Fama-French three-factor model) have been better able to explain investor re-

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12 See Chapter 3 of Cleveland S. Patterson, *The Cost of Capital Theory and Estimation*, 1st ed. (Westport, CT: Quorum Books, 1995), for a summary of the empirical evidence on the validity of the CAPM.

turns than the simple CAPM.[13]

In addition to the questions about the model's validity, the CAPM poses significant application challenges. The size of the market risk premium cannot be directly observed and is subject to a wide divergence of opinion. While historic risk premiums may provide a perspective on the size of the expected forward-looking market risk premium, historic results are sensitive to the country from which the data are drawn and the time period over which they are measured. Moreover, the market risk premium is not a fixed quantity; it changes with investor experience and expectations. It would be higher, for example, when investors perceive that the risk of the market has increased. However, the model does not readily allow estimation of changes in the size of the market risk premium as economic or capital market conditions (e.g., interest rates) change.

ii) Discounted Cash Flow Test

The Discounted Cash Flow (DCF) model proceeds from the proposition that the price of an investment is the present value of the expected future cash flows, discounted at a rate that reflects the risk of the cash flows. Like the CAPM, the DCF model has common sense appeal. The model measures the cost of equity as the expected dividend yield on a common stock investment (expected dividend/stock price) plus the expected growth in dividends.

The DCF test is a direct measure of the utility cost of equity, which, in principle, should capture all the risks for which investors require compensation. The test is relatively easy to apply, and the data required are widely accessible. Approximately one-third to one-half of the DCF cost of equity, the dividend yield, is directly observable. The DCF model is the model most frequently used by U.S. regulators to set the allowed return on equity.

The application of the DCF test faces some challenges. There is some circularity in its application to utilities, inasmuch as the expected growth is dependent on the returns that regulators will allow. The model most frequently used, the constant growth model, is based on simplifying assumptions (i.e., dividends, stock prices, and earnings will all grow at the same rate forever). The growth rates themselves are not observable and must be inferred. There is a divergence of opinion on how best to measure growth expectations. Analyst forecasts of long-term growth in earnings are commonly used as a proxy for investor growth expectations. However, there is an ongoing debate over whether these forecasts are systematically optimistic.

iii) Comparable Earnings Test

The comparable earnings test is based on the concept of opportunity cost, that is, capital should not be committed to an enterprise unless it can earn a return commensurate with that available prospectively in alternative ventures of comparable

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13 The Empirical CAPM is based on the observed rather than theoretical sensitivities of returns to beta, effectively increasing the rate of return on a zero beta asset and increasing (decreasing) the betas of low (high) risk stocks. The Fama-French model is a three-factor version of the CAPM, which includes, in addition to the beta, size and value factors to improve the simple CAPM's predictive results.

risk. The traditional comparable earnings test measures returns of enterprises of comparable risk to utilities, where those returns are measured using the same original cost concept that underlies the measurement of a utility's rate base and capital structure. The test can be applied to both regulated and unregulated companies, but has typically been applied to unregulated companies. That approach avoids all potential circularity and recognizes that the investors' alternative investment opportunities are not limited to other utility companies.

The comparable earnings test, as applied to non-regulated companies operating in a competitive environment, recognizes that the objective of competition is to emulate competition, directly addresses the comparable returns requirement of the fair return standard, and ensures fairness to existing capital investment.

The principal issues related to the test's application are that:

- the comparable earnings test measures accounting return, rather than market returns;
- those returns may not represent economic returns. The criteria used to select comparable companies are subject to judgment as are the periods over which the returns are measured; and,
- the resulting measured returns may not be sufficient to meet the capital attraction standard.

2. Evaluation of the Cost of Equity Tests

In evaluating the usefulness of the different types of tests, the key point that needs to be recognized is that the allowed return on equity must satisfy all three requirements of the fair return standard: comparable returns, capital attraction, and financial integrity. The ability of utilities to attract capital is not synonymous with adherence to the comparable returns requirement.

The CAPM and DCF tests are capital attraction tests. The CAPM, for example, attempts to measure the minimum return an investor requires within the context of a diversified portfolio based on the contribution of the investment to the overall risk of the portfolio. While the application of the test relies on comparable companies, it does not actually measure the returns that are available to comparable companies.

To ensure that all three pillars of the fair return standard are satisfied, the capital attraction tests need to be supplemented with tests of comparable returns. Even if the traditional comparable returns test is not formally applied, alternative measures of comparable returns need to be used as benchmarks. For example, the returns allowed to similar risk utilities elsewhere or regulated returns that have been negotiated by "arms' length" third parties are reasonable benchmarks for the purpose of ensuring that the comparable returns requirement is satisfied.

With respect to the capital attraction tests, neither the DCF nor the CAPM test is a superior model. The CAPM, which measures the cost of equity for utilities indirectly, is based on a theoretical, but unproven, model of how investors price risk. Essentially, it is a model of how investors *should* behave. The DCF model, in contrast, measures the cost of equity directly by reference to the returns investors expect from utilities. The DCF test measures the returns investors *do* expect rather than the returns investors should expect. Both perspectives are relevant when determining a fair return.

Both the CAPM and DCF tests require the application of significant judgment. Neither can be deemed superior in terms of the amount of judgment required.

With respect to the DCF model, the principal judgment that must be made is the estimate of future growth expectations. Depending on the degree of uncertainty in the equity markets, the ability to accurately infer the growth rate investors expect over the long term may be more or less difficult.

With respect to CAPM, judgments are required for both the relative risk adjustment and the market risk premium. The CAPM captures the common sense idea that the cost of equity, a forward-looking concept, should reflect prevailing levels of interest rates in the economy, but does not easily lend itself to accurately measuring relative shifts in the cost of equity arising from changes in the risk/return relationship. For example, even if the measure of relative risk, beta, were able to capture all risks for which investors require compensation,[14] it is a historic measurement. Similarly, the risk premium that investors require, or "the market", is also typically measured using long-term historic averages as a point of departure. The equity risk premium is a forward-looking concept that may differ from the Canada-specific historical values.

Further, the application of the CAPM typically presumes that equity returns track long-term government bond yields up and down in a predictable fashion. That assumption can easily produce erroneous results because it ignores two important factors. First, long-term government bond yields reflect the demand for a limited supply of a specific security; that supply/demand balance says nothing about the cost of equity. Second, a decline in government bond yields may be signalling an increase in the cost of equity. A decline in government bond yields may reflect investors' flight to safety from higher risk in the equity markets. The typical application of the CAPM would capture the downward movement in government bond yields, rather than the upward movement in the cost of equity. Significant judgment is required to accurately capture the true trends in equity costs when applying the model.

In sum, the various models and tests address the different requirements of the fair return standard; each has its own strengths and weaknesses, and no single model is inherently superior to the others. All require significant judgment in their application, the extent of which depends on the prevailing state of the capital markets. Regulators need to recognize that the models give a sense of simplicity to a cost whose determination is inherently complex. No single model is powerful enough on its own to produce "the number" that will meet the fair return standard. Only by applying a range of tests along with informed judgment can adherence to the fair return standard be ensured.

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14 To illustrate, Burton Malkiel in *A Random Walk Down Wall Street* (New York: W. W. Norton & Co., 2003), p. 240, states:

> Beta, the risk measure from the capital-asset pricing model, looks nice on the surface. It is a simple, easy-to-understand measure of market sensitivity. Alas, beta also has its warts . . . I have argued here that no single measure is likely to capture adequately the variety of systematic risk influences on individual stocks and portfolios.

X. Regulators' Approach to the Allowed Return on Equity in Canada

Until the mid-1990s, most Canadian regulators gave weight to multiple tests, including equity risk premium tests, the DCF test (often applied to non-regulated companies), and the comparable earnings test. The need for regulators to apply informed judgment inherent in the application of multiple tests was explicitly recognized in Canada, as it was, and continues to be, in the U.S. Allowed returns on equity for Canadian and U.S. utilities were comparable.

Since the mid-1990s, there has been a shift to preponderant, or in some cases exclusive, reliance on the CAPM version of the equity risk premium test. The reasons for this shift reflect the confluence of two factors. First, economic conditions in the mid-1990s made other tests more difficult to apply reliably. Canada was undergoing a sea-change in its economic fundamentals. There had been a deep recession and significant restructuring of industry in the early part of the decade. In 1991, the federal government, committed to the reduction of huge budget deficits, adopted inflation targets, which remain in force today. While inflation had plummeted, investors remained concerned that the reduction would not be sustainable, given the magnitude of the government's fiscal problems. Further, the specter of a Québec separation loomed large in investors' minds. The uncertainties regarding the impacts of industry restructuring and further inflation on corporate earnings made both the discounted cash flow tests and comparable earnings test difficult to apply reliably. These difficulties led regulators to focus on the equity risk premium test.

Second, at the same time the economy was undergoing fundamental change, Canadian regulators had begun looking for a formulaic approach to determining utility allowed returns on equity in place of detailed annual reviews. A formulaic approach required an objective, observable variable whose year-to-year change would form the basis for changing allowed returns on equity. The yield on long-term Government of Canada bonds was such a variable. Using the equity risk premium/CAPM model, whose application incorporated the adjustment variable, could be viewed as providing internal consistency between the "base" or "going in" return and equity, and any adjustment formula.

In 1994 and 1995, both the British Columbia Utilities Commission (BCUC) and the National Energy Board (NEB) adopted automatic adjustment formulas. The specification of the adjustment formula was not without controversy as the evidence in support of the relationship between cost of equity and long-term government bond yields was relatively nebulous. The NEB, for example, was presented with alternative relationships between allowed returns on equity and government bond yields that suggested a relationship in the range of 1.0-to-1.0 to 0.50-to-1.0. It chose a middle ground: a 0.75-to-1.0 relationship. The BCUC initially chose a 1.0-to-1.0 tracking, but in 2006 switched to the 0.75-to-1.0 relationship, which had by then become the norm.

By 2004, the majority of major Canadian regulatory jurisdictions were using formulas to set utility returns on equity. Some have been reconfirmed, with modest changes, as recently as 2007. The designs of the formulas are virtually identical: the allowed return on equity changes by 0.75-to-0.80 of the change in long-term government bond yields. The allowed returns on equity for Canadian utilities have converged to a remarkably narrow range, as not only are the designs of the formulas

similar, but so have been the underlying or "base" returns on equity. Effectively, the widespread reliance on formulas in Canada has placed the allowed returns on equity on "autopilot".[15]

XI. Changes in Economy and Capital Markets and the Validity of the Formula Returns on Equity

As indicated above in Section X, evidence in support of the 0.75-to-1.0 formulaic relationship between bond yields and return on equity, when initially adopted, was nebulous at best. Even if it had been an accurate portrayal of the relationship at the time, the likelihood that this relationship has remained valid through the subsequent significant changes in the economy and the capital markets is remote.

Since the formulas began operating in the mid-1990s, the Canadian economy and capital markets have seen:

- Huge government budget deficits give way to an unbroken string of budget surpluses beginning in 1997;
- A vast improvement in government finances, which has steadily reduced the ratio of government debt to GDP, leading to a smaller supply of government bonds relative to the size of the economy;
- Government bond yields cut in half, from 9% in the mid-1990s to just over 4% in 2008;
- Significant swings in the value of the Canadian dollar, including a decline to a historically unprecedented low in 2002 and a subsequent rise in 2007 to levels that had not been experienced for approximately three decades;
- A material increase in the contribution of corporate profits to GDP over the past decade;
- The rapid progression in the globalization of capital markets, highlighted in Canada by the removal of the Foreign Property Rule in 2005, and without the removal of caps on the ability of individuals or institutions to invest abroad;
- Periods of extreme turbulence in the equity markets, including the global capital market crisis in 1998, nicknamed the "Asian Contagion", the technology sector "bubble" and subsequent "bust" in 2000-2001, corporate scandals in the early part of the decade, the terrorism attack of 9/11 and ensuing global political instability, soaring and volatile commodity prices, and the turmoil in the credit and equity markets resulting from the subprime mortgage crisis.
- Periodic flight to the safety of government securities in reaction to equity market turbulence (increased investor risk aversion).

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15 See also Hon. John C. Major and Roland Priddle, *The Fair Return Standard for Return on Investment by Canadian Gas Utilities: Meaning, Application, Results Implications*, commissioned by the Canadian Gas Association (2008) [Major-Priddle] for history of Canadian return regulation.

From the depth and range of changes that have occurred in the economy since the automatic adjustment formulas began operating, a number of conclusions can be drawn:

- With the passage of more than 13 years since the formulas were initially developed in the midst of a fundamental change in the Canadian economy, the rationale for sole reliance on the equity risk premium test is no longer valid.
- The reduction in government debt outstanding relative to the size of the economy calls into question the validity of a formula tied solely to government bond yields. A declining supply of debt relative to demand creates scarcity and puts downward pressure on bond yields. The resulting reduction in yields has no bearing on the cost of equity.
- The observed periodic flight of investors to the safety of government bond yields in the wake of equity market turbulence calls into question the validity of the premise underlying the automatic adjustment formulas that the cost of equity tracks government bond yields.

  A good illustration of the questionable validity of the premise of the automatic adjustment formulas can be seen in the behaviour in the capital markets during the subprime mortgage crisis. From the beginning of the crisis (Summer 2007) to Fall 2008, forecast long-term Government of Canada bond yields generally declined. Thus, application of the automatic adjustment formulas would have implied that the cost of equity had fallen over the period. Other capital market indicators told a completely different story. Utility bond yields, which would shed more direct light on utility equity return requirements, had risen dramatically, indicating that the cost of equity had risen. In late October 2008, the yields on some investment-grade Canadian utility bonds were actually higher than the formula allowed returns on equity. Dividend yields for publicly traded regulated companies also increased, signalling an increase in the cost of equity. The increase in the cost of equity would have been captured in the application of the DCF model, but not in the typical application of the CAPM, nor in the automatic adjustment formulas.
- The rapid globalization of the capital markets means that it is no longer sufficient to focus solely on returns available to investors domestically. Adherence to the comparable returns standard necessitates looking at comparable companies and their associated returns beyond domestic borders, something Canadian regulators have historically been reluctant to do.

In summary, the range and magnitude of changes in the economy and capital markets underscore the need to apply a range of tests (as well as other less formal, but equally informative benchmarks, e.g., utility bond yields) rather than rely solely on the equity risk premium test. The specific issues related to government bond yields as the sole gauge to the trends in the cost of equity necessitate a reconsideration of the wisdom of preponderant reliance on the equity risk premium test. The same issues point to the need for recalibration of the automatic adjustment formulas with the guidance of the experience in the capital markets since the formulas were first implemented.

The review of the changes in the economy and the capital markets is not intended to suggest that the equity risk premium test should be discarded as one tool for estimating the fair return. Rather, it does underscore the need to consider the full range of tests and benchmarks available to a regulator in arriving at a fair return on equity.

XII. Why Automatic Adjustment Formulas Are Problematic in Principle and in Practice

When automatic adjustment formulas replace the traditional method of setting allowed returns on equity, a critical element of the process is lost: informed judgment. With the setting of allowed returns on "autopilot", the probability that the result will steer off course, no matter what the formula, is relatively high. With myriad changes in the economy and capital markets over time, the ability of a formula to capture changes in the cost of equity, particularly one that ties the return on equity to a single factor, should be regarded with a healthy dose of skepticism.

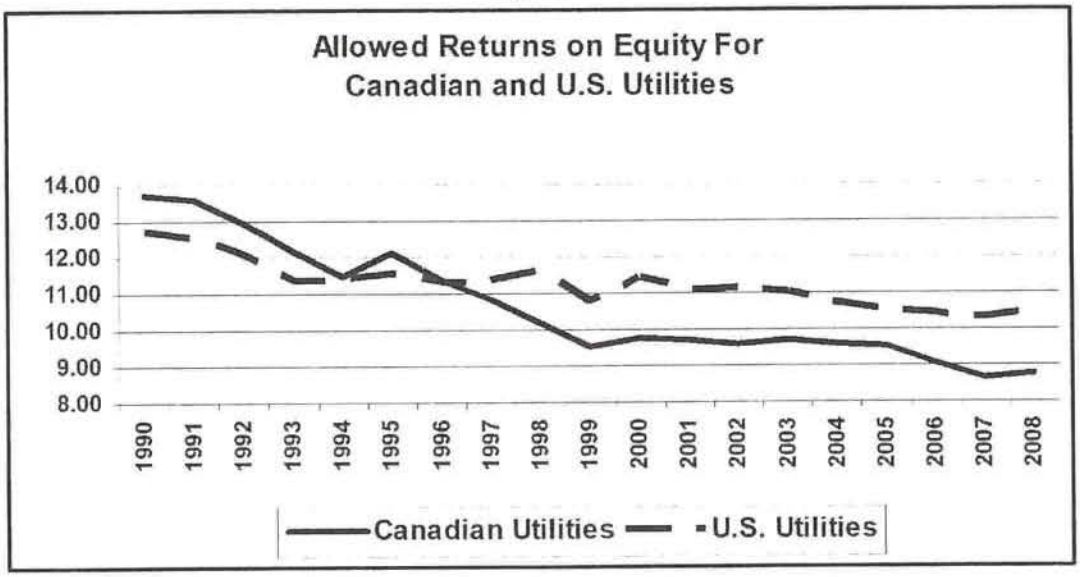
In the specific case of the formulas used by Canadian regulators, the probability that the results will steer off course is increased due to the construction of the formulas themselves. The formulas rely on a single variable, specifically the movement in long-term government bond yields. They ignore the factors directly relevant to equity return requirements. They do not consider changes in the equity markets that have occurred over time. Of critical importance, by focusing solely on the change in long-term government yields, they are incapable of expressly taking into account returns available to enterprises or investments of comparable risk.

The evidence that the automatic adjustment formulas are not producing returns that meet the fair return standard is strong. In Canada, in the pipeline sector, a comparison of the returns being negotiated by arms' length parties on new investment to the formula returns governing existing investments reveals much higher negotiated returns. The differential between the returns customers and regulated pipelines are willing to negotiate and those produced by the automatic adjustment formula cannot be explained or justified by risk differences. The negotiated returns on new pipeline investments (e.g., Enbridge Alberta Clipper, Line 4, and Southern Lights and TransMountain) have been 2.25 percentage points or more higher than the NEB's multi-pipeline formula return on equity.[16]

In comparison with those of U.S. utilities, the allowed returns on equity of Canadian utilities governed by formulas are materially lower, as demonstrated in Figure 1 below.

16 See also Canadian Energy Pipeline Association, *Perspective on Canadian Gas Pipeline ROEs* (2008).

Figure 1



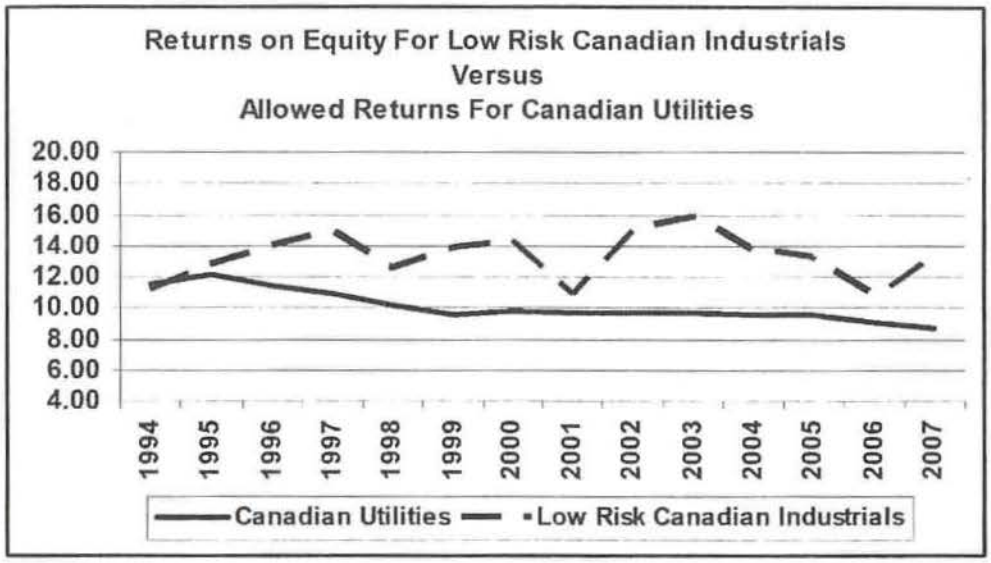
Source: Canadian regulatory decisions and Regulatory Research Associates

The graph above shows that allowed returns in the U.S. and Canada were generally comparable until the time the formulas tied to government bond yields became the norm (approximately 1997-1998) in Canada. Since that time, a significant and persistent gap has emerged. Between 1998 and 2008, Canadian utilities' allowed returns on equity have been, on average, 1.5 percentage points lower than those of their U.S. peers, whose allowed returns are governed not by formulas, but by application of various tests and judgment.

When the thicker common equity ratios adopted by regulators for U.S. companies (close to 50%) relative to those deemed for Canadian utilities (averaging less than 40%) are also taken into account, the gap between the returns on total capital is even more striking. The very fact that the opening of the gap occurred early in the history of the use of formula returns strongly suggests that the formula returns on equity veered off course soon after the formula approach was embraced.

A further piece of evidence that Canadian utility allowed returns do not meet the comparable returns test arises from a comparison with the returns that low-risk unregulated companies are earning. Figure 2 below plots the allowed returns for Canadian utilities since 1994, the first year a formula was adopted, along with returns earned by low-risk Canadian unregulated firms operating in consumer-oriented industries.

Figure 2



Source: Canadian regulatory decisions and Kathleen C. McShane, *Opinion on Capital Structure and Fair Return on Equity*, prepared for Ontario Power Generation (2007) and updates.

The graph above shows that over the entire period low-risk unregulated companies' earned returns have averaged close to 2.5 percentage points higher than utilities have been allowed. The gap over the past five years (2002–2007) has been more pronounced. Low-risk unregulated companies were earning over 4.0 percentage points more than the allowed returns on equity of Canadian utilities.

XIII. "Red Herrings"

A number of claims have been made in cost of capital proceedings that purport to demonstrate the allowed returns on equity for Canadian utilities established under the existing formulas are consistent with the fair return standard. This section addresses those claims.

1. Price/Book Value Ratios Higher than 1.0

Some analysts argue that a price/book (or market/book) value ratio of utility equity higher than 1.0 constitutes evidence that the allowed returns are adequate. Their argument proceeds from the premise that a price/book value ratio of 1.0 is evidence that the utility is earning its cost of capital on the invested capital. Similarly, a price/book ratio higher than 1.0 means that the utility is earning more than its cost of capital, that is, it is earning "excess" returns. The analysts then point to the higher than 1.0 prevailing price/book ratios of publicly traded entities in Canada with regulated operations and higher than 1.0 price/book ratios paid to acquire utility assets as evidence that the returns on equity allowed under the formulas are generous. Their argument fails on several counts.

First, the prevailing price/book ratios of publicly traded companies with regulated operations are due to their non-regulated operations, not their regulated operations. For example, with respect to Canadian pipelines in particular, the investment community indicated to the National Energy Board that the regulated pipelines on a

stand-alone basis (without the benefit of their non-regulated operations) could have trouble raising capital given current allowed returns on equity, despite the significant liquidity that existed in the capital markets at the time of the consultation.[17]

Second, with respect to the price/book ratios implied by the purchase of utility assets, the price investors are willing to pay reflects various considerations in addition to the current level of the allowed return. These considerations include diversification of investments, the ability to pursue growth opportunities, the consolidation of the companies' market presence, and the perceived ability to improve future returns.

Third, prices of utility equities need to be viewed relative to the market as a whole. If the tenor of the equity market is such that investors are willing to pay relatively high (low) prices for equities in general, the price/book ratios of utility shares will reflect that overall level of optimism (or pessimism). The objective of regulation is to emulate competition. If competitive firms are able to maintain price/book ratios in excess of 1.0, constraining utility price/book ratios to 1.0 is contrary to this objective.

2. Formulas Have Been Reviewed

Some would argue that the automatic adjustment mechanisms have not been on "autopilot" since they were first introduced in the mid-1990s. Several regulators have reviewed their formulas since they were first introduced and have reconfirmed the results or modified them only marginally. However, the fact that there have been several reconfirmations of the allowed return on equity formulas does not mean that the results meet the fair return standard.

With the serial adoption of formulas throughout Canadian regulatory jurisdictions, the automatic adjustment approach has effectively become the norm. As such, it is difficult for any individual regulator to break away from the norm. As was pointed out in the Major-Priddle report cited earlier, reliance on formulas may create an obstacle to reappraisal of the formulas.

As allowed returns on equity have converged throughout Canada, regulators may be convinced that the comparable returns requirement has been met. However, when all the returns on equity are set by similar formulas, the comparison becomes entirely circular. Moreover, a focus solely on the returns allowed for other Canadian utilities is too narrow to meet the comparable returns requirement. Canadian utilities do not compete only with other Canadian utilities for capital. With the massive amounts of incremental capital that is expected to be required for investment in regulated infrastructure in North America over the next decade, this is not a trivial consideration. Moreover, the opportunity cost principle does not extend solely to investments in other Canadian utilities. To satisfy the comparability of returns requirement, the ability and the observed willingness of investors to commit capital abroad must be recognized.

Reviews of the formula returns have tended to focus narrowly on incremental changes since the formula was last reviewed. The reasonableness of the formula results can best be assessed with the benefit of a comprehensive review of the

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17 National Energy Board, *Canadian Hydrocarbon Transportation System Report* (2007), p. 40.

trends and events since the formula was first introduced in the mid-1990s. Looking back over the entire period from today's vantage point would permit the full extent of the evidence to be appreciated. For example, with the benefit of available data since the formulas were first introduced, it can be clearly established that the cost of equity has not tracked long-term government bond yields nearly to the extent imputed by the formulas. Since long-term government bond yields have been in decline since the formulas were adopted, the result of overstating the relationship between the cost of equity and long-term government bond yields is a systematic understatement of the fair return on equity.

3. Ability to Attract Capital

The formula results have been determined by regulators to represent fair returns on the grounds that there is no evidence of utilities' being unable to attract capital. At the outset, it cannot be stated too strongly that an ability to attract capital is not synonymous with meeting the comparable returns standard. The fair return is one that meets all three requirements of the fair return standard, not just the attraction of capital standard. Also, the ability to attract capital standard is frequently applied to debt capital. This is an inappropriate application of the capital attraction standard.

The ability to attract debt capital says little if anything about whether a utility can attract third-party equity capital as debt and equity investors' concerns are very different. The debt investor is concerned that there are sufficient cash flows to pay interest and to repay the loan principal. Equity investors are more concerned with whether or not they will have an opportunity to earn a return that compensates them for the risks they are taking and that is commensurate with the returns they could have earned had they put their funds in alternative enterprises of similar risk. In addition, the ability to attract equity capital standard needs to be applied to the stand-alone utility, not to the consolidated operations of a parent company. If the parent's ability to attract equity capital is the result of profitable unregulated operations but is attributed to the stand-alone utility, that attribution constitutes cross-subsidization.

4. Non-Comparability of Comparables

Evidence that the allowed returns of Canadian utilities do not meet the comparable returns standard is sometimes countered with the claim that Canadian utilities are not comparable in risk to the enterprises to which they are being compared. Specifically, the claim has been made that Canadian utilities have better regulatory protection than their U.S. peers and experience less regulatory lag. Recent studies indicate otherwise.[18] In particular, analysis has shown that U.S. utilities have simi-

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18 Concentric Energy Advisors, *A Comparative Analysis of Return on Equity for Natural Gas Utilities*, prepared for the Ontario Energy Board (June 2007) [Concentric Energy Advisors]; James Coyne, *Comparative Analysis for Return on Equity for Utilities in Canada and the U.S.*, presented at CAMPUT (2008); and Kenneth Gordon and Jeff D. Makholm, National Economic Research Associates, *Allowed Return on Equity in Canada and the United States, An Economic, Financial and Institutional Analysis* (February 2008) [Gordon-Makholm].

lar access to regulatory protection as Canadian utilities in the form of deferral accounting. The regulatory lag argument, that is, U.S. utilities face longer lags between rate proceedings than Canadian utilities, ignores a critical point: the lag between rate proceedings in the U.S. is typically by choice. U.S. utilities have the ability to apply to regulators for rate changes when they determine that they no longer have the ability to earn a fair return. Regulators can compel utilities to file a rate case if they believe the utilities are earning excess returns.

Moreover, comparability between Canadian and U.S. utilities does not mean that the firms must be identical; they must be of similar risk. The fundamental similarities in business and regulatory risks between U.S. and Canadian utilities outweigh any differences. Therefore, the returns available to U.S. utilities provide a relevant benchmark for Canadian ones to ensure adherence to the comparable returns standard.[19]

The further claim that the Canadian and U.S capital markets are too different to make any valid comparison between utilities in the two countries is also a "red herring". The capital markets in Canada and the U.S. are integrally related, and capital flows across the borders virtually seamlessly. If anything, the Canadian equity environment, given its relative concentration in the commodity and financial sectors, is a riskier environment than the more diversified U.S. equity market.

The argument has been made that, even if comparability has been established, the awarded returns of U.S. utilities are not relevant because investors cannot invest at those returns. Further examination demonstrates that argument is faulty. The recently allowed returns for U.S. utilities, although applied to book values, are based on estimates developed by reference to prevailing market values. Hence, they are representative of returns expected on market values and of returns available to investors that pay those prevailing market prices.

5. Comparables' Returns Are Too High

The argument has been made that it is not the Canadian utilities' returns that are too low, it is the U.S. utilities' allowed returns on equity that are too high. Since U.S. utilities' allowed returns reflect the outcomes from a wide range of regulators, independently evaluating the results of multiple tests conducted by various stakeholders, and applying informed judgment to the results, that conclusion is counterintuitive. It is far more likely that a formula that uses a single variable to estimate a value (the cost of equity) which is the result of multiple factors will produce results that will steer off course.

A recent study commissioned by the American Gas Foundation highlights concerns with the trend and recent levels of allowed returns on equity for U.S. natural gas distribution utilities (averaging just under 10.5% during 2008). The study concluded that:

> Overall, it is fair to say that there is widespread concern over the industry's ongoing ability to raise and retain capital. Generally senior executives feel that in the current market, returns below 10 percent are very problematic,

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19 See, for example, Concentric Energy Advisors, *ibid.*; and Gordon-Makholm, *ibid.*, both studies conclude that the fundamental similarities in business and regulatory risks between U.S. and Canadian utilities outweigh any differences.

> that returns in the mid-10s are adequate to keep the businesses on an even keel, but not to win contested capital in competition with investments in other businesses with similar risk, and that returns in the low 11s, e.g., 11.25, can generally reach risk-adjusted parity with the investments with which LDCs must compete for capital.[20]

6. Higher Returns through Incentive Mechanisms

Some may argue that even if the allowed returns on equity are too low, the shortfall can be made up through incentive or performance-based ratemaking mechanisms. Such a conclusion misinterprets the objective of incentive mechanisms. Incentive mechanisms are intended to provide the opportunity to earn a reward for superior performance, not to provide an opportunity to earn the cost of capital. Using incentive mechanisms to allow a utility simply to reach a return equal to its cost of capital creates an asymmetric risk for utilities. The probability of earning a fair return is less than the probability of earning a lower than fair return. The allowed return should be the fair return.

XIV. Where Do We Go from Here?

The history of recent allowed returns in Canada underscores the potential problems of substituting informed judgment with automatic adjustment formulas. No simple formula can reasonably be expected to produce a fair return without steering off course within a relatively short period of time. Indeed, the National Energy Board in Canada recently decided to stop using a formula approach, stating:

> The Board notes that since 1994, there have been considerable changes in financial and economic circumstances. Based on these considerations, the Board is of the view that there is a doubt as to the ongoing correctness of the RH-2-94 Decision.[21]

The determination of the allowed return is inherently complex; and it requires the application of informed judgment, a factor that has been widely recognized by regulators. Administrative efficiency in the regulatory process is a laudable objective, but it cannot replace informed judgment in setting the fair return.

There needs to be a reassessment of the fair return from first principles. Assessing the fair return from first principles not only means considering the full battery of tests and other benchmarks that are relevant to setting a fair return, but also not viewing the prevailing adjustment formula results as the default position.

The comparable returns standard needs to be explicitly considered in any reassessment. Utilities are entitled by law to the opportunity to earn a return commensurate with the returns available to investments of comparable risk. The observation that utilities in Canada are able to attract capital does not permit the conclusion that the comparable returns requirement has been met as the two requirements are distinct.

Further, a fair return cannot be established independently of the capital struc-

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20 American Gas Foundation, *Regulatory Policy of Return on Equity: Review and Analysis of the Natural Gas Utility Sector* (December 2008), p. 4.

21 National Energy Board, *Review of the Multi-Pipeline Cost of Capital Decision*, Decision Letter, RH-2-94, 8 October 2009.

ture. The reassessment of a fair return must take into account not only the return on equity (ROE), but the capital structure as well. The comparable returns standard has not been met unless the overall return (comprising both capital structure and ROE) for Canadian utilities is commensurate with the overall returns of comparable companies.

Ideally, consideration should be given to reviewing the cost of capital in a forum that lends itself to a more open dialogue on the subject. The cost of capital is a complex subject and is typically reviewed in proceedings before regulatory tribunals that are inherently adversarial. The objectives of this alternative forum would include:

- Reaching a consensus on the requirements of the fair return standard;
- Defining parameters for selection of comparable risk enterprises and measuring comparable returns;
- Establishing quantitative benchmarks that could be used on an ongoing basis to track cost of equity trends; and
- Encouraging fresh thinking on methodologies for establishing the fair return.

Workshops similar to those that the National Energy Board held in the early 1990s on incentive regulation or the Ontario Energy Board's Natural Gas Forum, sponsored by CAMPUT, are one option.

If an automatic adjustment formula remains the instrument of choice for establishing the allowed return subsequent to a first principles reassessment of the fair return, there are a number of considerations that need to be taken into account.

1. The "base" return on equity can be determined using multiple tests, comparable return benchmarks, and informed judgment even though the automatic adjustment formula might rely on only one or two variables to make subsequent changes in the return. There is no compelling reason in setting the base return to focus solely on those tests that contain the same variables as the automatic adjustment formula. To illustrate, reliance on government bond yields as the variable for adjusting the allowed return does not dictate that only the equity risk premium test be used to set the base return.

2. The formula itself should be designed in such a way as to maximize the likelihood that the results adhere to the comparable returns standard throughout the formula's specified term. The fair return standard should not be sacrificed for simplicity. While reliance on observable and objective adjustment variables is key to the construction of a formula, if two such variables will provide a more accurate measure of the change in the cost of equity than one, the formula should incorporate two variables.

3. During the term of the formula, there should be specified alternative benchmarks that would be used to determine if the formula results are still on course. These benchmarks could be used for two purposes. First, they could be used as an off-ramp. If the formula produced results that were outside the range of changes in the benchmarks, a comprehensive review of the formula would be required. Examples of benchmarks that might be considered (assuming that they are not already incorporated in

the formula) include: changes in utility bond yields, changes in the DCF cost of equity for an agreed-upon sample of comparable companies, and changes in the allowed returns of comparable companies whose returns are not governed by formulas. Second, alternative benchmarks could be used to establish limits on the change in the return that the formula would otherwise call for. For example, an index of the allowed returns for comparable risk U.S. utilities could be created. Changes in the allowed returns of Canadian utilities could be limited to a prescribed relationship to changes in the index.

4. Although a formula may be appropriate for a reasonable period of time, a regular comprehensive review of the fair return is critical. The longer the formula is in place, the more likely it is that the results will veer off course. Similarly, the longer the formula is in place, the more important it is that specified alternative benchmarks are in place to establish, at a minimum, whether the formula results remain compatible with the fair return standard, and potentially, as indicated in 3. above, to specify limits on annual changes in the allowed returns.

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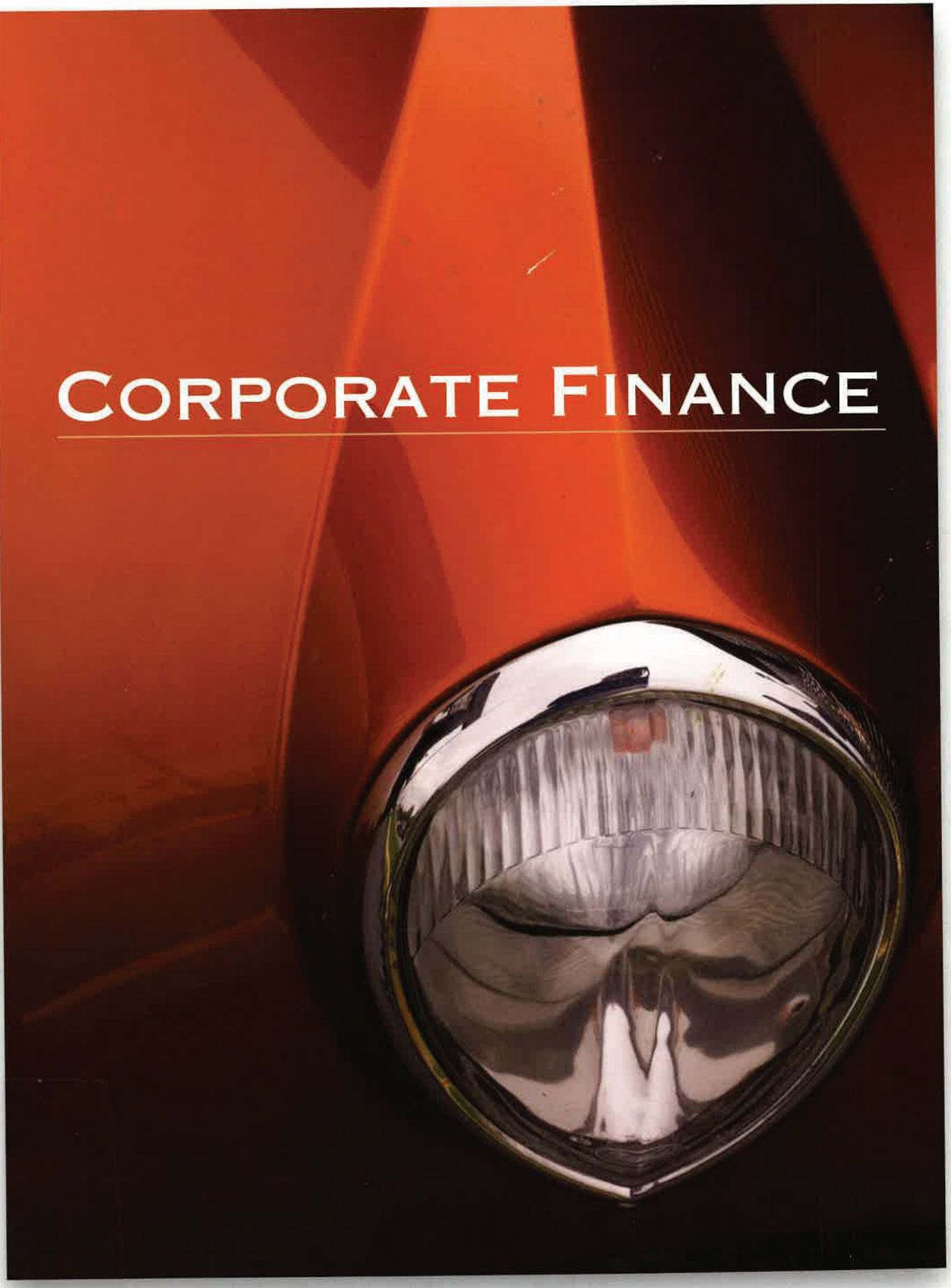
CORPORATE FINANCE



CORPORATE FINANCE

FINANCIAL MANAGEMENT IN A GLOBAL ENVIRONMENT

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EXAMPLE 9.4
Sharpe Ratios

PROBLEM

a. Calculate the Sharpe ratio for each of the following securities, assuming a risk-free rate of 3 percent:

Security	*Expected Return*	*Standard Deviation of Returns*
A	4%	3%
B	5%	5%
C	4.5%	7%
D	3.5%	2%

b. Which security has the best reward-to-risk ratio?

Solution

a.

Security	*Sharpe Ratio*
A	0.33
B	0.40
C	0.21
D	0.33

b. Security B has the highest Sharpe ratio.

stock has return of 6 percent and a standard deviation of returns of 7 percent. If the return on the risk-free security is 2 percent, the Sharpe ratio of the stock is 0.571:

$$\text{Sharpe ratio} = \frac{0.06 - 0.02}{0.07} = 0.5714$$

Concept Review Questions

1. What is the market price of risk according to the CML?
2. If the expected return on a diversified portfolio lies above the CML, should an investor buy or sell it?
3. When is the expected return equal to the required return?
4. Why is the Sharpe ratio frequently referred to as a "risk-adjusted" measure of performance?

9.3 THE CAPM AND MARKET RISK

The CML provides a method of estimating the required return on equity assets relative to their risk, but it applies only to efficient portfolios and not to individual securities. In addition, the risk premium is based on portfolio risk, as measured by the standard deviation of the return on the portfolio. In financial management, we are usually concerned with the risk associated with individual firms and the required return for investing in them. From the principles of diversification, we know that as the number of securities included

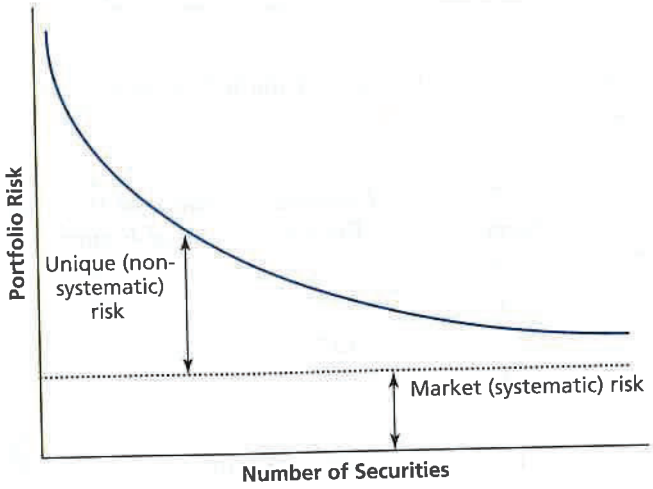

FIGURE 9-8 Portfolio Risk and Diversification

in a portfolio increases, unique (nonsystematic or diversifiable) risk is eliminated, and only market (systematic or nondiversifiable) risk remains. We depict this relationship in Figure 9-8.

We show the average risk of an individual security in Figure 9-8, where the curve gets very close to the vertical axis, that is, a one-stock portfolio. Therefore, by randomly building diversified portfolios, the risk of a portfolio falls until it reaches a baseline, and we cannot reduce risk below this market level. What this means is that part of an asset's risk is diversifiable. Further, if it can be diversified away by holding a portfolio of more than, say, 20 different assets, it is not important to rational investors. This is the key insight of the CAPM.

GLOBAL PERSPECTIVE | Is There Still a Benefit from International Diversification?

The implication of modern portfolio theory and the capital asset pricing model is that investors can benefit from holding a well-diversified portfolio. Investing internationally has been seen as one way to enhance diversification, reducing the level of market risk below the level available domestically. This is because different countries have different economic growth and different timing and extent of expansions and contractions in their business cycle.

But is this still true? With market integration on a global scale, increased international trade and flow of funds, and increased cooperation among central banks in times of economic stress, is there still diversification benefit from investing internationally?

Much of the evidence suggests that there is a little benefit from international diversification in developed markets, but some diversification benefit remaining in emerging markets, where an emerging market is a market in an economy in which there is low to middle per capita income.[9] Therefore, an investor in the U.S. is not likely to achieve much diversification by investing in Germany or Japan. But a U.S. investor may achieve diversification by investing in Morocco or Indonesia.

So, yes, it is possible to reduce risk by investing internationally, but the benefit depends on which country.

[9] Peterson Christoffersen, Vihang R. Errunca, Kris Jacos, and Xisong Jin, "Is the Potential for International Diversification Disappearing?" working paper, March 16, 2010, Available at SSRN: ssrn.com/abstract=1573345.

Beta

In the CAPM, rational investors are not compensated for unique or diversifiable risk because it can be eliminated through diversification. This implies that market risk is the appropriate measure of risk to determine the risk premium required by investors for holding a risky security. We now introduce a new term, **beta (β_i)**, which is a commonly used measure of market risk that relates to the extent to which the return on an asset moves with that on the overall market.

beta (β_i) measure of market risk, or performance volatility, that relates the extent to which the return on an asset moves with that on the overall market; the covariance between an investment and the market divided by variance of the market

We typically estimate beta by first plotting the returns on an individual security on the vertical axis relative to the returns for the market, which we plot along the horizontal axis, and then fitting a line through the observations, as we show in Figure 9-9. The line is the **characteristic line**, and we determine it by using a statistical technique called regression analysis. Regression is a statistical method of determining the best fitting line that depicts the relationship between two variables; in this case, between the return on an asset and the return on the market portfolio. The slope of the line is the asset's beta coefficient. For example, in Figure 9-7, the slope coefficient is 0.85, which indicates that if the return on the market portfolio goes up or down by 1.0 percent, the return on this asset is expected to go up or down by 0.85 percent, respectively; that is, it changes by 0.85 of the return on the market.[10]

characteristic line line of best fit through the returns on an individual asset, plotted on the vertical axis, relative to the returns for the market, plotted along the horizontal axis

Estimating beta coefficients is tricky because we are interested in the extent that an asset's returns move with the market over a future period. We typically estimate beta coefficients by using historical data, which assumes that what has happened in the past is a good predictor for the future. Typically, betas for securities are estimated by using 60 months of monthly returns, but sometimes 52 weekly returns are used. Betas change through time as the risk of the underlying asset or portfolio changes. This is particularly important for individual securities, for which betas can change quite dramatically over relatively short periods. Conversely, betas estimated for large portfolios or for industries are much more stable because of averaging over many assets. Therefore, estimates of portfolio betas show less change from period to period and are much more reliable than are the estimates for individual assets.

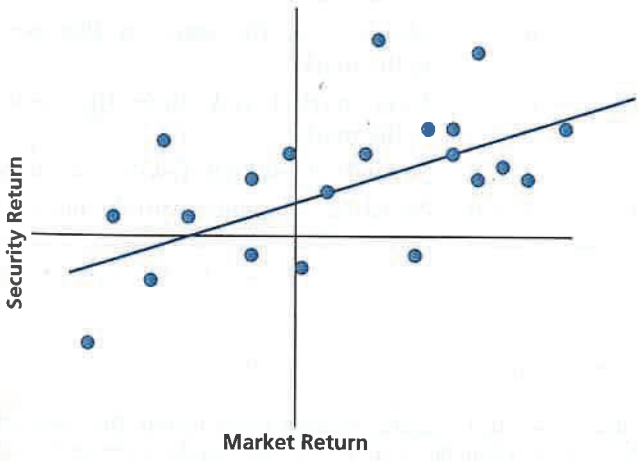

FIGURE 9-9 The Characteristic Line for Security A

[10] The characteristic line is also often estimated by using excess returns. The excess return is calculated by subtracting the risk-free rate from both the return on the stock and the return on the market. In excess return form, the same analysis applies.

Under some common statistical assumptions, we can estimate betas by using Equation 9-7:[11]

$$\beta_i = \frac{\text{Covariance of returns in security } i \text{ with the returns on the market portfolio}}{\text{Variance of the market portfolio's returns}} = \frac{COV_{i,M}}{\sigma_M^2} = \frac{\rho_{i,M}\sigma_i}{\sigma_M} \quad (9\text{-}7)$$

In Equation 9-7, we can see that the beta of an individual asset is the ratio of the covariance of that asset's return with the market, compared to the total variance of the market portfolio's returns.

Beta is a measure of the risk of an individual asset, stock, or portfolio relative to the market portfolio. A beta of 1 implies that if the market return increased (or decreased) by 1 percent, the return on the security (or portfolio) would, on average, increase (decrease) by 1 percent. Therefore, the market portfolio, by definition, has a beta of 1. An asset with a beta of 1.2 has returns that are 1.2 times as volatile as market returns, both up and down. In other words, if the market increased 10 percent, that security's returns would increase by 12 percent, and so on.[12]

Consider an example. Stock One has a beta of 0.8, whereas Stock Two has a beta of 1.2. If the returns on the market increase by 3 percent, we expect:

- Stock One returns to increase by $0.8 \times 0.03 = 0.024$ or 2.4%
- Stock Two returns to increase by $1.2 \times 0.03 = 0.036$ or 3.6%

If the returns on the market decline by 3 percent, we expect:

- Stock One returns to decline by $0.8 \times 0.03 = 0.024$ or 2.4%
- Stock Two returns to decline by $1.2 \times 0.03 = 0.036$ or 3.6%

SUMMARIZING: BETAS AND MARKET RISK

Beta		*Market Risk*
Greater than 1.0	$\beta_i > 1$	More market risk than the average security in the market
Equal to 1.0	$\beta_i = 1$	Market risk the same as the average security in the market
Less than 1.0	$\beta_i < 1$	Less market risk than the average security in the market
0	$\beta_i = 0$	No market risk (e.g., risk-free security)
Less than 0.0	$\beta_i < 0$	Negative correlation with the market return[13]

[11] The characteristic line is also often estimated by using excess returns. The excess return is calculated by subtracting the risk-free rate from both the return on the stock and the return on the market. In excess return form, the same analysis applies.

[12] You may notice that beta is an elasticity measure: It captures the sensitivity of the return on the stock to changes in the return on the market.

[13] According to Equation 9-7, negative betas can only occur if an asset has a negative correlation coefficient with market returns, which is uncommon. This is the only way a negative beta is possible because the standard deviation terms in Equation 9-7 are always positive. Gold stocks have sometimes had negative betas because the price of gold tended to go in the opposite direction of the market; investors would invest in gold when they were nervous about future market movements. However, this relationship is not as strong as it used to be, and negative betas rarely occur, even for gold stocks.

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2023 Generic Cost of Capital

March 31, 2022

Alberta Utilities Commission
Decision 27084-D01-2022
2023 Generic Cost of Capital
Proceeding 27084

March 31, 2022

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1 Decision summary

1. In this decision, the Alberta Utilities Commission approves the return on equity (ROE) of 8.5 per cent and deemed equity ratio of 37 per cent, except for an approved deemed equity ratio for Apex Utilities Inc. of 39 per cent (together, the ROE and deemed equity ratios are also referred to as "parameters") for 2023 on a final basis. The established parameters apply to the following utilities:

- AltaLink Management Ltd.[1]
- Apex Utilities Inc.[2]
- ATCO Electric Ltd.[3]
- ATCO Gas & Pipelines Ltd.[4] [5]
- ENMAX Power Corporation[6]
- EPCOR Distribution & Transmission Inc.[7]
- FortisAlberta Inc.[8]
- KainaiLink L.P.[9]
- City of Lethbridge[10]
- PiikaniLink L.P.[11]
- The City of Red Deer[12]
- TransAlta Corporation[13]

[1] Electricity transmission, including AltaLink Management Ltd. as general partner of AltaLink L.P., KainaiLink L.P. and PiikaniLink L.P.
[2] Natural gas distribution.
[3] Electricity transmission and distribution. Unless otherwise indicated, a reference to ATCO Electric includes both the transmission and distribution operations of this utility.
[4] ATCO Gas refers to the utility's natural gas distribution operations. ATCO Pipelines refers to the utility's natural gas transmission operations.
[5] Collectively, ATCO Electric, ATCO Gas and ATCO Pipelines are referred to as the ATCO Utilities.
[6] Electricity transmission and distribution. Unless otherwise indicated, a reference to ENMAX refers to both the transmission and distribution operations of this utility.
[7] Electricity transmission and distribution. Unless otherwise indicated, a reference to EPCOR refers to both the transmission and distribution operations of this utility.
[8] Electricity distribution.
[9] Electricity transmission. The Commission approved the transfer of specific transmission assets from AltaLink to KainaiLink L.P. in Decision 22612-D01-2018: AltaLink Management Ltd., AltaLink L.P. Transfer of Specific Transmission Assets to PiikaniLink L.P. and KainaiLink L.P. and the Associated 2017-2018 General Tariff Applications, Proceeding 22612, November 13, 2018.
[10] Electricity transmission.
[11] Electricity transmission. The Commission approved the transfer of specific transmission assets from AltaLink to PiikaniLink L.P. in Decision 22612-D01-2018.
[12] Electricity transmission.
[13] Electricity transmission.

2. The parameters set out in this decision do not apply to EPCOR Energy Alberta GP Inc., ENMAX Energy Corporation and Direct Energy Regulated Services because these entities are regulated rate providers pursuant to the *Electric Utilities Act* and the *Regulated Rate Option Regulation*. Similarly, the parameters in this decision do not apply to Direct Energy Regulated Services as a default supply provider under the *Gas Utilities Act* and the *Default Gas Supply Regulation*.

3. The parameters for the various investor-owned water utilities under the Commission's jurisdiction were not determined in this proceeding. However, the determinations in this proceeding may be considered in other Commission proceedings, should issues respecting ROE and deemed equity ratios arise in the regulation of investor-owned water utilities.

2 Background and procedural summary

4. In each of the *Public Utilities Act*, the *Gas Utilities Act* and the *Electric Utilities Act*, the Commission is required to set a fair return for utilities as a component of setting just and reasonable rates.[14] It has been the Commission's practice to consider the components of a fair return, namely the ROE and deemed equity ratio, for all utilities it regulates in a generic cost of capital (GCOC) proceeding.[15]

5. While each of the aforementioned statutes requires the Commission to determine a fair return, there is no prescribed method for doing so.[16] Rather, as recently confirmed by the Alberta Court of Appeal, the Commission has broad discretion in determining what factors are relevant in setting a fair return.[17] Determining just and reasonable rates requires the Commission to balance the interests of both the utility and its customers.[18] Rates must provide the utility a reasonable opportunity to earn a fair return on invested capital, while also ensuring that customers are not paying more than is required to maintain safe, reliable and economic service. In applying its judgment, the Commission often assesses conflicting evidence on risk, including the differing interests and perspectives of debt and equity investors.[19]

6. The Commission and its predecessors have accepted and considered the following three factors when setting a fair return: comparable investments, capital attraction, and financial integrity.[20] The Commission considers these factors to be well established and continues to be satisfied that the fair return standard is met when the return satisfies these three factors, while also understanding that a fair return is one component of the Commission's determination of just and reasonable rates. Another component of just and reasonable rates is a reasonable opportunity to recover costs and expenses including capital costs, operating costs, taxes and depreciation.

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14 *Public Utilities Act*, Section 90(1); *Gas Utilities Act*, Section 37(1); *Electric Utilities Act*, sections 121(2)(a) and 122(1)(a)(iv).

15 The Commission addressed the fair return standard in Decision 2009-216: 2009 Generic Cost of Capital, Proceeding 85, Application 1578571-1, November 12, 2009.

16 See Decision 2009-216, paragraphs 89, 93 and 98.

17 *The Office of the Utilities Consumer Advocate v Alberta Utilities Commission*, 2021 ABCA 336, paragraph 16.

18 For example, see the seminal case of *Northwestern Utilities Ltd. v Edmonton (City)* [1929] SCR 186, pages 192-193.

19 Decision 2009-216, paragraph 110.

20 Decision 2009-216, paragraphs 92-98.

7. Over the past 20 years, the Commission has used various methods to determine the ROE and deemed equity ratios. Historically, the Commission's predecessors considered these parameters for each utility on a case-by-case basis. For the 2004 test year, the Commission set a generic (i.e., the same) ROE for all utilities and adopted an adjustment mechanism formula to determine the ROE in subsequent years.[21] The formula was used from 2005 to 2008, and then the global financial recession of 2007 to 2009 led the Commission to deviate from the formula-based approach.

8. Starting in 2009, the Commission set the ROE based on economic and financial evidence filed by parties in GCOC proceedings, rather than on the formula-based methodology. In these proceedings, parties submitted a broad range of economic and financial evidence, including trends in Canadian and global capital markets; interest rates; bond yields; utility betas;[22] market volatility measures; and monetary policy considerations, among other variables and indicators that were employed in various financial models, to arrive at expectations of reasonable return. From 2009 to 2020, the Commission established the ROE and deemed equity ratios for a series of two- to three-year test periods. The parameters were set following intensive regulatory processes in GCOC proceedings, including oral hearings.

9. For 2021 and 2022, the Commission maintained an ROE of 8.5 per cent and a deemed equity ratio of 37 per cent (39 per cent for Apex Utilities Inc.).[23] These decisions were premised on the Commission's finding that the economic and market data that would normally be used to inform its judgment regarding a fair return were in a state of significant flux, in light of the COVID-19 pandemic. The decisions also took into account that there was conflicting evidence (some of which supported the need for increased returns, some of which supported decreased returns), and that it was not clear that additional process, like that used by the Commission in the period between 2009 and 2020, would provide any greater assurance that the resulting rates would be just and reasonable. Ultimately, the Commission concluded that there was an inadequate basis for departing from the currently approved parameters.

10. On January 3, 2022, the Commission initiated the present 2023 GCOC proceeding and issued a letter[24] informing interested parties that it was bifurcating this proceeding, with the first stage establishing the parameters for 2023, and the second stage focusing on 2024 and future years. This decision relates to the first stage.

11. In reaching the determinations set out within this decision, the Commission has considered all relevant materials comprising the record of this proceeding. 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 a particular matter.

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[21] Decision 2004-052: Generic Cost of Capital, AltaGas Utilities Inc., AltaLink Management Ltd., ATCO Electric Ltd. (Distribution), ATCO Electric Ltd. (Transmission), ATCO Gas, ATCO Pipelines, ENMAX Power Corporation (Distribution), EPCOR Distribution Inc., EPCOR Transmission Inc., FortisAlberta (formerly Aquila Networks), NOVA Gas Transmission Ltd., Proceeding 13130, Application 1271597-1, July 2, 2004.

[22] β, or beta, measures the sensitivity of a required return of an individual security to changes in the market return.

[23] Decision 24110-D01-2020: 2021 Generic Cost of Capital, Proceeding 24110, October 13, 2020; and Decision 26212-D01-2021: 2022 Generic Cost of Capital, Proceeding 26212, March 4, 2021.

[24] Exhibit 27084-X0004, AUC letter - Proceeding to determine fair return starting in 2023.

3 2023 parameters and completion of current GCOC proceeding

12. Recognizing the lingering uncertainty and continued volatility of financial markets due to the COVID-19 pandemic, the Commission indicated in correspondence dated January 3, 2022, its preparedness to extend for an additional year the cost-of-capital parameters previously approved for 2022. However, before making its decision, the Commission provided all interested parties in this proceeding an opportunity to comment on its proposal to maintain the status quo for another year, i.e., 2023.

13. In the sections that follow, the Commission discusses parties' responses and the reasons for the Commission's determination to maintain the ROE and deemed equity ratios for 2023 consistent with the approved parameters for 2022.

14. The Commission's reasons can be briefly summarized as follows:

(a) Although the utilities provided evidence to support higher cost-of-capital parameters for 2023, they were prepared to accept extending the 2022 parameters to the end of 2023. One customer group (The City of Calgary) was amenable to such an outcome as well.

(b) The evidence on some of the key economic indicators and market conditions shows upward pressure associated with inflation and interest rates. Other indicators such credit spreads and market equity risk premium (MERP) remain largely stable. Market volatility remains elevated, making it difficult to forecast relevant economic conditions for 2023. The evidence on business risk is mixed.

(c) Submissions from a customer group regarding the use of formulas led to proposed ROEs that were very close to 8.5 per cent, and recent decisions from other Canadian regulators provided additional validation that the current ROE is reasonable and represents a fair return.

(d) There are significant costs associated with a fully contested GCOC proceeding. The Commission considers that adding further process to the present proceeding would not permit prospective rates (which in turn can increase utilities' risk and future rates). In addition, the Commission is not persuaded that these additional costs, which are ultimately borne by customers, can be justified in this case.

15. The Commission's reasons are outlined in detail in the sections that follow.

3.1 Support from stakeholders

16. The utilities and one of the customer groups, Calgary, did not object to keeping the parameters for 2023 the same as the approved parameters for 2022. Each provided reasons to support the continuation of the approved parameters for 2023. While all of the utilities submitted that the ROE for 2023 should increase,[25] and ENMAX[26] and ATCO/Fortis/Apex[27] also argued that the deemed equity ratio should increase, each of the utilities was prepared to accept keeping

[25] Exhibit 27084-X0023, AltaLink/EPCOR, paragraph 5. Exhibit 27084-X0028, ATCO/Apex/Fortis, PDF page 1. Exhibit 27084-X0025, ENMAX, PDF pages 1-2.
[26] Exhibit 27084-X0025, ENMAX, PDF page 2.
[27] Exhibit 27084-X0028, ATCO/Apex/Fortis, PDF page 2. Exhibit 27084-X0032, Fortis, PDF pages 1-3.

the ROE and deemed equity ratios for 2023 the same as the approved parameters for 2022, in light of other considerations.[28] Calgary identified certain economic factors and circumstances that favour keeping the parameters the same and, ultimately, did not object to such an outcome.[29] The Commission considers this unanimous support from the utilities, and partial support from the customer groups, weighs in favour of the Commission's proposal.

17. The Commission also took into consideration submissions of parties that opposed keeping the parameters for 2023 the same, namely views of the Office of the Utilities Consumer Advocate (UCA) and the Consumers' Coalition of Alberta (CCA). The Commission discusses pertinent parts of these parties' submissions below.

3.2 Key economic and market conditions

18. Generally, the Commission considers a number of key economic indicators and financial market conditions in determining a just and reasonable ROE and deemed equity ratios. These include the interest rate environment, credit spreads and market volatility, as well as some other indicators that serve as inputs to, and guide the outcome of, the capital asset pricing model (CAPM). While some of these conditions were relatively stable, others have shifted materially over the last two years with the most prominent being substantial changes in inflation. Market volatility, and inflationary pressures especially with respect to food and energy prices, have been amplified by the geopolitical risks, uncertainty, and global economic ramifications of the largest land war the world has witnessed in 75 years triggered by Russia's recent invasion of Ukraine.

19. The Commission finds that the evidence before it shows upward pressure associated with inflation and interest rates. Other indicators such as credit spreads and MERP remain largely stable. Market volatility remains elevated, making it difficult to forecast relevant economic conditions for 2023. The evidence on business risk is mixed. These observations are discussed below.

3.2.1 Inflation, interest rate increase and credit spreads

20. In their submissions,[30] utilities made reference to the Bank of Canada (BoC) increasing its policy interest rate, and potential rate increases from both the BoC and the United States Federal Reserve in the upcoming year. The utilities referred to the BoC's latest Monetary Policy Report[31] and viewed the BoC's projections and commentary as an indication of future interest rate increases. The utilities made note of the BoC's overview of the Canadian economy, which highlighted recent developments such as increased inflationary pressures and absorbed economic slack.[32] AltaLink/EPCOR provided data from Statistics Canada showing the year-over-year growth rate in the Canadian consumer price index peaking at 4.8 per cent in December 2021. This was higher than the maximum annual growth rates seen in 2018, 2019 or 2020, and showed no indication of subsiding. These parties stated that the duration and extent of inflationary

[28] Exhibit 27084-X0023, AltaLink/EPCOR, paragraph 5. Exhibit 27084-X0028, ATCO/Apex/Fortis, PDF page 2. Exhibit 27084-X0025, ENMAX, PDF pages 1-2.
[29] Exhibit 27084-X0021, Calgary, paragraphs 17-18.
[30] Exhibit 27084-X0023, AltaLink/EPCOR, paragraphs 11-16, and exhibits 27084-X0025, 27084-X0029 and 27084-X0030.
[31] https://www.bankofcanada.ca, Bank of Canada, Monetary Policy Report, January 2022.
[32] Exhibit 27084-X0030, Appendix B, R. Buttke evidence, PDF page 1. Exhibit 27084-X0023, AltaLink, paragraph 14. Exhibit 27084-X0025, ENMAX, PDF pages 9-10.

pressure cannot be reasonably forecast.[33] J. Coyne for ENMAX concluded that "getting inflation under control will take several years."[34]

21. The UCA also referred to comments from the BoC's January 2022 Monetary Policy Report,[35] indicating that uncertainty regarding its inflation outlook was high, but lower than that found in previous monetary policy reports.

22. Overall, the utilities submitted that they view inflation and interest rates as positively correlated with authorized ROEs and, with all else equal, the expected future path of the policy interest rate should place upward pressure on authorized ROEs and other rates of return in the capital markets. The Commission notes that the BoC increased its target monetary policy interest rate on March 2, 2022.[36]

23. The Commission observes that higher interest rates are likely to affect expected utility returns. While interest rates are expected to increase, the magnitude of BoC rate increases (timing and scale of monetary policy rate change) is unknown. This adds a layer of uncertainty in establishing equity risk premiums and expected return values, absent reliance on a formula-based methodology. Under the circumstances, the Commission finds: (i) the utilities' preparedness to accept the current ROE of 8.5 per cent, coupled with (ii) the ongoing and pervasive uncertainty regarding the timing and extent of future changes in inflation and interest rates, including the potentially significant impact on global food and energy prices occasioned by Russia's invasion of Ukraine at the end of February 2022, supports a continuation of the current GCOC parameters into 2023, while moving forward with consideration of a formula-based approach in 2024.

24. Interveners submitted that utility credit spreads[37] are within the same range as credit spreads for debt issued by utilities in 2020 and 2018. The CCA[38] noted that credit spreads for ATCO Electric Distribution and ATCO Pipelines, when they issued debt in September 2020, was less than the cost of ATCO Electric Transmission's debt in 2018, which was the year of the last fully litigated GCOC proceeding. The CCA also noted that AltaLink issued debt with a smaller credit spread than previous debt issues, and ENMAX Distribution issued 10-year debt in 2020 at roughly the same spread as in June 2018. The CCA also submitted U.S. data as of February 2022 for corporate A-rated debentures showing a cost of debt at 42 basis points below the 25-year average, and 14 basis points above the one-year trend.

25. The UCA[39] referenced the spread between 30-year Canadian A-rated utility bonds and the yield on 30-year Government of Canada bonds (A-rated utility credit spreads). The utility credit spread was at 1.39 per cent in January 2022, which is very close to the long-term average of 1.40 per cent. The same credit spread data in March 2018 was reported to be 1.30 per cent.

26. Consistent with past GCOC decisions, the Commission views credit spreads as a measure of utility bond investors' risk perceptions and return expectations of utility investors. The spread

33 Exhibit 27084-X0023, AltaLink/EPCOR, paragraph 11.
34 Exhibit 27084-X0025, ENMAX, PDF page 13.
35 Exhibit 27084-X0031, UCA, paragraph 11.
36 https://www.bankofcanada.ca, Bank of Canada increases policy interest rate - Bank of Canada, March 2, 2022.
37 Credit spreads are the difference between the yield for a government bond (i.e., Bank of Canada or U.S. Treasury) and the debt securities of corporations (i.e., utilities). A higher credit spread indicates a higher level of risk.
38 Exhibit 27084-X0026, CCA, PDF pages 4-6.
39 Exhibit 27084-X0031, UCA, PDF page 7.

measured by the difference between 30-year Canadian A-rated utility bonds and 30-year Government of Canada bonds is similar to levels in March 2018, when the parameters were set in the 2018 GCOC decision. The Commission finds that the credit spread data submitted by the interveners indicates that this measure has not deviated significantly since 2018.

3.2.2 Market equity risk premium

27. In the 2018 GCOC proceeding, Dr. Villadsen, on behalf of Apex/ATCO Utilities,[40] provided the following description of the MERP:

> Like the cost of capital itself, the market equity risk premium is a forward-looking concept. It is by definition the premium above the risk-free interest rate that investors can expect to earn by investing in a value-weighted portfolio of all risky investments in the market. The premium is not directly observable, and must be inferred or forecasted based on known market information.[41]

28. Estimates of a forward-looking MERP are used as an input in the CAPM and the empirical capital asset pricing model (ECAPM). The greater is the estimate of the forward-looking MERP, the higher will be the ROE generated by the CAPM and the ECAPM, all else being equal. Different approaches can be used to estimate the forward-looking MERP.[42]

29. In the present proceeding, both the CCA and Dr. Villadsen presented Canadian MERP data; however, while the CCA relied on annual values, Dr. Villadsen focused on monthly data with special emphasis on January 2022. On this basis, she submitted that the forward-looking MERP has increased markedly since the 2018 GCOC decision was issued and since the submission of her evidence in the 2021 GCOC proceeding. She submitted that on average in January 2022, the Canadian forward-looking MERP was 11.07 per cent, which is nearly double the historical average of 5.68 per cent and well above the current U.S. forward-looking MERP of 8.12 per cent.[43] With reference to the annual MERP data, the CCA submitted that measures of the equity risk premium have remained largely stable. In support of this view, the CCA provided a table, based on publicly available sources of MERP, showing U.S. and Canadian premiums from 2011 to 2022.[44] The CCA submitted that the data and other factors support a downward adjustment to the Commission-approved MERP.[45]

30. Dr. Villadsen did not explain why the Canadian forward-looking MERP estimate in January 2022 was much higher than the historical average and much higher than the U.S. forward-looking MERP. Dr. Villadsen's monthly chart shows that MERP values demonstrated some marked "peaks and valleys" in 2020 and 2021; however, the annual average MERPs remained stable as the CCA's data shows. In the absence of any information and support from Dr. Villadsen on whether January 2022 is indicative of a long-term trend or whether it is a temporary change that is expected to reverse, the Commission places greater weight on the data presented by the CCA, which shows that the average annual MERP has remained largely stable

[40] The ATCO utilities are ATCO Electric - Distribution; ATCO Gas; ATCO Electric - Transmission; and ATCO Pipelines.
[41] Decision 22570-D01-2018: 2018 Generic Cost of Capital, Proceeding 22570, August 2, 2018, paragraph 300.
[42] Dr. Villadsen's description of two approaches is quoted in paragraph 300 of Decision 22570-D01-2018.
[43] Exhibit 27084-X0029, Appendix A - Dr. Villadsen evidence, PDF pages 4-5.
[44] Exhibit 27084-X0026, CCA, PDF page 12, paragraph 39.
[45] Exhibit 27084-X0026, CCA, PDF page 14, paragraph 41.

since 2018, and finds that the data supports a continuation of the current GCOC parameters into 2023.

3.2.3 Market volatility

31. The utilities highlighted persistent heightened market volatility, and the lack of certainty and clarity in available market data. AltaLink/EPCOR[46] referenced that market volatility reached an all-time high during 2020, and remains highly variable. Using the VIX[47] index as a short-term measure, AltaLink commented that the market was at least 30 per cent more volatile compared to historical norms. ENMAX[48] provided similar evidence of heightened market volatility: Canadian and U.S. volatility indexes were still relatively high compared to five-year averages.

32. J. Coyne for ENMAX submitted that investor perceptions of market volatility and expected return, as measured by utility betas, have changed. Data submitted indicated that proxy utility betas were 23 per cent to 38 per cent higher in January 2022 compared to January 2020.[49]

33. The CCA[50] submitted that it is not clear that the VIX has a substantial effect on the risk premium and expected return demanded by investors. The CCA noted that the correlation between the VIX index and equity risk premium has declined over the last decade.

34. The UCA[51] submitted that the VIX and credit spreads were both within the long-term average, and that there was no basis in maintaining the status quo for the GCOC parameters. The UCA noted the VIX was near its long-term average of 20 at the time of its submission in this proceeding.

35. Parties' submissions also diverged when it came to the timeframe over which a VIX index should be observed, with the UCA emphasizing "that volatility has decreased"[52] within the 2018-2022 range, while Robert Buttke, on behalf of ATCO Utilities/Apex/Fortis, stated that the "VIX index remains well above its twenty-year historical average."[53] R. Buttke further submitted that with the BoC and U.S. Federal Reserve on the cusp of instituting quantitative tightening, the balance of volatility risks remains solidly toward the upside.[54]

36. Consistent with its determinations in past GCOC decisions, the Commission considers market volatility to be relevant to determining the parameters.[55] In the Commission's view, the heightened volatility and the uncertain outlook remain present and are likely to affect economic and market fundamentals in 2023. The Commission acknowledged this environment in its last GCOC decision, where it referenced AltaLink/EPCOR emphasizing "the COVID-19 pandemic and other related global events that continue to elevate capital market volatility, as well as economic uncertainty, potentially extending through 2021 and beyond, therefore making it

46 Exhibit 27084-X0023, PDF pages 3 and 13.
47 Chicago Board Options Exchange Volatility Index (VIX), measures the 30-day implied volatility of the S&P (Standard and Poor's) 500 index (representing the stock market in the U.S.).
48 Exhibit 27084-X0025, ENMAX, PDF pages 17-18, Table 1.
49 Exhibit 27084-X0025, ENMAX, PDF page 18.
50 Exhibit 27084-X0026, CCA, PDF page 9.
51 Exhibit 27084-X0031, UCA, PDF page 5.
52 Exhibit 27084-X0031, UCA, paragraph 12.
53 Exhibit 27084-X0030, Appendix B - Mr. Buttke evidence, PDF page 4.
54 Exhibit 27084-X0030, Appendix B - Mr. Buttke evidence, PDF page 4.
55 Decision 26212-D01-2022, paragraph 19. Decision 20622-D01-2016: 2016 Generic Cost of Capital, Proceeding 20622, October 7, 2016, paragraphs 90-91.

impossible to forecast relevant economic conditions for 2022 with any reasonable degree of accuracy."[56] Overall, the Commission finds market volatility remains elevated, making it difficult to forecast relevant economic conditions for 2023. This lends further support to a rollover of GCOC parameters into 2023.

3.2.4 Business risk and earning above awarded ROE

37. Parties submitted conflicting assessments of changes to business risk since the 2018 GCOC decision. The ATCO Utilities/Apex/Fortis[57] submitted that there have been significant transformations occurring in the utility industry since 2018, including emphasis on decarbonization; a focus on environmental, social and governance standards; the need for grid modernization; and changes in the way in which customers are receiving utility service. These utilities stated that they are directly affected by these transformations, and these changes engender risk and uncertainty for utilities at a level seldom witnessed in the past.[58]

38. J. Coyne, on behalf of ENMAX, pointed to renewable energy investments and high capital expenditure plans in an increasing interest rate environment as contributors to the observed elevated utility risk.[59] Fortis engaged Dr. Toby Brown of the Brattle Group to assess the business risk of utilities in Alberta. Dr. Brown concluded that the business risk of the utilities in Alberta in 2023 remains elevated and may have increased since the 2021 GCOC proceeding.[60]

39. The UCA submitted that there has been no change in business risk since the 2018 GCOC decision was issued. It stated that the COVID-19 pandemic appeared to have little effect on the utilities' ability to provide safe and reliable service, and submitted that this confirms the utilities continue to have low business risk and operate within a supportive regulatory environment.[61] The CCA submitted that financial risk and regulatory risk are lower now than they were at the time of the 2018 GCOC proceeding. It noted the reduction in regulatory lag and stated that utility asset disposition risk has been largely eliminated.[62]

40. Some customer groups pointed to the utilities achieving actual ROEs in excess of the Commission-approved ROEs. For example, Calgary noted that ATCO Gas has been remarkably consistent in earning in excess of its approved ROE over the last four years, even when the economy at large has been decimated. It submitted that this indicates minimal business risk for ATCO Gas.[63] The Industrial Power Consumers Association of Alberta (IPCAA) submitted that over the last 10 years, most of the utilities in Alberta have been earning an ROE above the Commission-approved ROE.[64]

41. The Commission considers that historical earnings above or below the approved ROEs do not help it to determine what the ROE for a future test period should be. The Commission agrees with the following submissions made by AltaLink/EPCOR:

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56 Decision 26212-D01-2021, paragraph 13.
57 The ATCO utilities, Apex and Fortis filed a joint submission on the record, which is in Exhibit 27084-X0028.
58 Exhibit 27084-X0028, ATCO/Apex/Fortis, page 2.
59 Exhibit 27084-X0025, ENMAX, PDF page 18.
60 Exhibit 27084-X0032, Fortis, PDF pages 6-7.
61 Exhibit 27084-X0031, UCA, paragraphs 33-36.
62 Exhibit 27084-X0026, CCA, paragraph 53.
63 Exhibit 27084-X0021, Calgary, paragraph 38.
64 Exhibit 27084-X0024, IPCAA, paragraphs 7-9.

> Invariably, whether or not a utility earns its approved ROE in a given year will depend on utility specific matters, such as the utility's O&M [operating and maintenance] and capital cost performance in that year. Although these matters may be relevant to the regulation of a utility's revenue requirement (whether under cost of service regulation or performance-based regulation), they are not relevant in the context of establishing fair return within a GCOC proceeding.[65]

42. The Commission notes the conflicting evidence and positions of parties with respect to indicators of business risk and whether business risk is increasing or decreasing. The Commission is not persuaded that there is a quantifiable shift in business risk that would require either an increase or decrease in the deemed equity ratios for 2023.[66]

3.3 Comparable returns on equity

43. Some interveners referenced approved ROEs and ongoing GCOC proceedings from other jurisdictions. Calgary, for example, highlighted[67] two recent determinations of the Newfoundland and Labrador Board of Commissioners of Public Utilities and the New Brunswick Energy and Utilities Board. Both cases resulted in an approved ROE of 8.5 per cent through either a negotiated settlement or an award by a board. In Calgary's view, this is another circumstance accentuating that "the roll-over of 2022 GCOC parameters into 2023 should assure Customers with the comfort that distribution rates will not rise once again due to any parameter adjustments in 2023."[68]

44. The UCA used the Ontario Energy Board's (OEB) formula and, using the Commission's last approved ROE of 8.5 per cent as the base, along with certain market data values as recent as of January 18, 2022, arrived at a calculated ROE of 8.37 per cent. Alternatively, it noted that using a formula proposed by Dr. S. Cleary in the 2021 GCOC proceeding, updated with more current data, would produce an ROE of 8.3 per cent.[69] In the UCA's view, if the Commission was to set the ROE on a final basis without conducting further process, at a minimum, the approved ROE should be 0.27 per cent below the currently approved ROE of 8.5 per cent (i.e., 8.23 per cent).[70] The UCA also pointed to the ongoing GCOC proceeding at the British Columbia Utilities Commission (BCUC) notwithstanding "uncertainties in economic conditions, volatility in financial markets and changes in government policies."[71]

45. While all utilities supported keeping the ROE at 8.5 per cent, some utilities submitted evidence that current economic indicators would actually lead to a higher ROE for 2023 (as well as higher deemed equity ratios), if the Commission was to carry out a full GCOC proceeding.

46. AltaLink and EPCOR identified a number of relevant data points indicating that investor return expectations for utilities have increased, for example: (i) high inflation puts an upward pressure on interest rates and, as a result, investor-required returns on utility investments;

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65 Exhibit 27084-X0023, AltaLink/EPCOR, paragraph 27.

66 Since the 2009 GCOC decision, it has been the Commission's practice to establish an ROE that uniformly applies to all of the affected utilities and account for particular business risks faced by the affected utilities by incorporating any required adjustments into their respective approved deemed equity ratios, either collectively or on an individual basis.

67 Exhibit 27084-X0022, Calgary, paragraph 31.

68 Exhibit 27084-X0022, Calgary, paragraph 46.

69 Exhibit 27084-X0031, UCA, paragraphs 28-31.

70 Exhibit 27084-X0031, UCA, paragraph 27.

71 Exhibit 27084-X0031, UCA, paragraph 6.

(ii) a higher level of required return for debt instruments, which would correspond to a greater cost of common equity; and (iii) the upward directional movement of beta coefficients indicating an elevated level of observed investor risk and requiring a higher level of return to compensate investors for the additional risk. Nevertheless, AltaLink and EPCOR submitted that when all factors relevant to the Commission's statutory mandate and approval process are considered, it is just and reasonable that the Commission extend the current parameters into 2023 on a final basis.[72]

47. The Commission notes that matching the ROE and deemed equity ratios awarded by other regulators, on its own, does not satisfy the fair return standard, nor does it establish just and reasonable rates. The objective of the GCOC is to consider the market expectation for the utilities raising capital necessary to provide safe and reliable utility service in Alberta. In setting the GCOC for the utilities in Alberta, other jurisdictions can be a useful indicator or benchmark for evaluating contemporaneous rates of return and whether return expectations are generally increasing or decreasing.

48. In this regard, the Commission observes that the ROEs from other jurisdictions noted by interveners or calculated using formulaic methodologies do not materially depart from the Commission's last approved 8.5 per cent figure and, hence, provide no justification for commencing a full-scale review process given the additional time and costs involved. The Commission also notes that the OEB's latest 2022 approved formulaic cost-of-capital parameters result in an ROE of 8.66 per cent, which is 0.16 per cent higher than the Commission's rate of 8.5 per cent (and represents an increase from the OEB's approved ROE in 2021).[73]

49. The Commission is also not persuaded by the UCA's argument that just because the BCUC is currently conducting a GCOC proceeding, the Commission should as well. Each regulator makes determinations based on its own circumstances and jurisdiction, using its discretion and the best information available to it. The Commission observes that the benchmark ROE of 8.75 per cent and the benchmark deemed equity ratio of 38.5 per cent last approved by the BCUC has been unchanged for nearly a decade, since January 1, 2013 (and reaffirmed part way in 2016)[74] and can be distinguished on that basis.

3.4 Prospectivity

50. Nearly all parties[75] highlighted the importance of ensuring prospectivity of the approved parameters and commended the Commission's significant efforts over the past several GCOC proceedings in this regard. This endeavour helps reduce regulatory lag related to the cost-of-capital element of rates. Parties also emphasized that there would be insufficient time to prepare, file and test relevant cost-of-capital material to permit new parameters to be in place before January 1, 2023. In this respect, the Commission notes that during one of the most recent GCOC proceedings,[76] parties requested between four weeks and six months of time to prepare their evidence.

[72] Exhibit 27084-X0023, AltaLink/EPCOR, paragraph 18.
[73] https://www.oeb.ca/sites/default/files/OEB-Ltr-2022-Cost-of-Capital-Update-20211028.pdf
[74] https://docs.bcuc.com/Documents/Proceedings/2021/DOC_60592_A-1-GCOC-Proceeding-Notice.pdf
[75] Exhibit 27084-X0023, AltaLink/EPCOR, paragraph 26; Exhibit 27084-X0028, ATCO/Apex/Fortis, PDF page 3; Exhibit 27084-X0021, Calgary, paragraph 8; Exhibit 27084-X0031, UCA, paragraph 57.
[76] Proceeding 26212, 2022 GCOC.

51. The UCA submitted that "the Commission's objective of prospectivity, while commendable, can and should always be subordinate to the objective of establishing a fair return based on the best available information."[77] The Commission agrees with this statement but it is also aware that a failure to maintain prospectivity can be a factor that results in unfairness, greater risk and uncertainty, and can put upward pressure on rates.

52. Furthermore, given the bifurcated process established by the Commission, timely conclusion of this first stage of the proceeding provides parties with certainty and finality of 2023 rates while allowing parties and the Commission time to focus on a second stage, which addresses 2024 and future years. This approach is expected to maintain prospectivity, and mitigate risk and cost increases for utilities and their customers.

3.5 Cost of proceedings

53. Full GCOC proceedings are resource intensive and costly to conduct. For example, the most recent fully contested 2018 GCOC proceeding had costs awards that totalled $1,503,869.[78] The total costs, including the Commission's own costs and the costs incurred by parties over and above the Commission's scale of costs, were in excess of $4 million. While the amount of awarded costs is not the primary consideration, it is a relevant one for the Commission as these costs are ultimately paid by ratepayers. In the present circumstances, the Commission is not persuaded that incurring these additional costs is justified or would result in a better overall outcome. This view was echoed by AltaLink and EPCOR who stated that a detailed GCOC proceeding for 2023 would be costly and inefficient and, in the end, would be unlikely to provide any greater assurance of a just and reasonable result.[79]

54. For 2023, the Commission considers that its objective of ensuring that utilities earn a fair return and customers pay just and reasonable rates can be met without undertaking complex, lengthy and costly further process. A full process is likely to be frustrated by the need for multiple, potentially significant updates due to the current market volatility and uncertainty as noted by experts and the parties. Evidence, updates to evidence and further regulatory process could result in further delays.

4 Conclusion

55. Given the considerations outlined in this decision, the Commission concludes that there is an inadequate basis to depart from the currently approved ROE and the deemed equity ratios (either up or down). The Commission finds that maintaining the existing ROE of 8.5 per cent will, when combined with the existing deemed equity ratios, provide the utilities with a fair return for 2023. The Commission is satisfied that these parameters support an outcome that will ensure customers are not paying more than is required to maintain safe, reliable and economic service.

56. The Commission is not persuaded that there is a quantifiable shift in business risk that would require an increase or decrease in the deemed equity ratios for 2023. Therefore, the

[77] Exhibit 27084-X0031, UCA, paragraph 57.
[78] Decision 23628-D01-2018: 2018 Generic Cost of Capital Costs Award, Proceeding 23628, December 20, 2018.
[79] Exhibit 27084-X0023, AltaLink/EPCOR, paragraph 21.

Commission finds that the deemed equity ratios for 2023 should remain the same as those approved for 2022.

5 Costs award

57. The Commission will treat the date of this decision as the close of record date for the purpose of filing costs claim applications for the first stage of this proceeding. Accordingly, in accordance with the requirements of Rule 022: *Rules on Costs in Utility Rate Proceedings*, parties may submit their cost applications for the Commission's consideration within 30 days of March 31, 2022.

58. In light of the foregoing, the Commission concludes the first stage of this proceeding and will commence the second stage in due course to address its consideration of a formula-based approach to setting the parameters for 2024 and future years.

6 Order

59. It is hereby ordered that:

(1) The final approved generic return on equity for Apex Utilities Inc., AltaLink Management Ltd., PiikaniLink L.P., KainaiLink L.P., ATCO Electric Ltd., ATCO Gas, ATCO Pipelines, ENMAX Power Corporation, EPCOR Distribution & Transmission Inc., FortisAlberta Inc., the transmission operations of the City of Lethbridge, the transmission operations of The City of Red Deer, and certain electricity transmission assets of TransAlta Corporation, is set at 8.5 per cent for the entirety of 2023.

(2) The final approved deemed equity ratio for Apex Utilities Inc., AltaLink Management Ltd., PiikaniLink L.P., KainaiLink L.P., ATCO Electric Ltd., ATCO Gas, ATCO Pipelines, ENMAX Power Corporation, EPCOR Distribution & Transmission Inc., FortisAlberta Inc., the transmission operations of the City of Lethbridge, the transmission operations of The City of Red Deer, and certain electricity transmission assets of TransAlta Corporation, is set at 37 per cent (39 per cent for Apex Utilities Inc.) for the entirety of 2023.

Dated on March 31, 2022.

Alberta Utilities Commission

(original signed by)

Carolyn Dahl Rees
Chair

(original signed by)

Douglas A. Larder, QC
Vice-Chair

(original signed by)

Bohdan (Don) Romaniuk
Acting Commission Member

Appendix 1 – Proceeding participants

Name of organization (abbreviation) **Company name of counsel or representative**
Alberta Direct Connect Consumers Association (ADC)
AltaLink Management Ltd. (AltaLink)
Apex Utilities Inc. (Apex)
ATCO Electric Ltd. (ATCO Electric)
ATCO Gas Bennett Jones LLP
Capital Power Corporation (CPC) Dentons Canada LLP
Consumers' Coalition of Alberta (CCA)
ENMAX Power Corporation (ENMAX or EPC)
EPCOR Distribution & Transmission Inc. (EPCOR or EDTI)
FortisAlberta Inc. (Fortis or FAI)
Industrial Power Consumers Association of Alberta (IPCAA)
Office of the Utilities Consumer Advocate (UCA) Reynolds, Mirth, Richards & Farmer LLP
The City of Calgary (Calgary) McLennan Ross Barristers & Solicitors

Alberta Utilities Commission

Commission panel
- C. Dahl Rees, Chair
- D.A. Larder, QC, Vice-Chair
- B. Romaniuk, Acting Commission Member

Commission staff
- L.-M. Berg (Commission counsel)
- A. Sabo (Commission counsel)
- A. Jukov
- D. Mitchell
- L. Bondad

18

Ontario (Energy Board) (Re)

Ontario Energy Board Decisions

Ontario Energy Board

Panel: No panel mentioned

Decision: December 11, 2009.

No. EB-2009-0084

2009 LNONOEB 107

Report of the Board on the Cost of Capital for Ontario's Regulated Utilities

(153 paras.)

Case Summary

Tribunal Summary:

Earlier this year, the Board initiated a consultative process to assist the Board in reviewing its cost of capital policies. The consultative process began in February 2009 and has culminated in this policy report of the Board. All materials in relation to this consultation are available on the Board's web site.

The Board affirms its view that the Fair Return Standard frames the discretion of a regulator, by setting out three requirements that must be satisfied by the cost of capital determinations of the tribunal. Meeting the standard is not optional; it is a legal requirement. Notwithstanding this obligation, the Board notes that the Fair Return Standard is sufficiently broad that the regulator that applies it must still use informed judgment and apply its discretion in the determination of a rate regulated entity's cost of capital. The Board also confirms other key principles with respect to its cost of capital policy.

The Board has analyzed submissions, discussions at the consultation and the final written comments of participants to the consultation with these general principles in mind. In light of the information and supporting empirical analysis provided in consultation with stakeholders, the following refinements to the Board's policies with regard to the cost of capital are set out in this report.

1. Need to Reset and Refine Existing Return on Equity Formula: The Board will continue to use a formula-based equity risk premium approach. Also, the Board is of the view that the Long Canada Bond Forecast (the "LCBF") continues to be an appropriate base upon which to begin the return on equity calculation. However, in order to ensure that on an ongoing basis changing economic and financial conditions are adequately and appropriately accommodated in the Board's formulaic approach for determining a utility's equity cost of capital, the Board has determined that its current formula-based return on equity approach needs to be reset and refined.

* Reset the Formula: The formula needs to be reset to address the difference between the allowed return on equity arising from the application of the formula and the return on equity for a low-risk proxy group that cannot be reconciled based on differences in risk alone. Based on the equity risk premium recommendations derived from multiple approaches that were provided by all participants in this consultation, the Board has determined that an initial equity risk premium of 550 basis points is appropriate for the purposes of deriving the initial return on equity to be embedded in the Board's reset and refined return on equity formula. This includes an implicit 50 basis points for transactional costs. Consequently,

assuming a forecast long term government of Canada bond yield of 4.25%, the initial return on equity to be embedded in the Board's reset and refined return on equity formula will be 9.75% (i.e., 4.25% + 550 basis points = 9.75%).

* Refine the Formula: The formula also needs to be refined to reduce its sensitivity to changes in government bond yields due to monetary and fiscal conditions that do not reflect changes in the utility cost of equity. First, the Board views the determination of the LCBF adjustment factor to be an empirical exercise, and as such, based on the empirical analysis provided by participants in conjunction with the consultation, the Board is of the view that the LCBF adjustment factor should be set at 0.5. Second, based on the analysis provided by participants to the consultation, the Board concludes that there is a statistically significant relationship between corporate bond yields and the cost of equity, and that a corporate bond yield variable should be incorporated in the return on equity formula. The Board has determined that it will use a utility bond spread based on the difference between the Bloomberg Fair Value Canada 30-Year A-rated Utility Bond index yield and the long Canada bond yiel d and that the utility bond spread reflected will be subject to a 0.50 adjustment factor, consistent with the empirical analyses provided by participants to the consultation.

2. Refine Long-term Debt Guidelines and Approach to Determine Rate: The determination of the cost of long-term debt was not a primary focus of the consultation and the Board notes that the comments made by participants in the consultation largely supported the continuation of the Board's existing policies and practices. However, in the report the Board formalizes certain approaches to reflect recent determinations regarding long-term debt costs. Further, the deemed long-term debt rate will be estimated including the A-rated utility bond index yield consistent with refinement to the return on equity formula.

3. Refine Approach to Determine Deemed Short-term Debt Rate: The determination of the cost of short-term debt also was not a primary focus of the consultation. However, to better reflect utility short-term debt costs, the Board has determined that the spread over the Bankers' Acceptance rate used to derive the deemed short-term debt rate should be based on real market quotes for issuing spreads over Bankers' Acceptance rates for the cost of short-term debt.

The Board will apply the methods set out in this report annually to derive the values for the return on equity and the deemed long-term and short-term debt rates for use in cost of service applications. If the application of these methods produces numerical results that, in the view of the Board, raise doubt that the Fair Return Standard is met, the Board may then use its discretion to begin a consultative process. Also, the Board has determined that a review period of five years provides an appropriate balance between the need to ensure that the formula-generated return on equity continues to meet the Fair Return Standard and the objective of maintaining regulatory efficiency and transparency. Accordingly, the Board intends to conduct its first regular review in 2014.

The remainder of this Report sets out in greater detail the Board's policy as summarized above, as well as the considerations underlying the different elements of the Board's approach.

REPORT OF THE BOARD

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1 Introduction

1 The Ontario Energy Board (the "Board") adopted a formula-based approach using the Equity Risk Premium ("ERP") method for determining the fair rate of return on common equity for Ontario natural gas utilities in March, 1997. Application of the approach was extended to the electric utilities when the Board's regulatory oversight expanded to include the electricity sector in 1999. The Board's current approach for determining the cost of capital is set out in the *Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors*, dated December 20, 2006 (the "December 20, 2006 Report").

2 Earlier this year, the Board initiated a consultative process to assist the Board in reviewing its cost of capital policies. The consultative process, detailed below, began in February 2009 and has culminated in this policy report of the Board. All materials in relation to this consultation are available on the Board's web site.

3 This report sets out the Board's updated approach to cost of capital and the methods that the Board will use to annually update the cost of capital parameters for all rate-regulated utilities. Specifically, this report refines the Board's policies regarding the cost of capital in the following five ways: (i) resetting and refining the return on equity ("ROE") formula; (ii) refining long-term debt guidelines and the approach to determining the deemed long-term debt rate; (iii) refining the approach to determining the deemed short-term debt rate; and (iv) setting out an annual review process to be used by the Board in conjunction with each application of the methodology to ensure that the results meet the Fair Return Standard ("FRS"); and (v) developing a framework within which to conduct a periodic review of the Board's cost of capital policies.

Organization of this Report

4 This report is organized as follows: The consultative process is detailed in Chapter 2. Important principles in the regulation of cost of capital are discussed in Chapter 3. The Board's policy for and analysis of cost of capital are outlined in Chapter 4. Certain implementation considerations are identified in Chapter 5, and the annual update process and provision for periodic review of the cost of capital policies are addressed in Chapter 6. A summary of the formula-based ROE guidelines in effect in the 2009 rate year is provided in Appendix A. The new methods that the Board will use to annually update the cost of capital parameters as set out in this report are contained in the Appendices.

2 Consultative Process

5 On February 24, 2009, the Board issued a letter which set out its determination on the values for the ROE and the deemed long-term and short-term debt rates for use in the 2009 rate year cost of service applications. These cost of capital parameter values were calculated based on the methodologies and formulae set out in the December 20, 2006 Report. In that letter, the Board advised participants that it would be initiating a review of its current policy regarding the cost of capital.

2.1 Overview

Initial Consultation

6 On March 16, 2009, the Board initiated a consultation process to help it to determine whether current economic and financial market conditions warrant an adjustment to any of the cost of capital parameter values (i.e., the ROE, long-term debt rate, and/or short-term debt rate) set out in the Board's February 24, 2009 letter. The consultation was initiated, in part, by (i) the fact that the difference between the cost of equity and the cost of long-term debt values determined by the Board for the 2009 Cost of Service Applications was only 39 basis points (8.01% and 7.62%), versus a difference of 247 basis points in 2008; and (ii) concern that the Board did not have a sufficiently robust approach within which to exercise its discretion to adjust any or all of the values produced by the application of the methodology. The Board indicated that the objective of the consultation was to test whether the values produced, and the relationships among them, are reasonable in the current economic and financia l market conditions, and to allow the Board to determine if, when and how to make any appropriate adjustments to any of the values.

Cost of Capital Review

7 In light of stakeholders' comments, the Board determined not to vary the 2009 parameter values for 2009 rates. In its June 18, 2009 letter setting out this determination, the Board explained that it was not persuaded that there was a sufficient basis to do so, in a timely manner. Nevertheless, the Board determined that further examination of

its policy regarding the cost of capital was warranted to ensure that, on a going forward basis, changing economic and financial conditions are accommodated if required. Therefore, the Board advised that it would proceed with a review of its policy regarding the cost of capital. The Board indicated that any changes to the policy made as a result of this review would apply to the setting of rates for the 2010 rate year.

8 The Board set an issues list to form the basis of its review which took into account the stakeholder comments received in response to the Board's March 16, 2009 letter and other information that the Board considered relevant (the "Issues List"). This Issues List was posted to the Board's web site on July 30, 2009. Appended to the Issues List were: a summary of stakeholder options in response to the Board's March 16, 2009 letter; and a list of references to documents germane to the consultation.

The Issues List

9 In the cover letter to the Issues List, the Board affirmed its view that the FRS constitutes the over-arching principle for setting the cost of capital, which is one input into the setting of rates. The Board also set the scope for the consultation as follows. First, that the consultation would deal only with the means by which the Board determines the cost of capital. The actual effect, if any, on specific utilities' revenue requirements as a result of any updated policies arising from this consultation and the determination of just and reasonable rates would not be addressed in this process, but in future rate proceedings. Second, that historically, the Board has found the ERP approach to be pragmatic and efficient given the Ontario market structure and the number of utilities that the Board regulates. The Board concluded that an ERP approach remains the most appropriate in the current circumstances. However, the Board decided to review the application and the derivation of the current ERP appro ach to determine if it is sufficiently robust to guide the Board's discretion in applying the FRS. And third, the Board stated that the application of the FRS would be central to the consultation.

10 The Board identified three areas where further information was needed:

* Potential adjustment to the established cost of capital methodology (i.e., based on the ERP approach) to adapt to changes in financial market and economic conditions;
* Determination of reasonableness of the results based on a formulaic approach for setting cost of capital parameter values; and
* Board discretion to adjust those results, if appropriate.

11 The Board received written comments from stakeholders identifying their views and positions on the listed issues and held a Stakeholder Conference to provide a forum for discussion of the substantive matters contained in the Board's Issues List.

The Stakeholder Conference

12 The Stakeholder Conference was held over a three day period, September 21, 22 and October 6, 2009.

13 The Board identified the objectives of the stakeholder conference as follows:

* To allow participants and their respective experts to clarify and elaborate on their written comments;
* To provide participants with an opportunity to explore in some depth the rationale and merits of alternatives supported by other participants and their respective experts; and
* To help the Board gain, through the presentations and an interactive exchange with participants and their respective experts, a clearer understanding of the positions of participants and of significant issues and areas of concern.

14 At the start of the Stakeholder Conference, a Capital Markets Panel provided participants with a comprehensive

overview of capital markets conditions. The Panel was comprised of practicing capital markets individuals, representing investor, equity analyst, and bond market perspectives. Representatives from Sun Life Financial, TD Securities Inc., Scotia Capital, and Macquarie Capital Markets participated on the Capital Markets Panel. Panel members addressed matters such as:

* What the capital markets have been through, where they are today, and set out key indicators or variables that are of interest prospectively;
* Overall availability of capital and the cost of that capital (both debt and equity);
* Access to bank credit/debt/equity, the absolute cost of debt, spread, term availability, and covenants;
* Spreads that have been and are being observed and under what conditions; and
* Activity that has been and/or is evident in the market in terms of funds flow into the market and between asset classes.

15 Following the Capital Markets Panel discussion, the following individuals provided presentations to participants and the Board at the Stakeholder Conference:

* Dr Laurence D. Booth, Professor, University of Toronto (consultant for the Building Owners and Managers Association of the Greater Toronto Area, the Consumers Council of Canada, Canadian Manufacturers and Exporters, Industrial Gas Users Association, London Property Management Association, and the Vulnerable Energy Consumer's Coalition);
* Mr. Donald A. Carmichael, Independent Consultant (consultant for Enbridge, Fortis Ontario Inc., and Toronto Hydro-Electric System Limited);
* Mr. James M. Coyne, Senior Vice President, Concentric Energy Advisors (consultant for Enbridge, Hydro One Networks, Inc. and the Coalition of Large Distributors [Enersource Hydro Missisauga Inc., Horizon Utilities Corporation, Hydro Ottawa Limited, PowerStream Inc., Toronto Hydro-Electric System Limited and Veridian Connections Inc.]);
* Mr. John Dalton, Power Advisory LLC (consultant for Great Lakes Power Transmission);
* Ms Kathleen McShane, President, Foster Associates (consultant for Electricity Distributors Association);
* Dr Lawrence P. Schwartz, Consulting Economist (consultant for Energy Probe Research Foundation); and
* Dr. James Vander Weide, Research Professor of Finance and Economics, Duke University, The Fuqua School of Business (consultant for Union Gas).

16 Subsequent to the Stakeholder Conference and in light of the presentations made by participants and discussions at the conference, the Board received final written comments from participants. The Board indicated in its October 5, 2009 letter to participants that following the receipt of final written comments, it would review all of the materials, including Stakeholder Conference transcripts and all of the written comments in making its determination, and that the Board aimed to issue its report in December.

2.2 Approach to Developing Regulatory Policy

17 In their final comments to the Board, several participants expressed concern regarding the potential scope of outcomes arising from this consultation. In a joint submission, the Consumers Council of Canada, the Vulnerable Energy Consumer's Coalition and the Canadian Manufacturers and Exporters describe their understanding that the consultation was intended to have a limited scope, and pointed to several statements made by the Board regarding the scope of the consultation. In summary, the submission states: "[i]n these circumstances, we suggest that the possible outcomes of this consultation are limited to a Board report which evaluates whether any of the information

presented during the course of the consultative is sufficient to call into question the continued appropriateness of any element of the Board's current cost of capital methodology."1 The School Energy Coalition filed a similar submission, stating: "[t]he primary purpose of this part of the consul tation, as noted by the Board in a number of communications, and reiterated at the stakeholder conference, is to help understand whether the current approach to cost of capital has sufficient robustness to be relied on by the Board in all circumstances."2

18 Although the Board appreciates the perspectives of these participants about their expectations, it does not agree that the scope of the consultation was limited in the fashion that they suggest. The Issues List set out a comprehensive set of issues that set the scope for this consultation. Amongst the issues are the following: How should the Board establish the initial ROE for the purpose of resetting the methodology? Does the current approach used by the Board to calculate the ERP remain appropriate? If not, how should the ERP be calculated?3

19 In response to a letter it received on August 13, 2009 from Mr. Robert Warren, sent on behalf of the Consumers Council of Canada, the Vulnerable Energy Consumers Coalition and the London Property Management Association, the Board again invited participants to provide any information they felt appropriate in responding to the questions on the Issues List:

> Stakeholders are asked to provide in their written comments answers to the questions identified in the Board's Issues List. To help the Board in its review, the Board invites stakeholders to include in their written comments some analytical support and detailed information to identify their views and support their positions in response to the Board's questions.4

20 It is the Board's view, therefore, that the policies determined by the Board in this report are within the scope of the consultation. The Board has benefitted from the materials and submissions received from the participants. This information contributes to the substantive foundation upon which the Board will base its policies. The Board does not believe that the extensive body of information before it would be materially improved by a hearing process, as was suggested by some participants.

21 Courts have long recognized that duties of procedural fairness such as the requirement of a hearing apply to adjudicative decisions and decisions affecting specific rights, interests and privileges. Where a board is engaged, as here, in the development of a policy guideline, courts have held that it falls to the board to decide on the method of consultation to be employed - as long as the legislative requirements, if any, are met. There also is abundant precedent for this approach within the Board's practice, and it is neither unusual nor improper to develop a guideline through a consultative process.5

22 The final "product" of this process, of course, is a Board policy. This was not a hearing process, and it does not - indeed cannot - set rates. The Board's refreshed cost of capital policies will be considered through rate hearings for the individual utilities, at which it is possible that specific evidence may be proffered and tested before the Board. Board panels assigned to these cases will look to the report for guidance in how the cost of capital should be determined. Board panels considering individual rate applications, however, are not bound by the Board's policy, and where justified by specific circumstances, may choose not to apply the policy (or a part of the policy).

3 Context, Background and the Role of the Board

23 In competitive markets, the outputs of the goods and services of the economy and the prices for these outputs are determined in the market place, in accordance with consumers' preferences and incomes, as well as producers' minimization of cost for a given output. In such a market, the outcome is the efficient allocation of resources, including capital, and social welfare is maximized.

24 However, in some situations, markets fail to achieve such efficient outcomes. Market failure refers to situations in which the conditions required to achieve the market-efficient outcome are not present. Common examples of market failure are the existence of significant externalities, the exercise of market power by a small number of producers or buyers, natural monopolies, and information asymmetry between producers and their customers.

25 Electric transmission and distribution companies and natural gas distribution utilities are natural monopolies and are subject to rate regulation in Ontario by the Ontario Energy Board. In this context, the purpose of rate regulation, among other things, is to create or emulate an efficient market solution that cannot otherwise be achieved due to the presence of one or more market failures. As it relates to a rate regulated entity's cost of capital, the role of the regulator is to determine, as accurately as possible, the opportunity cost of capital to ensure that an efficient amount of investment occurs in the public interest for the purpose of setting utility rates.

3.1 Fair Return Standard

26 On July 30, 2009 the Board issued a letter and its Issues List for the then planned stakeholder consultation. In that letter, the Board communicated its view that the FRS constitutes the over-arching principle for setting the cost of capital, which is one input into the setting of rates. There are a number of key messages in this statement.

27 First, as set out by the Federal Court of Appeal, the cost of capital to a utility "is equivalent to the aggregate return on investment investors require in order to keep their capital invested in the utility and to invest new capital in the utility."6

28 Second, the Federal Court of Appeal also stated:

> ... even though cost of capital may be more difficult to estimate than some other costs, it is a real cost that the utility must be able to recover through its revenues. If the... [Board] does not permit the utility to recover its cost of capital, the utility will be unable to raise new capital or engage in refinancing as it will be unable to offer investors the same rate of return as other investments of similar risk. As well, existing shareholders will insist that retained earnings not be reinvested in the utility.7

29 Thirdly, the Board is of the view that the process to determine the cost of capital aligns the private interest of the utility and its shareholders with the public interest, and notes that the Federal Court of Appeal said:

> ... in the long run, unless a regulated enterprise is allowed to earn its cost of capital, both debt and equity, it will be unable to expand its operations or even maintain its existing ones...This will harm not only its shareholders, but also the customers it will no longer be able to service. The impact on customers and ultimately consumers will be even more significant where there is insufficient competition in the market to provide adequate alternative service.8

30 The determination of a utility's cost of capital must meet the FRS. The FRS is a legal concept, and has been articulated in three seminal court determinations as set out below:

1. In *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia* et. al. 262 U.S. 679 (1923), the FRS is expressed to include concepts of comparability, financial soundness and adequacy:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

2. In *Northwestern Utilities Limited v. City of Edmonton*, *[1929] S.C.R. 186*, the FRS concept was described as follows:

> 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.

3. In *Federal Power Commission v. Hope Natural Gas* 320 U.S. 591 (1944), the Court expresses that "balance" is achieved in the ratemaking process, and outlines three elements of a fair return:

The rate-making process under the act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests...the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock...By that standard, the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

31 The FRS was further articulated by the National Energy Board in its RH-2-2004 Phase II Decision as:

A fair or reasonable return on capital should:

* be comparable to the return available from the application of invested capital to other enterprises of like risk (the comparable investment standard);
* enable the financial integrity of the regulated enterprise to be maintained (the financial integrity standard); and
* permit incremental capital to be attracted to the enterprise on reasonable terms and conditions (the capital attraction standard).9

32 In its letter of July 30, 2009, the Board noted that the National Energy Board's articulation of the FRS is consistent with the principled approach described on page 2 of the Compendium to the Board's March 1997 *Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Utilities* (the "1997 Draft Guidelines") and the policies set out in the Board's December 20, 2006 Report.

33 The Board is of the view that the FRS frames the discretion of a regulator, by setting out three requirements that must be satisfied by the cost of capital determinations of the tribunal. Meeting the standard is not optional; it is a legal requirement. As set out by Enbridge in their final comments, the Supreme Court of Canada has "described this requirement that approved rates must produce a fair return as an 'absolute' obligation."10 Notwithstanding this mandatory obligation, the Board notes that the FRS is sufficiently broad that the regulator that applies it must still use informed judgment and apply its discretion in the determination of a rate regulated entity's cost of capital.

34 Informed by the comments made by stakeholders in the context of this consultation and the relevant jurisprudence, the Board offers the following observations about the application of the FRS.

35 First, the Board notes that the FRS expressly refers to an opportunity cost of capital concept, one that is prospective rather than retrospective.

36 Second, the Board agrees with the National Energy Board which stated that "[i]t does not mean that in determining the cost of capital that investor and consumer interests are balanced."11 Further, the Board notes that the Federal Court of Appeal was clear that the overall ROE must be determined solely on the basis of a company's cost of equity capital and that "the impact of any resulting toll increase is an irrelevant consideration in that determination. This does not mean however, that any resulting increase in tolls cannot be considered by a tribunal in determining the way in which a utility should recover its costs."12 The Federal Court of Appeal also stated that:

It may be that an increase is so significant that it would lead to "rate shock" if implemented all at once and therefore should be phased in over time. It is quite proper for the Board to take such considerations into account, provided that there is, over a reasonable period of time, no economic loss to the utility in the

> process. In other words, the phased in tolls would have to compensate the utility for deterring the recovery of its cost of capital.13

37 Third, all three standards or requirements (comparable investment, financial integrity and capital attraction) must be met and none ranks in priority to the others. The Board agrees with the comments made to the effect that the cost of capital must satisfy all three requirements which can be measured through specific tests and that focusing on meeting the financial integrity and capital attraction tests without giving adequate consideration to comparability test is not sufficient to meet the FRS.

38 Fourth, a cost of capital determination made by a regulator that meets the FRS does not result in economic rent being earned by a utility; that is, it does not represent a reward or payment in excess of the opportunity cost required to attract capital for the purpose of investing in utility works for the public interest. Further, the Board reiterates that an allowed ROE is a cost and is not the same concept as a profit, which is an accounting term for what is left from earnings after all expenses have been provided for. The Board notes that while cost of capital and profit are often used interchangeably from a managerial or operational perspective, the concepts are not interchangeable from a regulatory perspective.

39 Fifth, there was considerable discussion in the consultation about utility bond ratings. The ability of a utility to issue debt capital and maintain a credit rating were generally put forth by stakeholders in the consultation as a sufficient basis upon which to demonstrate that a particular equity cost of capital and deemed utility capital structure meet the capital attraction and financial integrity requirements of the FRS. The Board is of the view that utility bond metrics do not speak to the issue of whether a ROE determination meets the requirements of the FRS. The Board acknowledges that equity investors have, as the residual, net claimants of an enterprise, different requirements, and that bond ratings and bond credit metrics serve the explicit needs of bond investors and not necessarily those of equity investors.

40 Finally, the Board questions whether the FRS has been met, and in particular, the capital attraction standard, by the mere fact that a utility invests sufficient capital to meet service quality and reliability obligations. Rather, the Board is of the view that the capital attraction standard, indeed the FRS in totality, will be met if the cost of capital determined by the Board is sufficient to attract capital on a long-term sustainable basis given the opportunity costs of capital. As the Coalition of Large Distributors commented:

> [t]he fact that a utility continues to meet its regulatory obligations and is not driven to bankruptcy is not evidence that the capital attraction standard has been met. To the contrary, maintaining rates at a level that continues operation but is inadequate to attract new capital investment can be considered confiscatory. The capital attraction standard is universally held to be higher than a rate that is merely non-confiscatory. As the United States Supreme Court put it, 'The mere fact that a rate is non-confiscatory does not indicate that it must be deemed just and reasonable'.14

The Role of the Comparable Investment Standard

41 Continued investment in network utilities does not, in itself, demonstrate that the FRS has been met by a regulator's cost of capital determination, and in particular, whether the determination of the equity cost of capital meets the requirements of the FRS. This is a particular challenge -- how does the regulator determine when investment capital is not allocated to a rate regulated enterprise? These decisions are typically made within the utility/corporate capital budgeting process and rarely, if ever, broadly communicated to stakeholders. The Board notes that acquisition and divestiture activities of regulated utilities are not definitive in this regard, one way or the other, and notes that there are many reasons why investors are willing to acquire or desirous of selling utility assets, notwithstanding their view of whether an allowed ROE meets the FRS.

42 The primary tool available to the regulator to rectify this lack of transparency is the comparable investment standard. By establishing a cost of capital, and an ROE in particular, that is comparable to the return available from the application of invested capital to other enterprises of like risk, the regulator removes a significant barrier that impedes the flow of capital into or out of, a rate regulated entity. The net result is that the regulator is able, as

accurately as possible, to determine the opportunity cost of capital for monies invested in utility works, with the ultimate objective being to facilitate efficient investment in the sector.

43 There are a number of specific issues relating to the comparable investment standard that the Board considers are relevant in the context of this cost of capital policy.

44 First, "like" does not mean the "same". The comparable investment standard requires empirical analysis to determine the similarities and differences between rate-regulated entities. It does not require that those entities be "the same".

45 Second, there was a general presumption held by participants representing ratepayer groups in the consultation that Canadian and U.S. utilities are not comparators, due to differences in the "time value of money, the risk value of money and the tax value of money."15 In other words, because of these differences, Canadian and U.S. utilities cannot be comparators. The Board disagrees and is of the view that they are indeed comparable, and that only an analytical framework in which to apply judgment and a system of weighting are needed. The analyses of Concentric Energy Advisors and Kathy McShane of Foster Associates Inc. are particularly relevant in this regard, and substantially advance the issue of establishing comparability to meet the requirements of the FRS. Further, the Board notes that in the consultation session on October 6, 2009, Dr. Booth stated that it is "absolutely possible" to form a sample from a risky universe that is low risk and compa re it to the universe or the population of Canadian utilities.16 All participants agreed.

46 The Board notes that Concentric did not rely on the entire universe of U.S. utilities for its comparative analysis. Rather, Concentric carefully selected comparable companies based on a series of transparent financial metrics, and the Board is of the view that this approach has considerable merit. Commenting on Concentric's analysis, Union Gas noted that no one else in the consultation performed this kind of detailed analysis of U.S. comparators.17 The use of a principled, analytical, and transparent approach to determine a low risk comparator group from a riskier universe for the purpose of informing the Board's judgment was supported by various participants in the consultation.

47 The PWU commented that the position taken by Dr. Booth on the question of the comparability of US utility returns is not based on an appropriate empirical foundation.18 The PWU further commented that:

> On the other hand, it is the view of the PWU that the analysis produced by Concentric, as summarized in one of their charts presented at the conference, represents a far more comprehensive analysis of the key characteristics of distribution utilities in Ontario vs. a North American proxy group. Differences and similarities were thoroughly considered before arriving at the conclusions that based on a careful selection of like companies, a proxy group which includes US distribution utilities adheres to the Comparable Investment Standard. Moreover, Concentric was better suited to complete such as an analysis, having recognized expertise in the risks faced by both Ontario and US electricity distributors.19

48 Dr. Vander Weide indicated that since Canadian utility bonds tend to have more covenants than US utility bonds, they would receive a slightly higher credit rating. The PWU observed that it the slight variance in ratings can be attributed to specific features of debt instruments, rather than fundamental differences in the underlying business or regulatory risks faced by the utilities. This observation was also made by Ms. Zvarich of Sun Life Financial, who presented evidence that Canadian utility bonds generally have more restrictive covenants than U.S. utility bonds.20

49 The Board is of the view that the U.S. is a relevant source for comparable data. The Board often looks to the regulatory policies of State and Federal agencies in the United States for guidance on regulatory issues in the province of Ontario. For example, in recent consultations, the Board has been informed by U.S. regulatory policies relating to low income customer concerns, transmission cost connection responsibility for renewable generation, and productivity factors for 3rd generation incentive ratemaking.

50 Finally, the Board agrees with Enbridge that, while it is possible to conduct DCF and CAPM analyses on publicly-traded Canadian utility holding companies of comparable risk, there are relatively few of these companies.

As a result, the Board concludes that North American gas and electric utilities provide a relevant and objective source of data for comparison.

3.2 The Cost of Capital in Theory and Practice

The Cost of Capital

51 The Ontario Energy Board has been engaged in the rate regulation of utilities for many years. Over this extended period, the Board notes that there continues to be any of a number of misconceptions about the cost of capital concept, particularly what the cost of capital is and why it is an important consideration.

52 The Board is of the view that the following points articulated by Dr. Bill Cannon in his presentation at CAMPUT's 2009 Energy Regulation Conference on July 3, 2009, are principally relevant to defining and understanding the cost of capital concept.

> At its simplest, the cost of capital is the minimum expected rate of return necessary to attract capital to an investment. The rate of return includes the income received during the time the investment is held plus any capital gain or loss, realized or accruing during this period, all as a percentage of the initial investment outlay.
>
> The cost of capital can be viewed from both: (a) a company or utility perspective; and (b) from the investor's or capital provider's perspective. From the company's perspective, the cost of capital is the minimum rate of return the company must promise to achieve for investors on its debt and equity securities in order to preserve their market values and, thereby, retain the allegiance of these investors.
>
> [There is interest] in the cost of capital...because all utilities -- private or public -- at some time... must raise financial capital to pay for investments, and both fairness and practical considerations dictate that the private and/or government investors who provide these capital funds must be adequately compensated. Raising capital is a competitive process. Private investors are under no obligation to buy a particular utility's securities, and government-owned utilities must compete with other government spending priorities. A utility will be able to secure new capital and replace maturing securities only if investors believe that they will be adequately rewarded for providing new capital funds. That required reward, in turn, must compensate the investors for a least two things: (1) for postponing the consumption of the goods and services that they might otherwise have enjoyed had they not made the investment; and (2) for exposing their funds to the risk that they may not get all their money back or not get it back as promptly as they anticipated. The reward demanded by investors is therefore a necessary cost of doing business from the utility's point of view, just as much as the cost of labour or fuel.
>
> From the viewpoint of investors as a group, however, the cost of capital can be defined more clearly and operationalized as "the expected rate of return prevailing in the capital markets on alternative investments of equivalent risk and attractiveness." There are four concepts embedded in this operational definition:
>
> > First, it is *forward-looking.* Investment returns are inherently uncertain and the ex post, actual returns experienced by investors may differ from those that were expected ahead of time. The cost of capital is therefore an *expected* rate of return.21
> >
> > Second, it reflects the *opportunity cost* of investment. Investors have the opportunity to invest in a wide range of investments, so the expected rate of return from a given utility-company investment must be sufficient to compensate investors for the returns they might otherwise have received on foregone investments.
> >
> > Third, it is *market-determined.* This market price - expressed as the expected return per dollar of invested capital - serves to balance the supply of, and demand for, capital for the firm.
> >
> > And, fourth, it reflects the *risk* of the investment. It reflects the expected returns on investments in the marketplace that are exposed to equivalent risks. Another way of expressing this principle is to say that the cost of capital depends on the *use* of the capital -- or, more precisely, the risk associated with the use of the funds -- and not on the *source* of the funds.

53 In Ontario, utilities regulated by the Board in the gas and electricity sectors are structured to operate as commercial entities. As such, the rate setting methodologies used by the Board apply uniformly to all rate-regulated entities regardless of ownership. The determination of rate-regulated entities' cost of capital is no exception. It follows that the opportunity cost of capital should be determined by the Board based on a systematic and empirical approach that applies to all rate-regulated utilities regardless of ownership. The Board sees no compelling reason to adopt different methods of determining the cost of capital based on ownership.

The Equity Risk Premium Approach

54 As previously indicated, the Board has determined that the ERP approach remains the most appropriate approach in the current circumstances. The ERP approach is one of four main approaches that are traditionally used by experts during regulatory cost of capital reviews to establish a fair ROE: (1) the comparable earnings approach; (2) discounted cash flow approach; (3) the capital asset pricing model; and (4) ERP approach. These methods are all used in varying degrees to formulate and/or test an opinion regarding a fair return to investors.22 The Board's current formulaic approach is a modified Capital Asset Pricing Model methodology and ERP approach.

55 Each of these four main approaches has well documented strengths and weaknesses. Notwithstanding the known weaknesses of these differing approaches, the Board agrees with Ms. McShane when she states: "each of the various types of tests brings a different perspective to the estimation of a fair return. No single test is, by itself, sufficient to ensure that all three requirements of the fair return standard are met."23

56 Through the consultative process which began in February 2009 and has culminated in this report, the Board has been informed by a number of ex-post analytical approaches, including analysis of experienced ERPs on investments in Canadian utility stocks. The Board observes from these analyses that the ROE produced by various approaches can be expressed as an absolute ROE number or as an ERP over a risk-free rate. Also, the Board agrees that expressing the ROE in terms of a premium above the long-term Canada bond yield does not mean that the initial ROE needs to be estimated by using a single test or a number of tests that might be defined as ERP tests.

A Formulaic Approach

57 The Board has used a formula-based methodology to determine the rate of ROE since 1998. The advantages identified in the 1997 Draft Guidelines remain appropriate today and include:

* Simplification of the hearing process;
* Is relatively free from conflicting interpretation and is readily understood by all participants;
* Reduces the need for complex, annual risk assessments, while still reflecting major changes in the capital markets; and
* Is capable of producing a rate of return that approximates the result which would have been produced through the traditional process.24

58 The Board also notes that a formula-based approach:

* Is transparent, resulting in predictable and consistent outcomes, and meets the needs of stakeholders broadly, particularly those in the capital market; and
* Is a practical necessity in Ontario, given the large number of rate regulated entities.

59 The Board also acknowledges that a formula-based ROE methodology and mechanical approaches in general, have a number of disadvantages, as identified in the 1997 Draft Guidelines:

* Establishing the initial parameters of the generic formula will have a profound influence on the potential success or failure of the process. Over time, these parameters and adjustment factors will

have a cumulative or compounding effect on the results of the formulaic ROE mechanism. The use of an inappropriate initial ROE will either inflate or understate subsequent rate determinations;

* The present formulaic ROE generally relies predominantly on the ERP method to the exclusion of other methods;
* Adjustment for the impact of timing differences for utilities with different year-ends is a challenge; and
* The Board's ability to make discretionary adjustments to a utility's return for the purpose of creating incentives for particular behaviours or sending signals to the marketplace may be restricted.25

60 Notwithstanding these concerns, the Board is of the view that it is appropriate to continue to use a formulaic approach to determine the equity cost of capital and that the overall advantages of the approach outweigh potential disadvantages.

An Empirical Foundation

61 The essential elements of a formulaic approach must be empirically derived -- the initial ROE, implied ERP and the adjustment factor are determined by the Board based on empirical analysis. It is essential that sufficient empirical analysis be provided periodically to ensure that assumed relationships are not misspecified. This includes the construction and application of a framework to evaluate the degree of comparability between rate regulated natural gas distribution and electricity distribution and transmission utilities in Canada and the United States.

62 To be clear, the approach to be used by the Board in setting the essential elements of a formula-based rate of ROE (i.e., base ROE, formula terms and adjustment factors) will be based on "economic theory and empirically derived from objective, data-based analysis."26 As such, it is not sufficient for a formulaic approach for determining ROE to produce a numerical result that satisfies the FRS on average, over time. The Board is of the view that each time a formulaic approach is used to calculate an allowed ROE it must generate a result that meets the FRS, as determined by the Board using its experience and informed judgment.

63 This principle is supported by the *Hope* decision, which states: "Under the statutory standard of 'just and reasonable' it is the result reached not the method which is controlling..."27

4 The Board's Approach

4.1 Summary of Key Principles

64 As discussed previously, the Board confirms the following key principles with respect to its cost of capital policy. The Board has analyzed submissions, discussions at the consultation and the final written comments of participants to the consultation with these general principles in mind.

1. **Fair Return Standard.** All three requirements -- comparable investment, financial integrity and capital attraction -- must be met and none ranks in priority to the others. It is not sufficient for a formulaic approach for determining ROE to produce a numerical result that satisfies the FRS on average, over time. The Board is of the view that each time a formulaic approach is used to calculate an allowed ROE; it must generate a number that meets the FRS, as determined by the Board using its experience and informed judgment.
2. **The overall ROE must be determined solely on the basis of a company's cost of equity capital**. It does not mean that in determining the cost of capital that investor and consumer interests are balanced. The opportunity cost of capital should be determined by the Board based on a systematic and empirical approach that applies to all rate-regulated utilities regardless of ownership. The Federal Court of Appeal was clear that the overall ROE must be determined solely on the basis of a company's cost of equity capital and that the impact of any resulting toll increase is an irrelevant consideration in that determination.

3. **Efficient amount of investment.** As it relates to a rate regulated entity's cost of capital, the role of the regulator is to determine, as accurately as possible, the opportunity cost of capital to ensure that an efficient amount of investment occurs in the public interest for the purpose of setting utility rates.
4. **Predictability, transparency, and stability**. The approach adopted by the Board to determine the opportunity cost of capital should result in an environment where outcomes are predictable and consistent so that investors, utilities and consumers are better able to plan and make decisions.
5. **Systematic and empirically-based approach**. The methodology used by the Board to determine the cost of debt and equity capital should be a systematic approach that relies on economic theory and is empirically derived from objective, data-based analysis. For example, in establishing comparability, it is possible to build a low-risk sub-set from a higher risk universe using an empirically based approach.
6. **Minimize the time and cost of administering the framework.** Costs imposed on all participants, including the regulated entity and the regulator, should not exceed the benefits available. This objective could be met through a simple process that reflects the concerns of interested participants and reduces the formal process requirements.

4.2 Return on Equity

4.2.1 Need to Reset and Refine Existing ROE Formula

65 In order to ensure that on an ongoing basis changing economic and financial conditions are adequately and appropriately accommodated in the Board's formulaic approach for determining a utility's equity cost of capital, **the Board has determined that its current formula-based ROE approach needs to be reset and refined**. As previously indicated, **the Board will continue to use a formula-based ERP approach**. However, informed by the discussion at the consultation and the written comments of participants generated by the consultation, as well as its own analysis, the Board has concluded that the formula needs to be reset to address the difference between the allowed ROE arising from the application of the formula and the ROE for a low-risk proxy group that cannot be reconciled based on differences in risk alone. The formula also needs to be refined to reduce its sensitivity to changes in government bond yields due to monetary and fiscal conditions that do not reflect changes in the utility cost of equity.

66 The Board's current approach to estimating the cost of equity has been in effect for 12 years. The Board notes that in the 1997 Draft Guidelines, the Board stated that "it is persuaded that there exists a non-linear relationship between interest rates and the ERP."28 The existing formula approximates this relationship using a linear specification. The Board is of the view that it is unreasonable to conclude that the current formula correctly specifies this relationship, based on the passage of time, changes in financial and economic circumstances generally, and the empirical analyses provided by participants to the consultation and the discussion at the consultation itself. However, the Board is of the view that its current formulaic approach for determining the equity cost of capital should be reset and refined, not otherwise abandoned or subject to wholesale change.

67 The events that unfolded earlier this year that triggered this review effectively illustrated that the Board's approach needs to be refined to reduce the sensitivity of the formula to changes in government bond yields due to monetary and fiscal conditions that do not reflect changes in the utility cost of equity. The Board concludes that the current approach could be more robust and better guide the Board's discretion in applying the FRS. The Board notes that while the current formula today produces results similar to that in 2008, it does not address the observed behaviour of the formula during the financial crisis -- lowering the allowed ROE when the amount and price of risk in the market was increasing.

68 The view expressed by some participants in the consultation that the Board must wait to be provided with evidence from a regulated utility in Ontario of financial hardship due to the current allowed ROE before its adapts its policies to better reflect market realities is not consistent with the Board's approach.

69 The Board is of the view that resetting and refining the current formula-based ERP approach maintains the transparency, predictability and stability associated with the current approach, and avoids sudden changes in regulatory policy to address potentially transitory capital market conditions.29

70 The Board has been informed by the numerous approaches used by various participants to the consultation to determine whether the formula continues to produce results that meet the FRS. The sum of the elements supporting the Board's decision to reset and refine its formulaic ROE is independent of the recent financial crisis and whether or not the crisis has abated.

4.2.2 The Initial Set Up

Use of Multiple Tests

71 The Board's current formulaic approach for determining ROE is a modified Capital Asset Pricing Model methodology, and in his written comments, Dr. Booth recommended that this practice be continued. Dr. Booth recommended that "the Board base its fair ROE on a risk based opportunity cost model, with overwhelming weight placed on a CAPM estimate"30.

72 This view was not shared by other participants in the consultation, who asserted that the Board should use a wide variety of empirical tests to determine the initial cost of equity, deriving the initial ERP directly by examining the relationship between bond yields and equity returns, and indirectly by backing out the implied ERP by deducting forward-looking bond yields from ROE estimates.

73 Participants argued from a number of different perspectives that a variety of methods should be used to develop the ERP:

* "The Board should not limit itself to one specific method of calculating an ERP; rather it should consider the results produced by multiple approaches in order to generate a range of reasonable results from which it may select an appropriate ERP. This process requires the exercise of informed judgment"31.
* "The Board established the initial risk premium for the Formula, in its decision for Consumers Gas in EBRO 495, by considering an array of risk premium estimates put forward by experts and selecting a risk premium within the range of results presented. The risk premiums put forth by experts were either the result of directly measuring the historical relationship between bond yields and equity returns; or alternatively, by deriving an implied risk-premium, by backing-out forward looking bond yields from ROE estimates produced by using other methodologies, i.e., DCF, CAPM, or Comparable earnings.

Multiple approaches for determining ROE provide greater assurance that the end result will be just and reasonable, as conditions that may bias results could be detected or mitigated by considering alternative results."32

* "The Board should consider comparable utilities' rates of return and a minimum spread to long-term debt rates, as well as resetting the reference rate".33
* "The Board should establish the initial ROE by looking at the best available evidence on the utilities' required return. This evidence should include results of various cost of capital methodologies...The Board would be remiss to predetermine a single methodology for establishing the initial allowed ROE without reviewing alternative methods for determining cost of equity."34
* "We propose that the Board, in reviewing cost of capital, would hear the evidence of the various experts with their different views of the ERP result, but would also look at other ways in which the market directly speaks about returns...they (the examples provided) and many other examples - are ways in which the market communicates the returns for investment comparable to utility

investments. These sources are therefore useful in testing whether the results of various ERP or other market studies of cost of capital are realistic."35

* "If the utility is not a stand-alone entity and/or does not have traded shares, then the Board has no alternative but to look at total rates of return earned by investors in a relevant sample of companies."36

* "Expressing the ROE in terms of a premium above... long-term Canada bond yield... does not mean that the initial ROE need be estimated solely using a test or tests that might be defined as ERP tests."37

"No single model is powerful enough to produce 'the number' that will meet the fair return standard. Only by applying a range of tests along with informed judgment can adherence to the fair return standard be ensured."38

* "...use of multiple tests. The tests all measure different factors that should be considered in setting a fair return on equity that is consistent with the comparable investment standard, the financial integrity standard and the capital attraction standard. The OEB should not rely on a single method or test."39

74 The Board agrees that **the use of multiple tests to directly and indirectly estimate the ERP is a superior approach to informing its judgment than reliance on a single methodology**. In particular, the Board is concerned that CAPM, as applied by Dr. Booth, does not adequately capture the inverse relationship between the ERP and the long Canada bond yield. As such, the Board does not accept the recommendation that it place overwhelming weight on a CAPM estimate in the determination of the initial ERP.

Setting the Initial Equity Risk Premium

75 The Board is of the view that the initial ERP should be reset to address the difference between the allowed ROE arising from the application of the formula and the ROE for a low risk proxy group that cannot be reconciled based on differences in risk alone.

76 Therefore, based on the ERP recommendations provided by all participants in this consultation the **Board has determined that an initial ERP of 550 basis points** is appropriate for the purposes of deriving the initial ROE to be embedded in the Board's reset and refined ROE formula. This includes an implicit 50 basis points for transactional costs.

77 Consequently, **assuming a forecast long term government of Canada bond yield of 4.25%, the initial ROE to be embedded in the Board's reset and refined ROE formula will be 9.75%** (i.e., 4.25% + 550 basis points = 9.75%).

78 The Board has assessed the various empirical tests and recommendations submitted by participants and translated each of the recommended approaches as an ERP assuming a forecast long term government of Canada bond yield of 4.25%, where appropriate, as summarized in Table 1.

79 The empirical tests of each of the participants to the consultation are also described below. Although the Board maintains its view that each of the tests has empirical strengths and weaknesses, the diversity of approaches tabled and discussed in the consultation was helpful. As a result, the Board has given each test weight in the process to establish the initial ERP to be embedded in the Board's formula.

Table 1: Summary of Participant Recommendations

Direct/Indirect Equity Risk Premium	Low	Medium	High
Dr. L.D. Booth			
CAPM (Adjusted Using CoC Formula to Reflect 4.25% GOC, 0.75 Adj)	3.31%	3.31%	3.31%
Average Dr. L.D. Booth	**3.31%**	**3.31%**	**3.31%**
Concentric Energy Advisors			
DCF Analysis for Low-Risk Proxy Group (US Gas, Elec, Cdn)	6.03%	6.78%	7.83%
CAPM Analysis for Low-Risk Proxy Groups (US Gas, US Elec, Cdn)	4.58%	4.72%	4.86%
ERP Econometric Model (Average Gas and Electric)	6.35%	6.35%	6.35%
Average Concentric Energy Advisors	**5.65%**	**5.95%**	**6.35%**
J. Dalton - Power Advisory LLC			
ERP Econometric Model #1 and ERP Econometric Model #2	6.05%	6.45%	6.85%
Average J. Dalton - Power Advisory	**6.05%**	**6.45%**	**6.85%**
K. McShane - Foster Associates			
New Formula for Calculating Allowed ROE (NEB Initial Formula Metrics)	6.38%	6.38%	6.38%
Illustrative method	5.75%	5.75%	5.75%
Average: K. McShane	**6.07%**	**6.07%**	**6.07%**
Dr. J.H. Vander Weide			
Experienced Equity Risk Premium	4.30%	5.50%	6.60%
2008 Awarded ROEs Vs. Avg 2008 US LT T-Bills - Gas	6.16%	6.16%	6.16%
2006-8 Awarded ROEs Vs. Avg 2006-8 US LT T-Bills - Gas	5.61%	5.61%	5.61%
2008 Awarded ROEs Vs. Avg 2008 US LT T-Bills - Electric	6.26%	6.26%	6.26%
2006-8 Awarded ROEs Vs. Avg 2006-8 US LT T-Bills - Electric	5.71%	5.71%	5.71%
Forecast $E(R_e)$ = DCF Expected Return - LT Treasury Yield			
Gas	6.19%	6.19%	6.19%
Electric	6.21%	6.21%	6.21%
Regression - Ex-ante ERP (Above) with YTM LT Treasury Yields			
Gas (Modified to use Canadian LT GOC bond)	6.97%	6.97%	6.97%
Electric (Modified to use Canadian LT GOC bond)	7.33%	7.33%	7.33%
DCF Analysis for Value Line Utility Companies			
Gas	7.81%	7.81%	7.81%
Electric	8.71%	8.71%	8.71%
Average: Dr. J.H.Vander Weide	**6.48%**	**6.59%**	**6.69%**
Average ERP All Submissions	**5.51%**	**5.67%**	**5.85%**

Analyses of Dr. J. H. Vander Weide

80 Dr. Vander Weide performed a number of empirical analyses. The average experienced ERP on an investment in Canadian utility stocks from data on returns earned by investors in Canadian utility stocks compared to interest rates on long-term Canada bonds was approximately 5.50 percent, as set out below:

Comparable Group	Period of Study	Average Stock Return	Average Bond Yield	Risk Premium
S&P/TSX Utilities	1956 - 2008	11.84%	7.54%	4.3%
BMO CM Utilities Stock Data Set	1983 - 2008	14.31%	7.66%	6.6%
Average				**5.5%**

Source: Written comments of Dr. J.H. Vander Weide. Page 14.

81 He also provided information on recent allowed ROEs for U.S. utilities which demonstrated implicit ERPs:

	Natural Gas Distribution		Electric Utilities	
	2008	2006 - 2008	2008	2006 - 2008
Average U.S. ROE Awarded (%)	10.4	10.3	10.5	10.4
Spread to OEB September 2009 Long Bond Estimate of 4.25%	6.15	6.05	6.25	6.15
Spread to Average Long-Term Canada Bond Yield in 2008 of 4.06%	6.34	NA	6.44	NA
Spread to Average Long-Term Canada Bond Yield in 2006 to 2008 of 4.21%	NA	6.09	NA	6.19
Spread to Average Long-Term U.S. Treasury Bill Yield in 2008 of 4.24%	6.16	NA	6.26	NA
Spread to Average Long-Term U.S. Treasury Bill Yield in 2006 to 2008 of 4.69%	NA	5.61	NA	5.71

Sources: Government of Canada Bond Yields: Bank of Canada; U.S. Long-Term Treasury Bill Yields: U.S. Department of Treasury

82 Further, forecast expected required returns by investors were calculated by Dr. Vander Weide by deducting the long-term Treasury bond yield from the DCF expected return (Exhibit 5, Dr. Vander Weide) over the period September 1999 to February 2009. This calculation produced an average ERP of 621 basis points for electric utilities and an average expected ERP of 619 basis points for natural gas utilities (Exhibit 6, Dr. Vander Weide) over the period June 1998 to February 2009.

83 However, regressing the relationship between the *ex ante* risk premium and the yield to maturity on long-term U.S. Treasury bond produced an ERP equation of:

* ERP = 12.10 - 1.123 x IB for Electric Utilities. Assuming an estimated Canadian Long-Term Bond yield of 4.25%, the Ex-Ante expected ERP is 7.33% and an ROE of 11.58%; and
* ERP = 10.26 - 0.773 x IB for Natural Gas Distribution Utilities. Assuming an estimated Canadian Long-Term Bond yield of 4.25%, the Ex-Ante expected ERP is 6.97% and an ROE of 11.22%.

84 Finally, Dr. Vander Weide conducted a DCF Analysis for Value Line Natural Gas Companies that resulted in an estimated ROE of 11.5% (Exhibit 9, Dr. Vander Weide) or an ERP of approximately 7.81%, using the average February 2009 long-term composite Treasury bond yield of 3.69%. His DCF Analysis for Value Line Electric Companies (Exhibit 8, Dr. Vander Weide) resulted in an estimated ROE of 12.4% or an ERP of approximately 8.71%, assuming the same long-term composite Treasury bond yield.

Analysis of Kathy McShane of Foster Associates Inc.

85 Ms. McShane proposed a new formula for calculating the allowed ROE: ROENew = Initial ROE + 50% (Change in Forecast GOC Bond Yield) + 50% (Change in Corporate Bond Yield Spread), which reflects the analysis provided in her comments.

86 Ms. McShane also demonstrated that using her recommended approach for 2009, based on the NEB formula contained in RH-2-94 Decision, the ROE would have been 10.73%40, equal to an ERP of 638 basis points and assuming a forecast GOC yield of 4.35% for 2009.

87 For illustrative purposes in her analysis, she linked a forecast long-term Canada bond yield of 4.5% and a corporate bond yield spread of 175 basis points to an ROE of 10%. Implied in this ROE is an ERP of 550 basis points.

Analysis of Power Advisory LLC

88 Power Advisory evaluated a range of different model specifications in an effort to come up with a formula that will yield more reasonable results than the existing formula under a range of different credit and financial market conditions.41 Two models performed the best in terms of standard econometric considerations (i.e., goodness of fit, highly significant parameter values, and plausible statistical relationships)42:

1. ROE = 7.008% + (US Corp BAA Bond Yield with 6 month lag x 0.5356); and
2. ROE = 7.451% + (US Gov 30 Year Bond yield with 6 month lag x 0.5122) + (VIX index value with 6 month lag x 0.0077).

89 Using current values for these variables produces ROE estimates of 10.5% to 11.3%. Using Canadian values in these models results in ROE estimates of 10.3% to 11.1%. The implied ERP using the results of the models run using a forecast long-term government of Canada bond yield of 4.25% is 605 basis points to 685 basis points.

Analysis of Concentric Energy Advisors

90 Concentric's overall recommended ROE for natural gas distribution utilities, assuming a 40% deemed equity capital structure is 10.5% and for electric transmission and distribution utilities is 10.3%, also assuming 40% deemed equity. The implied ERP assuming a 4.25% forecast GOC bond yield is 625 basis points and 605 basis points, for natural gas and electric transmission and distribution, respectively. These recommendations are supported by multiple analytical approaches; each calculated using data for a specific proxy group for the natural gas and electric transmission and distribution utilities established by Concentric.43

91 The results of Concentric's DCF analysis are presented in the table below44.

Proxy Group	Low	Mean	High
U.S. Natural Gas Distribution Utilities	9.70%	10.44%	11.57%
U.S. Electric Distribution Utilities	10.08%	10.96%	12.09%
Canadian Utilities	9.97%	10.60%	11.47%
Average	9.92%	10.67%	11.71%
Implied ERP at 4.25% forecast LT GOC Yield	5.67%	6.42%	7.46%
Implied ERP Including 50 basis points Flotation Costs	**6.17%**	**6.92%**	**7.96%**

92 The results of Concentric's CAPM analysis are presented in the table below. The results reflect a Market Risk Premium of 586 basis points, which is supported by material provided in Appendix F (page F-10) and Exhibit Concentric-06 of their written comments.

Proxy Group	Low	Mean	High
U.S. Natural Gas Distribution Utilities	9.05%	9.18%	9.32%
U.S. Electric Distribution Utilities	8.54%	8.68%	8.82%
Canadian Utilities	7.80%	7.95%	8.10%
Average	8.46%	8.61%	8.75%
Implied ERP at 4.25% forecast LT GOC Yield	4.21%	4.36%	4.50%
Implied ERP Including 50 basis points Flotation Costs	**4.71%**	**4.86%**	**5.00%**

93 The results of Concentric's ERP analysis are presented in the table below and are explained in detail in Appendix F of their written comments.

94 Concentric's ERP regression formula is as follows: ROE = Constant = U.S. Gov 30-year Bond . x**1** + Moody's Utility A-rated Spread . x**2** + % Generation . x**3** + Natural Gas Dummy Variable . x**4**.45

	U.S. Natural Gas Distribution Proxy Group	U.S. Electric Distribution Proxy Group
Constant	7.634	7.634
U.S. Government 30-year Bond Yield	0.428 x 4.18	0.428 x 4.18
Moody's Utility A-rate Spread (July 2009)	0.310 x 1.56	0.310 x 1.56
% Generation	0.008 x 0.00	0.008 x 49.76
Natural Gas Dummy (Electric = 0,Gas = 1)	0.384 x 1.00	0.384 x 0.00
Authorized ROE	10.29%	10.30%
Implied ERP at 4.25% forecast LT GOC Yield	6.04%	6.05%
Implied ERP Including 50 basis points Flotation Costs	**6.54%**	**6.55%**

95 The tables below summarize Concentric's recommended ROEs prior to any adjustment for changes in leverage:46

U.S. Electric T & D Utilities	Low	Mean	High
DCF	10.08%	10.96%	12.09%
CAPM	8.54%	8.68%	8.82%
Average	9.31%	9.82%	10.46%
Differential between Vertically Integrated and T&D Utilities	(0.40%)	(0.40%)	(0.40%)
Return before Leverage and Flotation Cost Adjustments	8.91%	9.43%	10.06%
Flotation Cost Adjustment 0.50%	0.50%	0.50%	0.50%
Benchmark T&D ROE	9.41%	9.93%	10.56%
Benchmark T&D Equity Ratio	46.32%	46.32%	46.32%
Implied ERP using 4.25% forecast LT GOC Yield	5.16%	5.68%	6.31%

U.S. Natural Gas Distribution Utilities	Low	Mean	High
DCF	9.70%	10.44%	11.57%
CAPM	9.05%	9.18%	9.32%
Return before Leverage and Flotation Cost Adjustments	9.37%	9.81%	10.45%
Flotation Cost Adjustment 0.50%	0.50%	0.50%	0.50%
Benchmark Natural Gas Distribution ROE	9.87%	10.31%	10.95%
Benchmark Natural Gas Distribution Equity Ratio	44.47%	44.47%	44.47%
Implied ERP using 4.25% forecast LT GOC Yield	5.62%	6.06%	6.70%

96 Adjusting for leverage that is higher than the benchmark equity ratio, i.e., deemed equity of 40%, the recommended ROEs increase to 10.5% for natural gas distribution and 10.3% for electric transmission and distribution, representing implied ERPs of 625 basis points and 605 basis points, respectively.

Analysis of Dr. Booth

97 Dr. Booth recommended a fair ROE of 7.75%. This number is based on the following key assumptions.47

98 First, a market risk premium of 5.0%. However, Dr. Booth noted that many of his peers believe it to be 6.0%. Second, beta is estimated to be 0.5. Dr. Booth indicated that he "is not using the current beta coefficient"48; i.e., the beta of 0.5 used to derive the recommended ERP of 325 (assuming a 4.50% long-term government of Canada bond yield) is not supported by Dr. Booth's recent beta estimates, where beta is less than 0.5. Thirdly, Dr. Booth also noted that the range of fair return cost of equity estimates could vary by 0.50%. His unadjusted estimate of a fair return was 7.00% and he noted that the estimates of his colleagues would be 7.50%. He therefore added 0.25% to his estimate to "split this difference", resulting in his ROE recommendation of 7.25%. Finally, Dr. Booth added 0.50% for issuance costs, bringing his fair recommended return to 7.75%.

99 The Board notes that in the course of the consultation, Dr. Booth indicated that he would be prepared to

recommend "fixing ROE at 8.5% or 8.75% over the business cycle, for say, a five-year period."49 Dr. Booth did not support this estimated ROE with empirical analysis, and as such, there is no principled basis upon which the Board can rely on Dr. Booth's recommendation of 8.5% or 8.75%.

4.2.3 The Formula-based Return on Equity

4.2.3.1 Long Canada Bond Forecast

100 The Board is of the view that the LCBF continues to be an appropriate base upon which to begin the ROE calculation. In particular, the Board is of the view that the sensitivity of the allowed ROE to changes in government of Canada bond yields arising from monetary and fiscal conditions that do not reflect changes in utility cost of equity will be addressed, in part, by the use of multiple methods to determine the initial ERP or ROE in the formula. The Board also agrees with Ms. McShane's comment that the LCBF provides an important forecast component to the formula50 and with the Industrial Gas Users Association's comment that "there is an intrinsic logic to using the same parameter to adjust ROE as was used to set the ROE in the first place."51

4.2.3.2 Long Canada Bond Forecast Adjustment Factor

101 In its 1997 Draft Guidelines, the Board determined that the difference between the LCBF for the current test year and the corresponding rate for the immediately preceding year should be multiplied by a factor of 0.75 to determine the adjustment to the allowed ROE.52 In that same document, however, the Board noted that there was a significant difference of opinion concerning the relationship between interest rates and the ERP and that ratios contained in the evidence from generic rate of return proceedings in other Canadian jurisdictions ranged from 0.5:1 to 1:1.53 Moreover, the Board notes that the selection of the 0.75 adjustment factor is described in the 1997 Draft Guidelines as "admittedly somewhat arbitrary."54

102 The Board views **the determination of the LCBF adjustment factor to be an empirical exercise, and as such, based on the empirical analysis provided by participants in conjunction with the consultation, the Board is of the view that the LCBF adjustment factor should be set at 0.5**. The Board notes that four participants in this consultation empirically tested the relationship between government bond yields and ROE:

* Dr. Vander Weide determined that when the yield to maturity on long-term government bonds increases by 100 basis points, the allowed ERP tends to decrease by approximately 55 basis points, and when the yield to maturity on long-term government bonds decreases by 100 basis points, the allowed ERP tends to increase by approximately 55 basis points.55
* Kathy McShane of Foster Associates, Inc. submitted that a regression analysis used to estimate the relationship between government bond yields and the utility cost of equity indicates that the ROEs increased (decreased) by approximately 50 basis points for every one percentage point increase (decrease) in long-term government bond yields.56
* Concentric Energy Advisors also conducted a regression analysis in which the litigated ROEs of U.S. LDC utility returns demonstrated an elasticity factor to government bond yields of 0.45. This implies that the risk premium should have actually increased by approximately 0.55 for each percentage point drop in the government bond yield (as opposed to the 0.25 implied by the current formula).57
* John Dalton of Power Advisory also used a regression analysis to determine that the ERP changes by less than 50% of the change in the long-term government bond rate.58

103 The Industrial Gas Users Association also stated that it sees some merit in further consideration of adjusting downwards to 0.5 the coefficient for application of changes in long Canada bond yields to ROE.

4.2.3.3 Additional Term - Changes in Utility Bond Spread

104 The Board is of the view that the sensitivity of the formula to changes in government bond yields due to monetary and fiscal conditions that do not reflect changes in the utility cost of equity is addressed, in part, by using multiple methods to determine the initial ERP and ROE in its formulaic ROE approach and by reducing the LCBF adjustment factor to 0.5 from 0.75. The Board also is of the view, however, that **the specification of the relationship between interest rates and the ERP in the formula would be improved by the addition of a further term to the formula.**

105 In particular, the Board is of the view that there is a relationship between corporate bond yields and the equity return, and the Board agrees with Dr. Booth, who stated, with respect to corporate bond spreads, that "this is not to say that spreads have no information about required risk premium."59 The Board notes that three participants to the consultation conducted empirical analysis to specify the relationship between corporate bond yields and the equity return:

* Concentric demonstrated by using a regression analysis that there is a statistically significant relationship between ROE and corporate bond yields and specified that the sensitivity of allowed returns to corporate bond yields is about 0.45 to 0.5560. Concentric also demonstrated empirically that Treasury bonds have been more volatile than corporate bonds since January 1997.
* Kathy McShane of Foster Associates tested the relationship between corporate bond yields and the utility cost of equity. She determined the cost of equity using two approaches: first, by using approved returns on equity for utilities not governed by formulas as a proxy for the utility cost of equity, and second, by relying on a time series of utility costs of equity developed by using the discounted cash flow approach against which yields on utility bonds can be compared61. By using regression analysis, Ms. McShane determined that allowed ROEs have increased (decreased) by approximately 45 basis points for every one percentage point increase (decrease) in the A rated utility bond yield. Similarly, the DCF cost of equity increased (decreased) by approximately 55 basis points for every one percentage point increase (decrease) in long-term A rated utility bond yields.62
* John Dalton from Power Advisory LLC conducted an econometric analysis, which established that the relationship between ROE and U.S. corporate BAA bond yields with a six month lag is approximately 0.53.63

106 Based on the analysis provided by participants to the consultation, the Board concludes that **there is a statistically significant relationship between corporate bond yields and the cost of equity, and that a corporate bond yield variable should be incorporated in the ROE formula**. The Board notes that the presence of a corporate bond yield variable in its current ROE formula would have served to increase the allowed ROE during the recent credit crisis, which, in the Board's view, would have been directionally correct.64

107 The Board has determined that it is appropriate to use a corporate yield variable that is reflective of the borrowing costs of Canadian utilities, one that is well-understood and is based on an established index from a recognized source. **The Board has** accordingly **determined that it will use a utility bond spread based on the difference between the Bloomberg Fair Value Canada 30-Year A-rated Utility Bond index yield and the long Canada bond yield.** This is further described in Appendix B.

108 The Board agrees with the comment of Ms. McShane that separating the LCBF and the utility bond spread variables, as opposed to using one corporate bond yield variable that would implicitly incorporate the LCBF, provides transparency as it shows "what part is causing the ROE to move in either direction."65

109 The Board also determines that the utility bond spread reflected in the reset and refined formulaic ROE approach will be subject to a 0.50 adjustment factor, consistent with the empirical analyses provided by participants to the consultation.

4.3 Capital structure

110 The Board's current policy with regard to capital structure for all regulated utilities continues to be appropriate. As noted in the Board's draft guidelines, capital structure should be reviewed only when there is a significant change in financial, business or corporate fundamentals.66 The Board's current policy is as follows:

* The Board has determined that a split of 60% debt, 40% equity is appropriate for all electricity distributors.67 Capital structure was not a primary focus of the consultation and the Board notes that the comments made by participants in the consultation largely supported the continuation of the Board's existing policy.
* For electricity transmitters, generators, and gas utilities, the deemed capital structure is determined on a case-by-case basis. The Board's draft guidelines assume that the base capital structure will remain relatively constant over time and that a full reassessment of a gas utility's capital structure will only be undertaken in the event of significant changes in the company's business and/or financial risk.68

4.4 Debt Rates

4.4.1 Long-term debt

111 The determination of the cost of long-term debt was not a primary focus of the consultation and the Board notes that the comments made by participants in the consultation largely supported the continuation of the Board's existing policies and practices.

112 While the Board agrees with this approach, it is important to note that the determination of the cost of long-term debt has typically received significant interest in the processes to establish electricity distribution and, to a lesser extent, electricity transmission rates. In contrast to the difficulty establishing the utility cost of equity that arises from a lack of transparency, the issues associated with the determination of a utility's long-term debt cost arise from different factors, including the relatively short period of time since the corporatization of electricity distribution and transmission utilities, the relatively short history of rate regulation by the Board, and the presence of significant amounts of affiliate debt.

Natural gas distributors

113 The Board has a long history of determining the cost of long-term debt for natural gas distributors. Based on this experience and in the absence of any material comments in the consultation suggesting otherwise, the Board is of the view that **the current policy of using the weighted cost of embedded debt should continue**. Consistent with the current practice, in a forward test year rate application the onus is on the applicant utility to forecast the amount and cost of new long-term debt. These values are then factored into the estimated cost of existing long-term debt for the purpose of setting regulated natural gas distribution rates. Debt instruments and debt rates are subject to a prudence review in an application for rates. However, it is the Board's policy that the total estimated cost of debt should be a close proxy for the actual long-term debt cost incurred by the natural gas utility in the rate year.

OPG's prescribed rate-regulated baseload generation

114 Consistent with the Board's practice in OPG's 2008 Cost of Service application, considered under Board file number EB-2007-0905, the Board is of the view that **OPG's cost of long-term debt should be set in a manner similar to that adopted for natural gas distributors**.

Electricity transmitters

115 Consistent with the Board's current practice as set out in various Decisions and Orders arising from rate

applications by electricity transmitters, the Board is of the view that **an electricity transmitter's cost of long-term debt should be set in a manner similar to that adopted for natural gas distributors**.

Electricity distributors

116 In the 2000 Electricity Distribution Rate Handbook, the Board adopted deemed long-term debt rates and deemed capital structures that varied based on the size of utility rate base.

117 The deemed long-term debt rates applied regardless of a utility's actual cost of debt and actual capitalization. This deemed approach reflected the ongoing corporatization of the sector and the fact that many electricity distribution utilities had no debt.

118 The *2006 Electricity Distribution Rate Handbook*, issued by the Board on May 11, 2005, documented an evolution of the treatment of long-term debt for electricity distributors. While the size-related capital structure and (updated) deemed debt rates were retained, the handbook outlined that long-term debt costs could also reflect the cost of embedded debt. The cost of affiliate debt was also capped by the deemed debt rate at the time of issuance.

119 In April of 2006, Board Staff undertook research, commissioned expert advice and consulted with stakeholders on the methods for setting the cost of capital and 2nd Generation Incentive Rate Making. These consultative activities culminated in the December 20, 2006 Report. In that report, the Board provided additional guidance on the treatment of long-term debt, and emphasized that while there should be increased reliance on actual or embedded debt costs, the need for a deemed debt rate that would continue to apply (either in itself or as a ceiling on affiliate debt) was recognized.

120 In distribution utility rate applications heard by the Board since the issuance of the December 20, 2006 Report, the Board has made determinations on the treatment of long-term debt that not only reflect the 2006 guidelines, but are based on the record before it in each application. The Board has also been informed by the findings made in relation to completed applications. **The Board is of the view that it is appropriate for this cost of capital policy to reflect the current practices of the Board with respect to determining the cost of long-term debt based on recent Board decisions**.

121 The following guidelines on the treatment of long-term debt are intended to provide more certainty for applicants and all participants in general. **The Board wishes to emphasize that the long-term debt guidelines relating to electricity distribution utilities are expected to evolve over time and are expected to converge with the process used by the Board to determine the amount and cost of long-term debt for natural gas distributors**. The Board recognizes that there is still a need for the deemed long-term debt rate, however its usage should become more limited in application. The Board wishes to reiterate that the onus is on the distributor that is making an application for rates to document the actual amount and cost of embedded long-term debt and, in a forward test year, forecast the amount and cost of new long-term debt to be obtained during the test year to support the reasonableness of the respective debt rates and terms.

122 The following guidelines are relevant with respect to the determination of the amount and cost of long-term debt for electricity distribution utilities.

123 The Board will primarily rely on the embedded or actual cost for existing long-term debt instruments. The Board is of the view that electricity distribution utilities should be motivated to make rational decisions for commercial "arms-length" debt arrangements, even with shareholders or affiliates.

124 In general, the Board is of the view that the onus is on the electricity distribution utility to forecast the amount and cost of new or renewed long-term debt. The electricity distribution utility also bears the burden of establishing the need for and prudence of the amount and cost of long-term debt, both embedded and new.

125 Third-party debt with a fixed rate will normally be afforded the actual or forecasted rate, which is presumed to

be a "market rate". However, the Board recognizes a deemed long-term debt rate continues to be required and this rate will be determined and published by the Board. **The deemed long-term debt rate will act as a proxy or ceiling for what would be considered to be a market-based rate by the Board in certain circumstances**. These circumstances include:

* For affiliate debt (i.e., debt held by an affiliated party as defined by the Ontario *Business Corporations Act, 1990)* with a fixed rate, the deemed long-term debt rate at the time of issuance will be used as a ceiling on the rate allowed for that debt.
* For debt that has a variable rate, the deemed long-term debt rate will be a ceiling on the rate allowed for that debt. This applies whether the debt holder is an affiliate or a third-party.
* The deemed long-term debt rate will be used where an electricity distribution utility has no actual debt.
* For debt that is callable on demand (within the test year period), the deemed long-term debt rate will be a ceiling on the rate allowed for that debt. Debt that is callable, but not within the period to the end of the test year, will have its debt cost considered as if it is not callable; that is the debt cost will be treated in accordance with other guidelines pertaining to actual, affiliated or variable-rate debt.
* A Board panel will determine the debt treatment, including the rate allowed based on the record before it and considering the Board's policy (these Guidelines) and practice. The onus will be on the utility to establish the need for and prudence of its actual and forecasted debt, including the cost of such debt.

Deemed Long-term Debt Formula for Electricity Distributors

126 While the Board is of the view that greater reliance should be placed on embedded debt, including forecasts of the amount and cost of new debt expected to be incurred during the test year, the Board recognizes that there is a continuing need for a deemed long-term debt rate.

127 While there were no specific suggestions for how the deemed long-term debt rate should be calculated, **the Board sees merit in modifying the formula in a manner consistent with the changes adopted for the ROE adjustment formula**

128 Specifically, the Board considers that **the deemed long-term debt rate for the test year should be an estimate based on the long (30-year) Government of Canada bond yield forecast plus the average spread between an A-rated Canadian utility bond yield and 30-year Government of Canada bond yield for all business days in the month three (3) months in advance of the (proposed) effective date for the rate changes** This change is only in the source of the data, in the following ways:

* The 30-year A-rated Canadian utility bond yield data from Bloomberg will replace the BBB/A-rated Canadian Corporate bond yield series that was obtained from PC Bond, an affiliate of TSX.69
* The monthly average of business daily data will be used, instead of the weekly data used previously.

129 The changes are due to the data availability, and to transparency and cost. Both Bloomberg and PC Bond corporate bond series are proprietary and available on subscription bases. Using the same A-rated Canadian utility bond yield series from Bloomberg will reduce costs and work and increase transparency of the calculations. The Board does not consider the changes in methodology will have any material impact on the calculated deemed long-term debt rate. The Board also notes that this methodology was supported by LPMA and BOMA in their final written comments.70

130 Appendix C provides a detailed description of the methodology for calculating the deemed long-term debt rate.

4.4.2 Short-term debt

Natural gas distributors

131 For rate regulated natural gas distributors, short-term debt is used for an unfunded portion to true-up the deemed capitalization to the utility's actual capitalization. As the variance between actual and deemed capital structures is generally small, the unfunded portion is typically a small fraction of total capitalization for rate-setting purposes.

132 In a Cost of Service application, the applicant natural gas distributor forecasts the cost of short-term debt for the test year, and this is subject to review. The Board notes that no participant questioned the Board's policy and practice for natural gas distributors, and **has determined that it is appropriate to continue with this approach.** With the development of a new deemed short-term debt rate for use in the electricity transmission and distribution sector, the Board notes that it and other participants may take into consideration the deemed short-term debt rate, as discussed below and documented in Appendix D.

OPG's prescribed rate-regulated baseload generation

133 Consistent with the Board's practice in OPG's 2008 Cost of Service application (EB-2007-0905), **the Board is of the view that OPG's cost of short-term debt should be set in a manner similar to that adopted for natural gas distributors.**

Electricity transmitters and distributors

134 Prior to the issuance of 2008 rates, short-term debt was not factored into electricity distribution and transmission rate-setting. In the December 20, 2006 Report, the Board adopted a deemed short-term debt rate that would apply to a deemed 4% of the capital structure. The formula for the deemed short-term debt rate was established as the average 3-month Bankers' Acceptance rate plus a 25 basis point spread, determined three months in advance of the effective date for rates. The short-term debt rate, and deemed 4% component of the capital structure was introduced in Cost of Service applications for 2008 distribution rates.

135 In the consultation, certain electricity distributors commented that they are unable to borrow at rates as predicted by the current deemed short-term debt formula.71,72 These electricity distributors have documented that the cost of short-term debt is much higher and depends on market conditions and on the rating of a distributor. The concern was not with using the Bankers' Acceptance rate, but primarily with the spread over Bankers' Acceptances. The suggestion was that the Board should obtain estimates of the spread from major Canadian banks, and add this to the average Bankers' Acceptance rate as calculated for rate-setting. To lessen the burden, it was suggested that this spread be calculated annually in January of the year, and used as needed. The Board could obtain quotes from banks more frequently if market conditions warranted it.

136 The Board is of the view that this approach to establishing the deemed short-term debt rate has merit. **The Board thus will adopt the following approach to determining the deemed short-term debt rate:**

* In mid-January of each year, the Board will contact major Canadian banks to obtain estimates of the spread of a typical short-term loan for an R1-low utility over the 3-month Bankers' Acceptance rate. The selection of R1-low is to reflect the fact that most distributors currently going to market would fall in that category; only Toronto Hydro Electric Systems Limited and Hydro One Networks Inc. would be R1-Mid or R1-High. Up to six quotes will be obtained. Ideally, the high and low estimates will be discarded to reduce the influence of outliers, and the average spread will be calculated. In the event that less than four quotes are obtained, the average spread will be calculated without discarding high and low estimates. The identity of the banks providing quotes will be protected.

* For the month three months in advance of the effective date for rates, the average 3-month Bankers' Acceptance rate should be calculated based on data for all business days in the month. To this will be added the average spread calculated above, giving the deemed short-term debt rate for rate-setting purposes.

137 Full documentation on the deemed short-term debt rate methodology is provided in Appendix D.

138 In its final comments, LPMA/BOMA submitted that the current formula should be retained, but the spread increased from 25 basis points to 50 basis points, on the basis of recent economic history.73 The Board has determined that distributors and other participants provided sufficient documentation that the spread over bankers' acceptance rates with which they can borrow short-term debt is much higher than the 25 basis points currently used, or even the 50 basis points proposed by LPMA/BOMA. Further, LPMA/BOMA's proposal could possibly need review in the future. The Board is of the view that its adopted approach, while entailing some more work by the Board to obtain the spread quotes from the banks each year, is more flexible and will provide more reasonable estimates of the cost of short-term debt in each year.

4.5 Summary

139 The key elements of the Board's cost of capital policy are summarized in the following table.

Table 2: Components of the Board's Cost of Capital Policy

Capital structure	• 60% debt (56% long-term and 4% short-term) and 40% equity for electricity distributors. • Gas distributors, electricity transmitters and OPG will continue with approved capital structures.
Short-term debt rate	• Once a year, in January, obtain real market quotes from major banks, for issuing spreads over Bankers Acceptance rates for the cost of short-term debt. • The short term rate will be calculated as the average Bankers' Acceptance for the month 3 months in advance of the effective date for the rates, plus the spread for the year calculated above.
Long-term debt rate	• The deemed long-term debt rate will be based on the Long Canada Bond Forecast plus an average spread with an A-rated long-term utility bond yield). • Third-party embedded/actual debt with fixed rates, terms and maturity will get the actual rate. • Affiliate embedded/actual debt with fixed rates, terms and maturity will get the lower of actual and deemed debt rate at time of issuance. • Utility provides forecasts of new debt for a forward test year, where possible. New third-party debt will be accepted at the negotiated market rate. If a forecasted new rate is not available (i.e., due to timing), the deemed long-term debt rate may apply. • For new affiliated debt, the deemed long-term debt rate will be a ceiling on the allowed rate. The onus will be on the utility to demonstrate that the applied for rate and terms are prudent and comparable to a market-based agreement and rate on arms-length commercial terms. • Variable-rate debt will be treated like new affiliated debt. • Renegotiated or renewed debt will be considered new debt. • Where a utility has no actual debt, the deemed long-term debt rate shall apply.
Common equity return	• Refined formula-based ROE will be calculated as the base ROE + 0.5 X (change in Long Canada Bond Forecast from base year) + 0.5 X (change in the spread of (A-rated Utility Bond Yield – Long Canada Bond Yield) from the spread in the base year). This includes an implicit 50 basis points for transactional costs. • The ROE (and the short-term and long-term debt rates) will be based on data for the month 3 months in advance of the effective date for rates. • Reset formula for 2010: The base ROE in the refined formula will be calculated for 2010 as Long Canada Bond Forecast rate plus an ERP of 550 basis points, and reflects multiple, empirically supported, estimates provided in consultation which led to this report.

5 Implementation

5.1 Transition to Recommended Cost of Capital

140 The policy set out in Chapter 4 of this report will come into effect for the setting of rates, beginning in 2010, by way of a cost of service application.

141 The Board's "Minimum Filing Requirements for Natural Gas Distribution Cost of Service Applications" and the Board's "Filing Requirements for Transmission and Distribution Applications" are sufficient for the purposes of implementing the policies set out in this report. Those requirements include information to be filed in support of a utility's proposed cost of capital in a cost of service application. There is no need for additional filing requirements. The onus is on an applicant to adequately support its proposed cost of capital, including the treatment of and appropriate rates for debt instruments. The Board notes that this is being done in cost of service applications. However, the Board wishes to point out the increased emphasis that it is placing on applicants to support their

existing and forecasted debt, and the treatment of these in accordance with the guidelines, or to support any proposed different treatment.

5.1.1 Continued Migration to Common Capital Structure

142 The Board will continue to include an adjustment to rates in 2010, as applicable, as outlined in its December 20, 2006 Report, in order to transition electricity distributors to the single deemed capital structure of 60% debt and 40% equity.

143 With 2010 rates, most electricity distributors will have completed the transition to the deemed capital structure of 60% debt (56% long-term and 4% short-term) and 40% equity. However, some distributors have not completed the transition. The Board will deal with the transition to the common deemed capital structure for these distributors when they file applications for rates.

5.2 Impact on Other Board Policies

5.2.1 Prescribed Interest Rates

144 The deemed short-term debt rate and the prescribed interest rate for deferral and variance accounts use closely related methodologies. Distributors commented that changes to the deemed short-term debt rate should be reflected in the prescribed interest rate. Further, there was acknowledgement that any new formula for the prescribed interest rate for deferral and variance accounts, used to calculate carrying charges on balances, would apply to both credit and debit balances. The Board agrees. While the policy in this report does not cover the prescribed interest rates, the Board intends to initiate a review of its approach to calculating the prescribed interest rate to align it with the approaches set out in this report.

6 Annual Update Process and Periodic Review

6.1 Annual Update Process

145 The Board will apply the methods set out in this report annually to derive the values for the ROE and the deemed long-term and short-term debt rates for use in cost of service applications.

146 If the application of these methods produces numerical results that, in the view of the Board, raise doubt that the FRS is met, the Board may then use its discretion to begin a consultative process to determine whether circumstances warrant an adjustment to the formulaic approach, in general, or to any of the cost of capital parameter values specifically. The Board also may, at its discretion and based on the circumstances at the time, use the previous year's formula-generated values on an interim basis until its final determination is made following the consultative process.

147 Stakeholders proposed a variety of tests and approaches that could be used to supplement the Board's annual review of the cost of capital parameters. The Board is of the view that any tests or approaches used to assess the reasonableness of the cost of capital parameters should be consistent with the formulaic ROE adjustment mechanism adopted. Accordingly, the Board will not attempt to annually derive the ROE using CAPM, DCF or other cost of capital methodologies to assess the reasonableness of the formula-generated ROE. The Board notes that participants are free to perform such calculations and ask the Board to review the formula when they feel it is appropriate.

148 For the purposes of assessing the reasonableness of results on an annual basis, the Board will examine the values produced by the Board's cost of capital methodology, and the relationships between them, in the context of the economic and financial conditions of the day. Further and consistent with the 1997 Draft Guidelines, the Board will review its approach as conditions arise that may call into question its validity. Further, parties may ask the Board to review its cost of capital policies when they feel it is appropriate or the Board may do so on its own

initiative. In either case it will be the Board's decision as to the time for a review. Finally, the Board may request the presentation of other tests or require some weighting for other tests should the Board want to assure itself that its approach does not lead to perverse results and is directionally in line with other market indicators.74

6.2 Periodic Review

149 The Board has determined that it will periodically review its formulaic ROE adjustment mechanism. The use of any formulaic approach to approximate a change in the ROE is bound to be imperfect and any such imperfection may, over time, result in cumulative or compounding effects such that the application of it may not continue to meet the FRS.

150 The Board notes that the time period for a review suggested by stakeholders varied from 3-5 years, with Energy Probe suggesting that "4-5 years is probably too short."75

151 The Board has determined that a review period of five years provides an appropriate balance between the need to ensure that the formula-generated ROE continues to meet the FRS and the objective of maintaining regulatory efficiency and transparency. Accordingly, the Board intends to conduct its first regular review in 2014 and any changes to the policy made as a result of that review would apply to the setting of rates for the 2015 rate year.

152 At the time of the review, the Board will provide guidance to stakeholders through, for example, an issues list similar to that issued on July 30, 2009, and the relevant period over which to estimate the risk-free rate. This latter approach will promote the use of a common basis to derive cost of capital estimates, increasing their direct comparability.

153 The periodic review will not necessarily result in a resetting of the base ROE or refining of the adjustment factors and/or terms of the formula. The Board will seek the views of stakeholders on the need to reset the ROE and the need to revise the formula. If the Board is satisfied that its approach remains appropriate, the base ROE and the formula will remain unchanged and the review will conclude.

* * * * *

Appendix A: Summary on the Formula-Based Return on Equity Guidelines in Effect in the 2009 Rate Year

The Board's existing formula-based approach using the equity risk premium ("ERP") method for determining the fair rate of return for natural rate regulated natural gas utilities is set out in its 1997 *Draft Guidelines on a Formula-Based Return on Common Equity.* The 1997 *Draft Guidelines* were first applied in the EBRO 495 proceeding which set fiscal 1998 rates for the Consumers' Gas Company Ltd. The Board's December 2006 *Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors* reaffirmed the continued use of this approach for electricity distribution utilities subject to a number of minor modifications, as described below.

Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Natural Gas Utilities:

The 1997 Draft Guidelines, have two phases: an initial setup and an ongoing adjustment mechanism.

Initial Set-Up

Step 1: Establish the forecast of the long Government of Canada yield for the test year

The forecast yield of long-term Government of Canada bonds is established for the test year by taking the average of the 3 and 12 months forward 10-year Government of Canada bond yield forecasts, as stated in the most recent issue of Consensus Forecasts, and adding the average of the actual observed spreads between 10 and 30-year

Government of Canada bond yields, for each business day in the month corresponding to the most recent Consensus Forecast issue.

Step 2: Establish implied risk premium

A utility's test year ROE will consist of the projected yield for 30-year long Canada bonds plus an appropriate premium to account for the utility's risk relative to long Canada bonds. The primary methodological approach to be used in evaluating the appropriate risk premium should be the ERP test.

The ERP test is designed to measure the cost of equity capital from the capital attraction perspective. It relies on the assumption that common equity is riskier than debt and that investors will demand a higher return on shares, relative to the return required on bonds, to compensate for that risk. The premium required by an investor to assume the additional risk associated with an equity investment is taken to be the difference between the relevant debt rate, usually the yield on long-term government bonds, and some estimate of the stock's cost of equity. The recommended cost of equity value under the ROE approach is therefore usually computed as the sum of the test-period forecast for the government yield and the utility-specific risk premium the analyst has estimated based on historical ROE evidence and forward-looking considerations.

The Adjustment Mechanism

Once the initial ROE has been set for each of the utilities, a procedure must be put in place to automatically adjust the allowed ROE for each utility to account for changes in long Canada yield expectations. The timing of the adjustment mechanism process for each utility will be consistent with its fiscal year-end.

Step 1: Establish the forecast long Canada rates

The formula-based ERP approach annually adjusts a utility's allowed ROE based on changes in forecast long-term Government of Canada bond yields. Each year the process outlined in Step 1 of the initial setup phase will be repeated and an updated, consensus-based forecast of 30-year long-Canada bond yields will be obtained. The current test year rate forecast will then be compared to the previous test year forecast.

Step 2: Apply adjustment factor

The difference between the forecast long Canada rate calculated in Step 1 and the corresponding rate for the immediately preceding year should be multiplied by a factor of 0.75 to determine the adjustment to the allowed ROE. This adjustment will then be added to the utility's previous test year ROE and the sum should be rounded to two decimal points.

Term of the Rate of Return Formula

The rate of return formula should be reviewed as conditions arise that may call into question its validity. Parties may ask the Board to review the formula when they feel it is appropriate or the Board may do so on its own initiative. In either case it is the Board's decision as to the time for a review.

The Board may request the presentation of other tests or require some weighting for other tests in the formula should the Board want to assure itself that the ERP formula approach does not lead to perverse results and is directionally in line with other market indicators.

December 20, 2006 ***Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors:***

Since 1999, the cost of capital for electricity distributors has been governed by the Board's Decision with Reasons in proceeding RP-1999-0034. This decision established a size-related capital structure for distributors and set the

return on equity at 9.88%.76 In the December 20, 2006 Report, the Board determined that the current approach to setting ROE would be maintained. The ROE will continue to be determined based on the Long Canada Bond Forecast plus an ERP. The approach is a modified Capital Asset Pricing Model method and includes an implicit 50 basis points for transaction costs. At that time, the Board also adopted deemed equity of 40% for all distribution utilities.

In the December 20, 2006 Report, the Board clarified the starting point to be used for each annual update and determined that it is appropriate to use the ROE calculated at that time as the starting point. This figure was 9.35%, as per the Board's determination in Hydro One Network Inc.'s RP-1998-0001 Decision. The Board indicated that it will use 9.35% as the starting point for the update. As a result of the December 20, 2006 Report, the ROE for any period would be:

$$ROE_t = 9.35\% = 0.75 \times (LCBF_t - 5.50\%)$$

Where:

* The ROE is set three months in advance of the effective date for the rate change. Therefore, for May 1 rate changes the ROE will be based on January data.
* The Long Canada Bond Forecast (LCBFt) for any Period is the average of the 3-month and 12-month forecasts of the 10-year Government of Canada bond yield as published in Consensus *Forecasts* at time t *plus* the average of the actual observed spreads between 10 and 30-year Government of Canada bond yields, for each business day during the month corresponding to the *Consensus Forecasts* at time t.

* * * * *

Appendix B: Method to Update ROE

With the release of this report, the Board is resetting and refining its formulaic approach for determining a utility's Return on Equity ("ROE") applicable to the prospective test year. The formula has been reset to address the difference between the allowed ROE arising from the application of the formula and the rate of ROE for a low risk proxy group that cannot be reconciled based on differences in risk alone. The formula has been refined to reduce the sensitivity of the approach to changes in government bond yields due to monetary and fiscal conditions that do not reflect changes in utility cost of equity.

The formula as set out in this report includes (a) a term to reflect the change in the Long Canada Bond forecast ("LCBF") and (b) a term to reflect the change in the spread between A-rated Utility bond yields over the Long Canada Bond yield.

The adjustment factor for the LCBF term is set at 0.5. The adjustment factor for the A-rated Utility bond term is set at 0.5. The methodology for calculating the Long Canada Bond forecast is the same as that set out in the Board's December 20, 2006 Report.

The base for the ROE adjustment formula is set at 9.75%. The corresponding base LCBF is 4.25% and the spread in 30-year A-rated Canadian utility bonds over the 30-year benchmark Government of Canada bond yield is 1.415%.

While there is a change in the base numbers and the adjustment formula, the general approach for calculating the updated ROE is the same as that set out in the Board's December 20, 2006 Report.

The ROE for the prospective test year (*ROEt*) will be calculated by the following adjustment formula:

$$ROE_t = BaseROE + 0.5 \times (LCBF_t - BaseLCBF) + 0.5 \times (UtilBondSpread_t - BaseUtilBondSpread)$$

Where:

* *LCBFt* is the Long Canada Bond Forecast for the test year, and is calculated as:

$$LCBF_t = \left[\frac{{}_{10}CBF_{3,t} + {}_{10}CBF_{12,t}}{2} \right] + \left[\frac{\sum_i ({}_{30}CB_{i,t} - {}_{10}CB_{i,t})}{I} \right]$$

Where

* 10*CBF*3,*t* is the 3-month forecast of the 10-year Government of Canada bond yield as published in Consensus Forecasts three (3) months in advance of the implementation date for rates;
* 10*CBF* 12,*t* is the 12-month forecast of the 10-year Government of Canada bond yield as published in Consensus Forecasts three (3) months in advance of the implementation date for rates;
* 30*CBi,t* is the benchmark bond yield rate for the 30-year Government of Canada bond at the close of day i of the month that is three (3) months in advance of the implementation date for rates, as published by the Bank of Canada [**Cansim Series V39056**];
* 10*CBi,t* is the benchmark bond yield rate for the 10-year Government of Canada bond at the close of day i of the month that is three (3) months in advance of the implementation date for rates, as published by the Bank of Canada [**Cansim Series V39055**]; and
* *I* is the number of business days for which Government of Canada and A-rated Utility bond yield rates are published in the month three (3) months in advance of the implementation date for rates.

* *UtilBondSpreadt* is the average spread of 30-year A-rated Canadian Utility bond yields over 30-year Government of Canada bond yields over all business days in the month three (3) months in advance of the implementation date for rates, and is calculated as

$$UtilBondSpread_t = \frac{\sum_i ({}_{30}UtilBonds_{i,t} - {}_{30}CB_{i,t})}{I}$$

Where:

* 30*UtilBondsi,t* is the average 30-year A-Rated Canadian Utility bond yield rate, from Bloomberg L.P., for business day i of the month that is three (3) months in advance of the implementation date for rates [**Series C29530Y**];
* 30*CBi,t* is the benchmark bond yield rate for the 30-year Government of Canada bond at the close of day i of the month that is three (3) months in advance of the implementation date for rates, as published by the Bank of Canada [**Cansim Series V39056**]; and
* *I* is the number of business days for which Government of Canada and A-rated Utility bond yield rates are published in the month three (3) months in advance of the implementation date for rates.

As noted above, based on September 2009 data, the base ROE is set at 9.75% and the corresponding *BaseLCBF* is 4.25% and *BaseUtilBondSpread* is 1.415%. Thus the ROE adjustment formula is specified as:

$$ROE_t = 9.75\% + 0.5 \times (LCBF_t - 4.25\%) + 0.5 \times (UtilBondSpread_t - 1.415\%)$$

The ROE for any period will be rounded and expressed as a percentage with two decimal places (i.e., XX.XX%).

As for other cost of capital parameters, data will be for the month that is three months prior to the effective date for the new rates. For example, for rates effective May 1, January data will be used to calculate the updated ROE. This means is that *Consensus Forecasts* published in the month of January, and Bank of Canada and Bloomberg L.P. data for all business days during the month of January will be used to calculate the updated ROE.

The necessary data are available shortly after the end of the month, and thus poses no undue delays for rate-setting.

The use of the ROE will be in accordance with the policy described in section 4.2 of this report.

* * * * *

Appendix C: Method to Update the Deemed Long-term Debt Rate

The Board will use the Long Canada Bond Forecast plus an average spread of A-rated Corporate Utility bond yields over the actual Long Canada Bond yield to determine the updated deemed long-term ("LT") debt rate.

This approach is consistent with the methodology adopted in the December 20, 2006 Report, to represent a fair market rate for a long-term debt instrument in the test period. The only change is the source of the corporate bond yields, which is now the A-rated Corporate Utility bond index yield obtainable from Bloomberg L.P.

Consistent with the approach used in prior guidelines, the *2006 Electricity Distribution Rate Handbook* and the December 20, 2006 Report, the ROE and the deemed long-term debt rates are based on the same forecast of the risk-free rate. For certainty, the Long Canada Bond Forecast (*LCBFt*) used in the ROE formula will be used in the calculation of the deemed LT rate.

The deemed LT debt rate (*LTDRt*) will be calculated as follows:

$$LTDR_t = LCBF_t + \frac{\sum_i ({}_{30}UtilBonds_{i,t} - {}_{30}CB_{i,t})}{I}$$

Where:

* *LCBFt* is the Long Canada Bond Forecast for the prospective test year, as defined in Appendix B for the calculation of the ROE;
* 30*UtilBondsi, t* is the average 30-year A-Rated Canadian Utility bond yield rate, from Bloomberg LP., for business day *i* of the month that is three (3) months in advance of the implementation date for rates **[Series C29530Y]**;
* 30*CBi,t* is the benchmark bond yield rate for the 30-year Government of Canada bond at the close of day *i* of the month that is three (3) months in advance of the implementation date for rates, as published by the Bank of Canada **[Cansim Series V39056]**; and

* *I* is the number of business days for which Government of Canada and A-rated Utility bond yield rates are published in the month three (3) months in advance of the implementation date for rates.

As for other cost of capital parameters, data will be for the month that is three months prior to the effective date for the new rates. For example, for rates effective May 1, January data will be used to calculate the updated deemed LT debt rate.

The use of the deemed LT debt rate will be in accordance with the policy described in section 4.4.1 of this report and based on the evidentiary record in the particular application.

* * * * *

Appendix D: Method to Update the Deemed Short-term Debt Rate

The Board will use a new methodology to estimate the deemed short-term ("ST") debt rate, consisting of the average 3-month Bankers' Acceptance rate as published by the Bank of Canada plus a forecasted average spread of short-term debt issuances over 3-month Bankers' Acceptance rates for R1-low Canadian utilities.

This is a change over the previous methodology, specifically in the spread above the Bankers' Acceptance rate which previously was fixed at 25 basis points. The new methodology will use spread forecasts obtained from Canadian prime banks to better reflect the short-term rates that utilities can obtain short-term financing for.

The calculation of the deemed ST debt rate will be done through a two-step process.

1. Annual calculation of the average spread over 3-month Bankers' Acceptance Rates

Once a year, in January, the average spread of short-term debt issuances over 3-month Bankers' Acceptance rates will be obtained by Board staff contacting major Canadian banks. Up to six quotes will be obtained to calculate the average spread to be used during the calendar year. Ideally, the high and low estimates will be discarded to reduce the influence of outliers, and the average spread will be calculated. In the event that less than four quotes are obtained, the average spread will be calculated without discarding high and low estimates.

If market conditions materially change, the Board could decide that the average spread may need to be updated at some point other than January.

2. Calculation of the Deemed Short-Term Debt Rate

The deemed short-term debt rate (*STDRt*) for the prospective test year will be calculated as:

$$STDR_t = \frac{\sum_i BA_i}{I} + AnnSpread_t$$

Where:

* *BAi* is the 3-month Bankers' Acceptance Rate for day *i* in the selected month, as published by Statistics Canada and the Bank of Canada [**Cansim Series V39071**];
* *I* is the number of business days for which published Government of Canada and A-rated Utility bond yield rates are published in the month three (3) months in advance of the implementation date for rates; and
* *AnnSpreadt* is the average annual spread in short-term debt issuances for an R1-low utility over 3-month Bankers' Acceptance rates for the test year *t,* calculated in step 1 above.

As for other cost of capital parameters, data will be for the month that is three months prior to the effective date for the new rates. For example, for rates effective May 1, January data will be used to calculate the updated deemed ST debt rate.

The use of the deemed ST debt rate will be in accordance with the policy described in section 4.4.2 of this report.

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1 Final Comments on behalf of the Consumers Council of Canada, the Vulnerable Energy Consumer's Coalition and the Canadian Manufacturers and Exporters. October 30, 2009. p. 3.

2 Final Comments on behalf of the School Energy Coalition, p. 2.

3 Ontario Energy Board. Letter to Participants re: Consultation on Cost of Capital -- Issues List, Attachment B: Issues for Discussion at Stakeholder Conference. July 30, 2009. Questions 10 and 13.

4 Ontario Energy Board. Letter to Mr. Robert B. Warren re: Consultation on Cost of Capital (Board File No.: EB-2009-0084). August 20, 2009.

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6 TransCanada PipeLines Limited v. National Energy Board et al. [2004] F.C.A 149. Para. 6.

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15 Professor L.D. Booth. Written Comments on behalf of Consumers Council of Canada, the Vulnerable Energy Consumer's Coalition, the Industrial Gas Users Association, the Canadian Manufacturers & Exporters (CME), the London Property Management Association and the Building Managers and Owners Association of the Greater Toronto Area. September 8, 2009. p. 25.

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32 Ibid. p. 47.

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71 Written Comments of FortisOntario Inc. September 10, 2009. p. 8, bullet at bottom of page. FortisOntario Inc. indicates that a high-grade utility would be Bankers' Acceptance + 175 basis points, for smaller operating company entities, it would be Bankers' Acceptance + 250-275 basis points

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2018 Generic Cost of Capital

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1 Introduction

1. This decision sets out the approved return on equity (ROE) for the years 2018, 2019 and 2020 on a final basis. The approved ROE applies uniformly to the utilities listed below:

- AltaGas Utilities Inc. (AltaGas)[1]
- AltaLink Management Ltd. (AltaLink)[2]
- ATCO Electric Ltd. (ATCO Electric)[3]
- ATCO Gas & Pipelines Ltd.[4] [5]
- ENMAX Power Corporation (ENMAX)[6]
- EPCOR Distribution & Transmission Inc. (EPCOR)[7]
- FortisAlberta Inc. (FortisAlberta)[8]
- City of Lethbridge (Lethbridge)[9]
- City of Red Deer (Red Deer)[10]
- TransAlta Corporation (TransAlta)[11]

(collectively, the affected utilities)

2. This decision also sets out the approved deemed equity ratios (also referred to as capital structure) for the affected utilities for 2018, 2019 and 2020 on a final basis.

3. Additionally, this decision considers the two commonly used income tax methodologies, flow-through and future income tax (FIT), and whether the Alberta Utilities Commission will direct the adoption of one standard methodology.

4. The approved final ROE and final deemed equity ratios for 2018, 2019 and 2020 for all of the affected utilities are set out in Table 1 below.

---

1 Natural gas distribution.
2 Electricity transmission.
3 Electricity transmission and distribution. Unless otherwise indicated, a reference to ATCO Electric includes both the transmission and distribution operations of this utility.
4 ATCO Gas refers to the utility's natural gas distribution operations. ATCO Pipelines refers to the utility's natural gas transmission operations.
5 Collectively, ATCO Electric, ATCO Gas and ATCO Pipelines are referred to as the ATCO Utilities.
6 Electricity transmission and distribution. Unless otherwise indicated, a reference to ENMAX refers to both the transmission and distribution operations of this utility.
7 Electricity transmission and distribution. Unless otherwise indicated, a reference to EPCOR refers to both the transmission and distribution operations of this utility.
8 Electricity distribution.
9 Electricity transmission.
10 Electricity transmission.
11 Electricity transmission assets.

Table 1. Approved final ROE for 2018, 2019 and 2020, and approved final deemed equity ratios for 2018, 2019 and 2020

	2018 approved	2019 approved	2020 approved
	(%)		
ROE	8.5	8.5	8.5
Deemed equity ratios			
Electricity and natural gas transmission			
AltaLink	37	37	37
ATCO Electric	37	37	37
ATCO Pipelines	37	37	37
ENMAX	37	37	37
EPCOR	37	37	37
Lethbridge	37	37	37
Red Deer	37	37	37
TransAlta	37	37	37
Electricity and natural gas distribution			
AltaGas	39	39	39
ATCO Electric	37	37	37
ATCO Gas	37	37	37
ENMAX	37	37	37
EPCOR	37	37	37
FortisAlberta	37	37	37

5. The approved ROE and deemed equity ratios from this decision do not apply to EPCOR Energy Alberta GP Inc., ENMAX Energy Corporation and Direct Energy Regulated Services because these utilities are regulated pursuant to the *Electric Utilities Act, Regulated Rate Option Regulation*[12] and the *Gas Utilities Act Default Gas Supply Regulation*,[13] respectively.

6. The ROE and deemed equity ratios for the various investor-owned water utilities under the Commission's jurisdiction were not determined in this proceeding. However, the determinations in this proceeding may be considered in other proceedings, should issues respecting ROE and deemed equity ratios arise for these utilities.

2 Procedural summary

7. On October 7, 2016, the Commission issued Decision 20622-D01-2016[14] (2016 Generic Cost of Capital (GCOC) decision), which set an approved ROE and deemed equity ratios for 2016 and 2017. With respect to 2018, the Commission stated:

[12] Alberta Regulation 262/2005.
[13] Alberta Regulation 184/2003.
[14] Decision 20622-D01-2016: 2016 Generic Cost of Capital, Proceeding 20622, October 7, 2016.

> 339. The allowed ROE for 2017 of 8.50 per cent awarded in this decision will remain in place on an interim basis for 2018 and for subsequent years until changed by the Commission.[15]
>
> …
>
> 623. The approved deemed equity ratios awarded in this decision will remain in place on an interim basis for 2018 and for subsequent years until changed by the Commission.[16]

8. On April 20, 2017, in Proceeding 20687: Commission-Initiated Generic Proceeding to Address the Income Tax Methodologies Used in Revenue Requirement Calculations for Regulated Utilities in Alberta (Proceeding 20687), the Commission issued correspondence indicating that it was not prepared to prescribe a single income tax methodology without first examining the implications of changing tax methodologies on other components that may affect the setting of rates by the Commission, such as cost of capital.[17] The Commission stated that the best forum to consider these matters was the 2018 GCOC proceeding. Accordingly, the Commission stated that the record of Proceeding 20687 would form part of the record of the 2018 GCOC proceeding.

9. Also on April 20, 2017, the Commission issued a letter initiating the 2018 GCOC proceeding, Proceeding 22570.[18] That letter proposed the scope of issues to be considered in Proceeding 22570 as well as process timelines and provided interested parties with an opportunity to comment.

10. On July 5, 2017, the Commission ruled that it would establish approved ROEs and deemed equity ratios for 2018, 2019 and 2020 in Proceeding 22570. The Commission also addressed the scope of the proceeding and the minimum filing requirements for the utilities. The Commission identified that the scope of Proceeding 22570 would include:

- Whether changes in the approved ROE and deemed equity ratios established in the 2016 GCOC decision are warranted.
- How the Commission should consider the traditional approaches and models used in previous GCOC proceedings for determining an approved ROE and equity ratios.
- The short-term and long-term effects of employing the two commonly used income tax methodologies, flow-through and FIT, on areas such as cost of capital and overall revenue requirement, and how the Commission should consider factors such as differences in the sum of the present discounted value of the revenue requirement and impacts on funds from operations (FFO)/debt in deciding which method should be applied to utilities.[19]
- The issues surrounding income tax methods or treatments, income tax deferral accounts, and performance-based regulation (PBR) implications, as set out by the Commission in its issues list in Proceeding 20687.[20]
- Relevant issues regarding long-term debt.[21]

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15 Decision 20622-D01-2016, paragraph 339.
16 Decision 20622-D01-2016, paragraph 623.
17 Exhibit 22570-X0077, paragraph 11.
18 Exhibit 22570-X0078.
19 Exhibit 22570-X0114, paragraph 28.
20 Exhibit 22570-X0114, paragraph 29.

- Matters with respect to municipally owned utilities, specifically how their ownership structure and the relationship between utility ratepayers and municipal taxpayers may affect ROE and deemed equity ratios for these utilities.[22]

11. Each of the affected utilities, except Lethbridge, Red Deer and TransAlta, actively participated in this proceeding. AltaGas and the ATCO Utilities co-sponsored the evidence of Dr. Bente Villadsen, Dr. Paul Carpenter and Mr. Robert Buttke. AltaLink, EPCOR and FortisAlberta co-sponsored the evidence of Mr. Robert Hevert. ENMAX sponsored the evidence of Mr. James Coyne. Additionally, each of AltaGas, AltaLink, ENMAX, EPCOR, FortisAlberta and the ATCO Utilities (collectively, the utilities) filed company-specific evidence, including the minimum filing requirements directed by the Commission.[23]

12. The City of Calgary (Calgary), the Consumers' Coalition of Alberta (CCA) and the Office of the Utilities Consumer Advocate (UCA) (collectively, the interveners) actively participated in the proceeding. Calgary sponsored the evidence of Mr. Hugh Johnson; the CCA submitted the evidence of Mr. Jan Thygesen and Mr. Dustin Madsen; and the UCA sponsored the evidence of Dr. Sean Cleary and Mr. Russ Bell.

13. In addition to the filing of evidence, the Commission's process included information requests (IRs) and responses on the utilities' evidence, and evidence sponsored by the utilities; IRs and responses on evidence sponsored by the interveners; rebuttal evidence filed by the utilities; a two-week oral hearing; and a further process to permit IRs and responses to follow up on outstanding answers to undertakings. The Commission also established a process for simultaneous written argument and reply argument.

14. The Commission considers that the record of this proceeding closed with the filing of reply arguments on May 8, 2018.

15. In reaching the determinations set out in this decision, the Commission has considered all relevant materials comprising the record of this proceeding, including the evidence and argument provided by each party, and the evidence and submissions from Proceeding 20687. 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.

3 Overview of the Commission's approach to setting an approved ROE and approved deemed equity ratios

16. In satisfying the fair return standard, the Commission is required to determine a fair ROE for the affected utilities. In Decision 2009-216[24] (2009 GCOC decision), Decision 2011-474[25]

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[21] Exhibit 22570-X0114, paragraph 34.
[22] Exhibit 22570-X0114, paragraph 36.
[23] A complete list of registered participants is produced in Appendix 1 to this decision.
[24] Decision 2009-216: 2009 Generic Cost of Capital, Proceeding 85, Application 1578571-1, November 12, 2009, paragraphs 77-78.
[25] Decision 2011-474: 2011 Generic Cost of Capital Proceeding, Proceeding 833, Application 1606549-1, December 8, 2011, paragraph 2.

(2011 GCOC decision), Decision 2191-D01-2015[26] (2013 GCOC decision) and the 2016 GCOC decision,[27] the Commission established an ROE that uniformly applied to all of the affected utilities and accounted for particular business risks faced by the affected utilities by incorporating any required adjustments into their respective approved deemed equity ratios, either collectively or on an individual basis. The Commission adopted the same approach in this decision.

17. For the purposes of this decision, the Commission's point of departure is the approved ROE and deemed equity ratios established in the 2016 GCOC decision. From this starting point, the Commission has evaluated the evidence and argument in this proceeding to determine whether changes in the approved ROE and deemed equity ratios from the 2016 GCOC decision are warranted.

18. In determining a fair ROE, the Commission begins, in Section 4, with a discussion of the fair return standard. This is followed by a discussion of income tax in Section 5.

19. In Section 6, the Commission evaluates changes in the global economic and Canadian capital market conditions since the conclusion of the 2016 GCOC proceeding. This review is a factor informing the Commission's determination of both a fair approved ROE and deemed equity ratios, as discussed in sections 8 and 9.

20. In Section 7, the Commission considers issues related to the municipally owned utilities, including the availability of the Alberta Capital Financing Authority (ACFA) financing and equity funding riders.

21. In Section 8, the Commission establishes the approved ROE for 2018, 2019 and 2020 on a final basis, after consideration of all the relevant factors, including changes in global economic and Canadian capital market conditions, financial models and the effect of potential regulatory risk factors identified by parties.

22. In Section 9, the Commission establishes the approved deemed equity ratios for 2018, 2019 and 2020, for all of the affected utilities other than AltaGas, after consideration of all the relevant factors, including credit metric analysis, business risk analysis, generic business risks, utility sector business risk analysis and any company specific adjustments. In Section 10, the Commission establishes the approved deemed equity ratio for AltaGas.

23. In Section 11, the Commission addresses other issues raised during the proceeding that are not specifically addressed in other sections.

24. In Section 12 of the decision, the Commission sets out how the approved ROE and deemed equity ratios are to be implemented by the affected utilities.

[26] Decision 2191-D01-2015: 2013 Generic Cost of Capital, Proceeding 2191, Application 1608918-1, March 23, 2015, paragraph 416.
[27] Decision 20622-D01-2016, paragraph 340.

4 Fair return standard

25. All parties agreed that the fair return standard requires consideration of three factors, specifically '"comparable investments," "capital attraction" and "financial integrity." The CCA suggested that, in addition to these three factors, the fair return should consider ratepayer impacts, while many of the utilities argued that the fair return should only be considered from the perspective of the utility equity investor. Another point of disagreement between the utilities and interveners related to the weight to be placed on comparable investments.

26. The CCA submitted that the Commission should have regard to the impact of any approved ROE and equity thickness on both customers and utilities, and that the fair return should be no more than is absolutely required to maintain safe, reliable and economic service for the foreseeable future.[28] In its reply argument, the CCA argued that the fair return standard does not override the requirement that rates be just and reasonable.[29]

27. EPCOR argued that the fair return factors, assessed from the perspective of an investor, address both investor and customer interests as customers benefit from being served by a functional utility that is able to maintain its financial integrity and attract capital.[30] In its reply argument, EPCOR discussed how an ROE of 25 per cent would doubtlessly satisfy the financial integrity and capital attraction factors, but would be too high to satisfy the comparable investment component, which operates to ensure that the utility and customers pay no more for equity than what the market requires.[31] EPCOR agreed that the just and reasonable standard is a fundamental legal requirement that applies to utility rates generally and to the fair return in particular.[32]

28. The ATCO Utilities and AltaGas suggested that the CCA's recommendation was an attempt to fabricate a new test for the fair return standard, and referred to several statements from *TransCanada Pipelines Ltd v National Energy Board*, including:

> … While I agree with the appellant that the impact on customers or consumers cannot be a factor in the determination of the cost of equity capital, any resulting increase in tolls may be a relevant factor for the Board to consider in determining the way in which a utility should recover its costs. It may be that an increase is so significant that it would lead to "rate shock" if implemented all at once and therefore should be phased in over time. It is quite proper for the Board to take such considerations into account, provided that there is, over a reasonable period of time, no economic loss to the utility in the process.[33]

29. ENMAX argued that the revenue requirement impact on customers is not a relevant consideration in determining a fair return.[34] Similarly, the ATCO Utilities and AltaGas, in their joint argument, stated that the impact on customer rates is irrelevant when determining the

[28] Exhibit 22570-X0888, paragraph 91.
[29] Exhibit 22570-X0920, paragraph 223.
[30] Exhibit 22570-X0893, paragraph 65.
[31] Exhibit 22570-X0915, paragraph 41.
[32] Exhibit 22570-X0915, paragraph 34.
[33] Exhibit 22570-X0918, paragraph 27.
[34] Exhibit 22570-X0896, paragraph 19.

required rate of ROE and that other regulatory mechanisms are available to mitigate impacts on customers.[35]

30. With respect to comparability, in his oral testimony, Mr. Coyne reflected that "I believe that the Commission in 2016 took a leg out from under the stool, or at least shortened it when it put greater reliance on just the credit rating."[36] In his rebuttal evidence, Mr. Coyne provided a figure showing the approved equity returns of Canadian gas and electric distribution utilities that have rates set through a litigated proceeding.[37] In oral testimony, Mr. Coyne admitted that this figure does not adjust for risk.[38] Mr. Coyne described this figure as an objective measure of what comparability looks like and that it is one valid way to consider all three fair return factors.[39] ENMAX argued that if the conclusion is that Alberta utilities are average risk compared to other Canadian utilities, then they should be in the middle of the figure to meet the comparable investments factor.[40]

31. In her evidence, Dr. Villadsen provided a summary of approved ROE and capital structures for regulated Canadian and United States (U.S.) utilities, which she submitted were relevant because investors compare returns across jurisdictions.[41]

32. In argument, EPCOR focused on the comparability or comparable investment component:

> 57. As developed by subsequent Canadian authorities, this aspect of the "fair return" standard has found its most complete expression in the "comparability" or "comparable investment" component of the test. This component has variously been expressed as requiring "(t)hat the investor should be able to obtain a return from his investment such as might alternatively be obtained from other investments of comparable risk and uncertainty," or that a fair return "be comparable to the return available from the application of the invested capital to other enterprises of like risk".[42]

33. EPCOR argued that a return that does not satisfy the comparability standard would not allow a utility to raise new capital or engage in refinancing.[43]

34. Mr. Hevert stated that the required return is a function of the risk and return characteristics of the investment, and not the source of the funds.[44] EPCOR noted that Dr. Cleary confirmed this principle.[45] Mr. Hevert submitted that any notion of a company having a different value depending on how its investors fund their equity investment violates the widely

35 Exhibit 22570-X0900, paragraph 26.
36 Transcript, Volume 5, page 1002.
37 Exhibit 22570-X0775, PDF page 40.
38 Transcript, Volume 5, page 1005.
39 Transcript, Volume 5, page 1005.
40 Exhibit 22570-X0896, paragraph 47.
41 Exhibit 22570-X0193.01, PDF pages 77-78.
42 Exhibit 22570-X0893, paragraph 57.
43 Exhibit 22570-X0893, paragraph 60.
44 Exhibit 22570-X0153.01, PDF pages 16, 125-126.
45 Transcript, Volume 10, page 2161.

acknowledged economic "law of one price." He added this principal states that in an efficient market, identical assets have the same value.[46]

Commission findings

35. In each of the *Public Utilities Act*, the *Gas Utilities Act* and the *Electric Utilities Act,* the fair return is referenced as a component of just and reasonable rates. The *Public Utilities Act* and *Gas Utilities Act* require the Commission, in fixing just and reasonable rates, to determine a rate base upon which it shall fix a fair return.[47] The *Electric Utilities Act* requires the Commission to ensure that a tariff is just and reasonable and provides the owner of an electric utility with a reasonable opportunity to recover a fair return on the equity of shareholders of the electric utility.[48]

36. The interplay between just and reasonable rates and a fair return was described in *Northwestern Utilities Ltd. v Edmonton (City)* as follows:

> The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested.[49]

37. As reflected in the preceding quotation, determining just and reasonable rates balances the interests of both the utility and its customers. The Commission exercises its judgment in determining a total return for each utility to establish rates that provide the utility a reasonable opportunity to earn a fair return on invested capital while ensuring that rates are just and reasonable so that customers are not paying more than is required to maintain safe, reliable and economic service.

38. The approach to determining a fair return on the equity component of invested capital in a regulated utility has ordinarily been referred to as the fair return standard.[50] The Commission has addressed the fair return standard in previous GCOC decisions, with Decision 2009-216[51] providing a thorough discussion of the underlying statutory framework and relevant case law. As discussed in Decision 2009-216, the Commission and its predecessors have accepted and considered the following three factors when setting a fair return: "comparable investments," "capital attraction" and "financial integrity." The Commission considers these factors to be well established and continues to be satisfied that the fair return standard is met when the return satisfies these three factors, while also understanding that this is a component of just and reasonable rates.

39. The Commission also does not consider that simply matching the ROE and deemed equity ratios awarded by other regulators satisfies the fair return standard, nor does it establish just and reasonable rates. The Commission remains of the view that seeking to match approved returns in other jurisdictions provides an outcome that is inherently circular. The objective of the

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46 Exhibit 22570-X0153.01, PDF page 126.
47 *Public Utilities Act*, RSA 2000, c P-4, s 90(1); *Gas Utilities Act*, RSA 2000, c G-5, s 37(1).
48 *Electric Utilities Act*, SA 2003, c E-5.1, s 121(2)(a), 122(1)(a)(iv).
49 *Northwestern Utilities Ltd v Edmonton (City)*, 1929 CarswellAlta 114, paragraph 18, [1929] 2 DLR 4, [1929] SCR 186.
50 Decision 2009-216, paragraph 87.
51 Decision 2009-216, Section 2.

GCOC is to consider the market expectation for the utilities raising capital and providing utility service in Alberta, not simply mimicking the returns awarded by other regulators.

40. In addition, there is insufficient evidence to conclude that utilities in other Canadian and U.S. jurisdictions are comparable and face the same risks as the affected utilities. The determination of a "comparable" return requires the Commission to apply its judgment in assessing the specific cost of capital for the utilities based on the evidence presented and in the absence of any utility under the Commission's jurisdiction issuing equity directly to investors.

41. The Commission acknowledges Mr. Hevert's view that "The opportunity cost concept applies regardless of the source of the funding." and that the nature of the investor does not necessarily impact the expected risk-adjusted return of an investment.[52] However, the Commission operates within its legislated mandate, and does not take this principle to mean that the owner or investor in the regulated utility must be disregarded in all contexts. Where the source of funds is likely to result in harm to customers of a regulated utility, the Commission may consider this.

42. For example, in circumstances where the Commission is tasked with approving the sale of a utility to another investor, the Commission has traditionally applied a no-harm test that considers, amongst other things, the impact of such a sale on customer rates and the impact on the financial profile of the utility for the purposes of attracting capital.[53]

43. The Commission may deny a sale or other transaction under sections 101 and 102 of the *Public Utilities Act* if the Commission determines that the transaction is likely to result in harm to customers in terms of the rates paid for service or the reliability of that service.

44. In applying for approval of a multi-step transaction whereby MidAmerican (Alberta) Canada Holdings Corporation (MC Alberta), a wholly owned subsidiary of Berkshire Hathaway Energy Company (BHE), replaced SNC as the owner of the entities that own and operate AltaLink, L.P.'s (ALP) transmission assets and business, MC Alberta cited the following passage made by the Alberta Energy and Utilities Board (the Board), the Commission's predecessor:

> The Board notes that, with respect to these types of applications, any potential benefits are generally intangible and harder to quantify. The Board notes that one persuasive factor in any sale is that a company that wants to be in the business is replacing one that wishes to exit the business.[54]

45. In its decision approving the above-noted transaction, the Commission noted:

> 116. In addition, MC Alberta noted that in its credit rating analysis, S&P took specific note of the fact that utility ownership is a core business of BHE, and also suggested that the fact that AILP [AltaLink Investments, L.P.] would be of more strategic importance to

[52] Exhibit 22570-X0153.01, PDF page 16.
[53] Decision 2014-326: AltaLink Investment Management Ltd. and SNC Lavalin Transmission Ltd. et al., Proposed Sale of AltaLink, L.P. Transmission Assets and Business to MidAmerican (Alberta) Canada Holdings Corporation, Proceeding 3250, Applications 1610595-1, 1610596-1, 1610597-1, November 28, 2014, paragraphs 107-108.
[54] Decision 2014-326, paragraph 115.

> BHE, as compared to the nonstrategic status of ALP to SNC-Lavalin could affect credit ratings after the close of the proposed transaction.
>
> 117. MC Alberta further noted that the Commission's predecessor had ascribed a benefit to customers from the acquisition of a utility by an owner with "access to extensive experience … through its affiliated companies" and argued that the fact that BHE affiliated companies have extensive experience in the electric utility industry is a relevant consideration for the Commission.[55]

46. The Commission recognized in Decision 2014-326 that the source of funds / financial strength of the owner is a consideration in determining whether a transaction satisfies the "no harm" test, and that any impact on credit ratings may have a corresponding impact on rates.[56] The Commission found that the willingness, experience and financial strength of the proposed owner of AltaLink was a positive factor.

5 Income taxes

47. As noted in Section 2, the scope of this proceeding includes various issues originally identified in the Commission-initiated generic proceeding on income taxes (Proceeding 20687). In a letter dated April 20, 2017,[57] the Commission decided that the income tax issues should be addressed as part of the 2018 GCOC proceeding. The Commission therefore closed Proceeding 20687 and informed parties that the record of Proceeding 20687[58] would form part of the record of this GCOC proceeding.

48. The scope of Proceeding 20687 included a consideration of income tax methods, income tax deferral accounts and PBR implications. The scope was expanded in this GCOC proceeding to include a consideration of the effects of employing flow-through and FIT on areas such as cost of capital and overall revenue requirement.[59]

49. The Commission addresses the following issues regarding income tax in the sections that follow:

- Income tax methods, including whether all the utilities should adopt one standard method.
- Claiming maximum allowable income tax deductions when forecasting income tax expense.
- The CCA's recommendation regarding reporting future income tax liabilities.
- Use of deferral accounts for income tax.
- PBR implications associated with income tax.

[55] Decision 2014-326, paragraphs 116-117.
[56] Decision 2014-326, paragraphs 122-123.
[57] Exhibit 22570-X0077.
[58] Exhibits 22570-X0002 to 22570-X0077 comprise the record of Proceeding 20687.
[59] Exhibit 22570-X0078, paragraph 3.

8 Return on equity

244. A GCOC proceeding establishes the deemed return on equity for the purposes of setting regulated rates for a future period; in this case, for 2018, 2019 and 2020. Generally, the cost of equity to a firm is the return that investors require to make on equity investment in the firm. That is, investors will only provide funds if the ROE that they expect to receive is sufficient to compensate them for the risks they are assuming in making the investment. The approved cost of equity in the GCOC period is a point estimator of investor return expectations that reflects investors' return requirements over the long run. In reality, due to the long-term nature of equity returns, investors evaluate their equity investment both in the short term and the long term, as actual returns fluctuate over time.

245. The Commission received a significant body of evidence to assist it in determining a fair approved ROE, including a number of opinions on the proper methodology to be employed and a wide range of proposed ROEs, based on evidence on the current financial environment and the results of a number of models.

246. Dr. Cleary, Dr. Villadsen, Mr. Buttke, Mr. Coyne, Mr. Hevert and Mr. Thygesen provided evidence on changes in the global and Canadian financial environment since the conclusion of the 2016 GCOC proceeding. The Commission's findings on this evidence are set out in Section 6.7.

247. Dr. Cleary, Dr. Villadsen, Mr. Coyne and Mr. Hevert utilized the capital asset pricing model (CAPM). Dr. Villadsen and Mr. Hevert also employed the use of an empirical CAPM (ECAPM). The Commission's findings on the evidence relating to these models are set out in Section 8.2.4 and Section 8.2.5.

248. Dr. Cleary and Mr. Hevert used a bond yield plus risk premium model (BYPRPM). Mr. Hevert also utilized a predictive risk premium model. The Commission's findings with respect to these models are set out in Section 8.3.

249. Dr. Cleary, Dr. Villadsen, Mr. Coyne and Mr. Hevert submitted discounted cash flow (DCF) model estimates for utility equities, in order to estimate the required ROE for the affected utilities. Dr. Cleary and Mr. Hevert submitted DCF model estimates for the Canadian market as a whole, while Mr. Hevert also submitted a DCF model estimate for the U.S. market as a whole. The Commission's findings on the various DCF model results are set out in Section 8.4.

250. Dr. Cleary submitted evidence on the stock market return expectations of finance professionals. The Commission addresses this area in Section 8.5.

251. Dr. Villadsen presented information on the approved ROE for other Canadian and U.S. utilities for 2016 and 2017. Dr. Cleary presented evidence on the relevance of market price-to-book (P/B) values in assessing the cost of equity. The Commission's findings on this material are set out in Section 8.7.

252. Consistent with the approach adopted in previous GCOC decisions, in arriving at the fair approved return for the affected utilities, the Commission considered a variety of approaches, models and directional indices. The Commission summarizes its findings and sets out the approved ROE for 2018-2020 in Section 8.8.

253. In Section 8.9, the Commission considered its previous approach of using an annual adjustment formula for ROE and indicates its intention to explore the possibility of returning to a formula-based approach to cost of capital matters

8.1 Use of proxy group companies

254. Before the Commission begins its review of the evidence on the financial models employed by the various witnesses, it will comment on the use of data from proxy group companies. Dr. Villadsen explained the need for the use of this data, as follows.

> Since the Utilities [the ATCO Utilities and AltaGas] are subsidiaries of consolidated entities and do not themselves have publicly traded stock, it is not possible to directly estimate their cost of equity using the CAPM or DCF models. This is because these models rely on market information (such as stock prices, betas based on historical stock returns, and growth rate estimates) to estimate the expected returns required by equity investors.[329]
>
> ….
>
> That is why I develop samples of publicly traded companies that are as analogous as possible to the Utilities in terms of business risk, and apply the models to those samples as proxies for the Utilities.[330]

255. Mr. Coyne[331] and Mr. Hevert[332] echoed the views of Dr. Villadsen.

256. The Commission has previously commented on some of the challenges associated with determining the ROE for the affected utilities, because of the lack of direct market evidence.

> …the determination of the rate of return on equity for a regulated utility is difficult given that the correct answer is not readily apparent. This determination requires an expert tribunal to apply its judgment in assessing often conflicting evidence and to consider the differing interests and perspectives on risk of debt and equity investors. This exercise is made even more complex in Canada, and in Alberta in particular, given the limited number of stand-alone utilities issuing debt and the lack of any utilities that issue equity directly to investors. This fact which has partially resulted from deregulation and unbundling of utility services, corporate reorganizations creating utility holding companies, holding companies owning a mix of regulated and unregulated business and utility acquisitions was referred to in the oral hearing as interposing a "dirty window" between direct market evidence on cost of capital and the true cost of capital for Alberta utilities.[333]

257. Mr. Hevert developed two proxy groups. The first group, referred to as his Canadian utility proxy group, consists of six publicly traded Canadian utility companies.[334] Mr. Hevert's second proxy group, referred to as his U.S. utility proxy group, consists of 25 publicly traded

[329] Exhibit 22570-X0193.01, A39.
[330] Exhibit 22570-X0193.01, A39.
[331] Exhibit 22570-X0131, PDF page 33.
[332] Exhibit 22570-X0153.01, PDF page 44.
[333] Decision 2009-216, paragraph 110.
[334] Exhibit 22570-X0153.01, Table 2.

whereas the monthly betas were not.[463] In his evidence, Mr. Coyne recognized that both monthly and weekly returns are commonly accepted in practice; however, due to the results of his analysis, Mr. Coyne recommended weekly five-year or two-year betas.[464]

338. Dr. Cleary submitted that both monthly and weekly return data are widely used to determine beta coefficients. Dr. Cleary further explained that he could not offer a definitive opinion on whether monthly or weekly data is best to calculate betas and he did not think that the Commission could conclusively decide the issue.[465] The UCA submitted that the pragmatic approach is to consider both monthly and weekly return data, which is the approach adopted by Dr. Cleary.[466]

339. The UCA disagreed with Dr. Villadsen's view that weekly betas have become standard practice. The UCA further explained that her comments are not reflective of a recent text which she co-authored, "Risk and Return for Regulated Industries," in which the use of monthly return is cited as the common approach.[467]

Commission findings

340. In the 2016 GCOC proceeding, witnesses recommended beta estimates in the range of 0.45 to 0.92. In its decision, the Commission observed that all witnesses had employed methods to estimate beta that were generally accepted, but that the resulting beta range of 470 bps was substantially wider than the beta range of 250 bps in the 2013 GCOC proceeding. The Commission found that it could not identify, with any reasonable degree of confidence, a method that allowed the Commission to narrow the range of betas recommended by the witnesses.[468]

341. In its April 20, 2017 letter[469] initiating this proceeding, the Commission stated the following:

> (i) If there is a wide range of beta values provided by the experts, will the Commission be able to identify, with any reasonable degree of confidence, a method that allows the Commission to narrow the range of these betas?

342. In addition to updating their proxy groups, witnesses in this proceeding also presented evidence with respect to the use of weekly versus monthly betas, and the use of the Blume adjustment, to address the above referenced issue.

343. With respect to the use of weekly versus monthly betas, the Commission notes a strong preference for weekly betas by the utility witnesses, whereas Dr. Cleary maintained that there is no clearly superior method. It is clear from the evidence on the record, just as it was in the 2016 GCOC proceeding, that weekly betas are associated with values toward the higher end of the recommended beta range, whereas monthly betas are associated with values toward the lower end of the recommended beta range.

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463 Exhibit 22570-X0131, PDF page 51.
464 Exhibit 22570-X0131, PDF page 53.
465 Transcript, Volume 10, pages 2123-2124.
466 Exhibit 22570-X0913, PDF page 24.
467 Exhibit 22570-X0897.01, PDF page 25.
468 Decision 20622-D01-2016, PDF page 46.
469 Exhibit 22570-X0078, PDF page 1.

344. The Commission is not persuaded that weekly betas are clearly superior in all instances to monthly betas as there remains some uncertainty and disagreement in the evidence on this point. Indeed, practitioners continue to use both weekly and monthly data, and the investment research firms that provide the data upon which analysts rely continue to provide both weekly and monthly data, including betas derived from both weekly and monthly data. Accordingly, the Commission will continue to consider both weekly and monthly based beta estimates in determining reasonable beta estimates.

345. There was also considerable debate in this proceeding over the use of the Blume adjustment. In the 2013 GCOC decision, the Commission acknowledged that adjusted betas are widely disseminated to investors by investment research firms, including Bloomberg, Value Line and Merrill Lynch. However, the Commission also indicated continued uncertainty about whether an adjustment is warranted for the betas of regulated utilities.[470]

346. The Commission has not been persuaded in this proceeding that adjusted betas are superior to unadjusted betas in the context of regulated utilities. The Commission continues to hold the view expressed in the 2016 GCOC proceeding that both raw betas and adjusted betas provide useful information with respect to utility risk.[471]

347. The low end of Dr. Cleary's recommended beta range, 0.30, was developed based on the long-term average over the last 25-28 years. The Commission agrees with Dr. Villadsen's submission that this estimate is biased downward since it considers anomalous periods such as the aftermath of the dot-com bubble.[472] Even Dr. Cleary acknowledged during the 2016 GCOC proceeding that betas from 1998 to 2002 were not meaningful.[473]

348. Dr. Villadsen stated that each beta calculated for up to five years after the dot-com bubble era is still contaminated by the anomalous data. She added that in order to eliminate the trailing impact of this anomalous data, a credible long-term average would have to exclude betas measured using data from 1998 to 2007.[474] The Commission agrees. The Commission derived the resulting long-term average beta for the TSX Utility sub-index, excluding data from 1998 to 2007. The resulting average was 0.47.[475] Based on this, the Commission finds that the low-end beta of 0.30 proposed by Dr. Cleary can be excluded.

349. The Commission considers Dr. Cleary's recommended beta of 0.45 to be the lower bound for a reasonable range of betas values. The 0.45 value does not significantly differ from the Commission's recalculated long-term average beta of 0.47, nor the 0.43 average Dr. Cleary calculated for his nine company Canadian utility proxy group.[476] The Commission also considers that the value-weighted portfolio beta value associated with Dr. Villadsen's Canadian utility

[470] Decision 20622-D01-2016, pdf 46.
[471] Decision 20622-D01-2016, pdf 46.
[472] Exhibit 22570-X0767.01, PDF page 135.
[473] Exhibit 22570-X0786.01, A10.
[474] Exhibit 22570-X0786.01, A10.
[475] Using data from Exhibit 20622-X0464, worksheet Rolling Results. Dr. Cleary, in Exhibit 22570-X0565, PDF page 2, references Figure 6 from Exhibit 20622-X0457. Exhibit 20622-X0457 was Dr. Villadsen's rebuttal evidence from the 2016 GCOC proceeding. The working paper underlying Figure 6 of her rebuttal evidence is in Exhibit 20622-X0464.
[476] Exhibit 22570-X0562.01, Table 8.

proxy group, 0.95, represents an upper bound for a reasonable range of betas. Accordingly, the Commission considers that a reasonable range of betas is 0.45 to 0.95.

8.2.4 The resulting CAPM estimate

350. The witnesses in this proceeding presented a large number of CAPM estimates by varying input parameters for each of the risk-free rate, beta and MERP.

351. Table 4 below summarizes the CAPM estimates and input parameters.

Table 4. CAPM inputs and resulting ROE estimates

	Rf	Beta	MERP	Float	Adj	ROE
	(%)		(%)		(%)	
Cleary-recommendation	2.60	0.450	5.00	0.50	0.13%	5.48
Coyne-Canadian utility proxy group	3.26	0.749	7.70	0.50	N/A	9.53
Coyne-U.S. electric proxy group	3.85	0.666	7.70	0.50	N/A	9.49
Coyne-North American electric proxy group	3.73	0.682	7.70	0.50	N/A	9.48
Hevert-Canadian utility proxy group	3.08	0.717	9.14	0.50	N/A	10.13
Hevert-U.S. utility proxy group-2018	3.30	0.624	10.02	0.50	N/A	10.08
Hevert-U.S. utility proxy group-2019	4.20	0.624	10.02	0.50	N/A	10.96
Hevert-U.S. utility proxy group-2020	4.30	0.624	10.02	0.50	N/A	11.06
Villadsen-Scenario 1-Cdn. utility proxy group-low	3.45	0.850	5.70	0.50	N/A	8.80
Villadsen-Scenario 1-Cdn. utility proxy group-high	3.45	0.950	5.70	0.50	N/A	9.40
Villadsen-Scenario 1-U.S. gas LDC utility proxy group-low	3.45	0.663	5.70	0.50	N/A	7.70
Villadsen-Scenario 1-U.S. gas LDC utility proxy group-high	3.45	0.669	5.70	0.50	N/A	7.80
Villadsen-Scenario 1-U.S. electric utility proxy group-low	3.45	0.578	5.70	0.50	N/A	7.20
Villadsen-Scenario 1-U.S. electric utility proxy group-high	3.45	0.608	5.70	0.50	N/A	7.40
Villadsen-Scenario 1-U.S. water utility proxy group-low	3.45	0.644	5.70	0.50	N/A	7.60
Villadsen-Scenario 1-U.S. water utility proxy group-high	3.45	0.750	5.70	0.50	N/A	8.20
Villadsen-Scenario 2-Cdn. utility proxy group-low	3.30	0.850	8.00	0.50	N/A	10.60
Villadsen-Scenario 2-Cdn. utility proxy group-high	3.30	0.950	8.00	0.50	N/A	11.40
Villadsen-Scenario 2-U.S. gas LDC utility proxy group-low	3.30	0.663	8.00	0.50	N/A	9.10
Villadsen-Scenario 2-U.S. gas LDC utility proxy group-high	3.30	0.669	8.00	0.50	N/A	9.20
Villadsen-Scenario 2-U.S. electric utility proxy group-low	3.30	0.578	8.00	0.50	N/A	8.40
Villadsen-Scenario 2-U.S. electric utility proxy group-high	3.30	0.608	8.00	0.50	N/A	8.70
Villadsen-Scenario 2-U.S. water utility proxy group-low	3.30	0.644	8.00	0.50	N/A	9.00
Villadsen-Scenario 2-U.S. water utility proxy group-high	3.30	0.750	8.00	0.50	N/A	9.80

Commission findings

352. The results in Table 4 above, show a wide range of ROE estimates based on CAPM, ranging from 5.48 per cent (Dr. Cleary's recommended value) to 11.40 per cent (Villadsen-Scenario 2-Canadian utility proxy group, which uses the value-weighted portfolio beta of 0.950).

353. The wide range of CAPM estimates is not surprising, given the Commission's determination above that the use of weekly and monthly based beta estimates, as well as the use of adjusted and unadjusted betas in the CAPM model, are acceptable. This wide range of CAPM results does not, on its own, provide much assistance to the Commission in determining an approved ROE. Nonetheless, the Commission has determined, as discussed below, a point estimate of 7.90 per cent with respect to the CAPM, which it will consider in establishing the ROE fair return for the affected utilities.

20

TransCanada PipeLines Ltd. (Re)

Canada National Energy Board Decisions

Canada National Energy Board

Calgary, Alberta; Toronto, Ontario; Montréal,

Québec; Calgary, Alberta

Panel: G. Caron (Presiding Member); G.A. Habib (Member); L. Mercier (Member)

Heard: 4, 5, 6, 7, 8, 11, 12, 13, 14,

15, 18, 19, 20, 21, 22, 25, 26, 27,

28, 29 June 2012, 9, 10, 11, 12, 13, 16,

17, 18, 19, 20 July 2012, 20, 21,

22, 23, 24, 27, 28, 29, 30, 31 August

2012, 10, 11, 12, 13, 14, 17, 18, 19,

20, 21, 24, 25, 26, 28 September 2012

and 1, 2, 3, 4 October 2012 and 13,

14, 15, 16, 19, 20, 21, 22, 23, 29, 30

November 2012 and 3, 4, 5 December

2012.

Decision: March 1, 2013.

No. RH-003-2011

2013 LNCNEB 2 | *2013 LNCONE 2*

IN THE MATTER OF the National Energy Board Act and the regulations made thereunder; AND IN THE MATTER OF an application dated 1 September 2011 by TransCanada PipeLines Limited NOVA Gas Transmission Ltd. and Foothills Pipe Lines Ltd. under Part IV of the National Energy Board Act for orders approving, among other things, tolls that TransCanada PipeLines Limited may charge for transportation services provided on its Mainline pipeline system (Mainline) between 1 January 2012 and 31 December 2013 under File OF-Tolls-Group1-T211-04 01; AND IN THE MATTER OF National Energy Board Hearing Order RH-003-2011, dated 27 September 2011; AND IN THE MATTER OF certain proposals made by intervenors in the RH-003-2011 proceeding for decisions or orders that determine how tolls are to be fixed for Mainline transportation services for 2012 and beyond.

(880 paras.)

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R.B. Wallace: Office of the Utilities Consumers Advocate (Participant).

D. Audino, P. Khan: National Energy Board (Participant).

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Abbreviations

ADOE	Alberta Department of Energy
ANE	Alberta Northeast Gas, Limited
APPrO	Association of Power Producers of Ontario
ATCO Gas	ATCO Gas and Pipelines Ltd.
ATM	Alternative Tolling Methodology
ATWACC	After-Tax Weighted Average Cost of Capital
Bcf/d	Billion cubic feet per day
B.C.	British Columbia
B.C. Ministry	British Columbia Ministry of Energy and Mines
Board or NEB	National Energy Board
BP	BP Canada Energy Group ULC
CAPM	Capital Asset Pricing Model
CAPP	Canadian Association of Petroleum Producers
CD	Consumed Depreciation
CDA	Central Delivery Area
Centra	Centra Gas Manitoba, Inc.
Centram SSDA	Centra Manitoba South Saskatchewan Delivery Area
CSV	Consumed Service Value
DCF	Discounted Cash Flow
DDA	Distributor Delivery Area
DMR	Discretionary Miscellaneous Revenue
Dth/d	Dekatherms per day

ECAPM	Empirical Capital Asset Pricing Model
EDA	Eastern Delivery Area
EGNB	Enbridge Gas New Brunswick Limited Partnership
EME	Eastern Mainline Expansion
EPH(s)	Economic Planning Horizon(s)
Extension or ASE	Alberta System Extension
FERC	Federal Energy Regulatory Commission
Foothills	Foothills Pipe Lines Ltd.
FST	Firm Service Tendered
FT	Firm Transportation Service
FT-SN	Firm Transportation Short Notice
GAAP	Generally Accepted Accounting Principles
Gaz Métro	Société en commandite Gaz Métro
GJ	Gigajoule
GLGT	Great Lakes Gas Transmission Company
GPUAR	*Gas Pipeline Uniform Accounting Regulations*
GRR	Gross Revenue Requirement
IGCAA	Industrial Gas Consumers Association of Alberta
IGUA	Industrial Gas Users Association
IT	Interruptible Transportation Service
LDC(s)	Local Distribution Company (or Companies)
LNG	Liquefied Natural Gas
LTAA	Long-Term Adjustment Account

LT-WFS	Long-Term Winter Firm Service
MAS	Market Area Shippers, which consists of Enbridge Gas Distribution Inc., Union Gas Limited and Société en comandite Gaz Métro
MFP	Multi-Year Fixed Price Service
MLP(s)	Master Limited Partnership(s)
MRP	Market Risk Premium
NEB Act	*National Energy Board Act*
NGTL or NOVA	NOVA Gas Transmission Ltd.
NIT	NOVA Inventory Transfer
NOL	Northern Ontario Line
OM&A	Operations, Maintenance and Administrative
Ontario	Ministry of Energy for Ontario
Prairies	The Prairies segment of the Mainline
Québec	Ministère des Ressources naturelles et de la Faune – Gouvernement du Québec
RAM	Risk Alleviation Mechanism
ROE	Return on Equity
RP or Restructuring Proposal	The TransCanada Business and Services Restructuring Proposal
SMB	Saskatchewan/Manitoba Border
SQ or Status Quo	The Mainline's existing tolling methodology
STAA	Short-Term Adjustment Account
STFT	Short Term Firm Transportation Service
STS	Storage Transportation Service

STS-L	Storage Transportation Service-Linked
ST-SN	Short Term Short Notice Service
SWDA	Southwest Delivery Area
TBO	Transportation by Others
Tcf	Trillion cubic feet
TJ/d	Terajoules per day
TransCanada	TransCanada PipeLines Limited, unless the context otherwise requires
Tenaska	Tenaska Marketing Canada
TSA	Toll Stabilization Adjustment account
TTF	Mainline Tolls Task Force
TQM	Trans Québec & Maritimes Pipeline Inc.
UCA	Office of the Utilities Consumer Advocate
Union	Union Gas Limited
UDCs	Unutilized Demand Charges
U.S.	United States of America
WCSB	Western Canada Sedimentary Basin
WEG	Western Export Group
YEC	York Energy Centre LP

Glossary of Terms

Alberta System Extension	Extension of the TransCanada Alberta System service.
Basis point	One-hundredth of a percentage point, used in reference to interest rates or rates of return on equity.
Beta	A measure of the systematic risk of a security, which estimates the extent to which a stock's price fluctuates more or less than average when the market fluctuates.
Billing determinants	Calculated values used in allocating a revenue requirement between tollpayers. They account for both volumes and distances.
Business risk	The risk attributed to the nature of a particular business activity (as distinct from financial risk); for pipelines, it typically includes supply, market, regulatory, competitive, and operating risks.
Capital Asset Pricing Model	A method used to estimate the cost of equity capital by comparing the return and risk characteristics of an individual company's shares with the market average.
Capital structure	The way in which a business is financed; generally expressed as a percentage breakdown of the types of capital employed.
Competitive risk	The business risk that results from competition for customers at both the supply and market ends of a pipeline system.
Delivery Area	A geographic area within a toll zone that is comprised of multiple delivery points where shippers receive delivery of their natural gas.
Depreciation Study	Mainline Depreciation Study.
Discounted cash flow	A method used for estimating the cost of common equity based on the expected dividend yield of the company's shares and the expected future dividend growth rate.
Economic Planning Horizon	The period over which it is expected that an asset will have a useful life. In the context of depreciation, the economic planning horizon is often used to establish a truncation period.
Embedded cost of debt	The weighted-average historical cost of long-term debt outstanding.

Financial risk	The risk inherent in a company's capital structure; financial risk increases as the proportion of debt increases.
Load Centre	A location within each toll zone or domestic delivery area calculated based on the energy-weighted average distance of haul for firm service deliveries during the base year.
Long-Haul	Transportation service originating at Empress or a Saskatchewan receipt point.
Market risk	The business risk that stems from the overall size of the market and the market share that a pipeline is able to capture.
Regulatory risk	Risk to the income-earning capability of the assets that arises due to the method of regulation of the company.
Revenue requirement	The total cost of providing service, including operating and maintenance expenses, depreciation, amortization, taxes, and return on rate base.
Restructuring Proposal	TransCanada Business Services Restructuring Proposal
RH-1-72	Phase II of NEB proceeding on TransCanada's Application concerning Tolls and Tariff (Reasons for Decision dated May 1973).
RH-2-76	NEB proceeding on Interprovincial Pipe Line Limited Application for Tariff and Tolls (Reasons for Decision dated December 1977).
RH-3-86	NEB proceeding on TransCanada's Application for new tolls effective 1 January 1987 (Reasons for Decision dated May 1987).
RH-4-2001	NEB proceeding on TransCanada's 2001-2002 Fair Return Application concerning cost of capital for the Mainline (Reasons for Decision dated June 2002).
RH-2-2004 Phase II	NEB proceeding on TransCanada's 2004 Mainline Tolls and Tariff Application (Phase II Reasons for Decision dated April 2005).
RH-3-2004	NEB proceeding on TransCanada's North Bay Junction Application (Reasons for Decision dated December 2004).

RH-1-2008	NEB proceeding on Trans Québec & Maritimes Pipelines Inc. Application dated 17 December 2007 concerning cost of capital (Reasons for Decision dated March 2009).
Settlement	Mainline 2007-2011Tolls Settlement
Shale gas	A form of unconventional gas that is trapped within shale, a sedimentary rock originally deposited as clay or silt and characterised by extremely low permeability or ability to flow. The majority of the gas exists as free gas or adsorbed gas though some gas can also be found in a dissolved state within the organic material.
Short-haul	Transportation service originating at locations other than Empress or a Saskatchewan receipt point.
Status Quo	The Mainline's existing tolling methodology.
Supply risk	The risk that the physical availability of natural gas could affect a pipeline's income-earning capability.
Test Year	A forward-looking 12-month period used for ratemaking purposes.
Throughput Study	TransCanada 2012-2013 Canadian Mainline Throughput Study.
Tight gas	A form of unconventional natural gas that is held in the pore space of a rock that has a lower permeability or ability to flow than usual for that type of rock.
Tolls Task Force	A joint industry task force initiated by TransCanada. Its membership is comprised of a wide cross-section of the natural gas industry, including representatives of the producing, marketing, brokering and pipeline segment of the industry, provincial governments and local distribution and industrial end-use customers.
TransCanada Contribution	Voluntary contribution of $25 million per year by TransCanada to reduce the Mainline revenue requirement for 2012 and 2013.

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* and the regulations made thereunder;

AND IN THE MATTER OF an application dated 1 September 2011 by TransCanada PipeLines Limited NOVA Gas Transmission Ltd. and Foothills Pipe Lines Ltd. under Part IV of the *National Energy Board Act* for orders approving, among other things, tolls that TransCanada PipeLines Limited may charge for transportation services provided on its Mainline pipeline system (Mainline) between 1 January 2012 and 31 December 2013 under File OF-Tolls-Group1-T211-04 01;

AND IN THE MATTER OF National Energy Board Hearing Order RH-003-2011, dated 27 September 2011;

AND IN THE MATTER OF certain proposals made by intervenors in the RH-003-2011 proceeding for decisions or orders that determine how tolls are to be fixed for Mainline transportation services for 2012 and beyond.

HEARD in Calgary, Alberta on 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 June 2012, and in Toronto, Ontario on 9, 10, 11, 12, 13, 16, 17, 18, 19, 20 July 2012, and in Montréal, Québec on 20, 21, 22, 23, 24, 27, 28, 29, 30, 31 August 2012, and in Calgary, Alberta on 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 28 September 2012 and 1, 2, 3, 4 October 2012 and 13, 14, 15, 16, 19, 20, 21, 22, 23, 29, 30 November 2012 and 3, 4, 5 December 2012;

Chapter 1

Disposition

The Business Environment

1 The Mainline is in an unprecedented position. No major NEB regulated natural gas transmission pipeline has ever been affected by market forces to the extent that the Mainline is now affected. Throughput on the Mainline has decreased significantly, and as a result, Mainline tolls have increased substantially over a short period of time.

2 The future of the Mainline depends on how TransCanada is able to respond to the changes to its business environment. The Mainline faces increasing competition for gas supply from intra-Alberta demand, other ex-Western Canada Sedimentary Basin (WCSB) pipelines and new markets for WCSB gas. The Mainline competes with pipelines from emerging shale and tight gas basins in the United States of America (U.S.), which deliver gas to eastern markets. The Mainline must adjust to this new environment because eastern consumers may not renew contracts for long-haul service and bypass infrastructure may be built.

3 Tolls cannot continue to increase each year in response to throughput decline. Costs associated with throughput variation have been passed to remaining Firm Transportation service (FT) shippers. Those shippers have borne all of the costs of, and the risk associated with, competition. If this were to continue, the Mainline's competitiveness could further erode and exacerbate the root cause of throughput declines.

Our Decision

4 The multi-year fixed tolls approach we have adopted stops the toll increases. Our Decision sets the FT toll from Empress, Alberta to Dawn, Ontario at $1.42/gigajoule (GJ), compared to the 2013 Status Quo toll of $2.58/GJ. We expect this toll to remain in effect through 2017. Recognizing the increased business risk that the Mainline is facing, we have approved the Mainline's return on equity (ROE) at 11.5 per cent on a 40 per cent equity ratio. We have also approved an incentive mechanism that would further increase the Mainline's profits if annual net revenues are higher than forecast.

5 We have approved several elements of TransCanada's Restructuring Proposal, including all of TransCanada's proposed changes to the Mainline's cost allocation, and the elimination of toll zones and the elimination of the Risk Alleviation Mechanism (RAM). In some cases, we have granted TransCanada more than it proposed, in particular, by conferring greater discretion upon TransCanada in how it prices Interruptible Transportation service (IT) and Short Term Firm Transportation service (STFT).

6 We have not approved the Alberta System Extension (ASE or Extension), the reallocation of accumulated depreciation and the proposed treatment of costs related to TransCanada's agreement for transportation services on Trans Québec and Maritimes Pipeline Inc.'s (TQM) pipeline system. We view the ASE as inappropriate cost shifting among affiliate companies that is contrary to sound tolling principles, such as the principle of "no acquired

rights or obligations," which we believe must be upheld. In our opinion, shippers' costs and benefits do not extend beyond a contract under which service was requested and made available. The ASE violates this principle and, accordingly, cannot produce tolls that are just and reasonable.

Multi-Year Fixed Tolls

7 We believe that multi-year fixed tolls will better enable the Mainline to address the current challenges imposed on it by the business environment in which it operates. Given the increase in throughput that is forecast, averaging the FT toll over a multi-year period lowers the FT toll immediately and better allows the Mainline to compete.

8 Multi-year fixed tolls provide toll certainty and stability for shippers. Shippers noted it was difficult to make contracting and investment decisions without knowing how much it would cost to transport on the Mainline. Multi-year fixed tolls provide a competitive advantage over the Status Quo and over the elements of the Restructuring Proposal that we have approved.

Greater Pricing Discretion

9 The current pricing methodology for IT and STFT is not appropriate. Shippers using IT or STFT to meet a firm operating requirement do not contribute sufficiently to the Mainline's fixed costs. For example, shippers are increasingly able to meet their peak requirements for gas by contracting for STFT for a short term (for as little as one week), often paying only 110 per cent of the corresponding FT toll for that term. This provides shippers the assurance that they will receive service when they need it, but pay only a fraction of the full year's cost of having the Mainline's capacity available to them.

10 The pricing discretion proposed by TransCanada under the Restructuring Proposal did not go far enough. In our view, conferring greater discretion on TransCanada to set bid floors for IT and STFT service will provide TransCanada the opportunity to recover the costs of its capacity, during the period of time in which its capacity is used, from those who use it.

11 TransCanada will have to assess how to price IT and STFT. Optimizing billing determinants and maximizing net revenues on the Mainline, while mitigating the threat of bypass, requires TransCanada to exercise judgment about how much it charges. TransCanada is accountable for how it exercises its discretion and is encouraged by the new incentive mechanism to make decisions that result in the greatest Mainline net revenue, which in the long-run will benefit shippers who require Mainline service.

A Streamlined Regulatory Process

12 The North American natural gas market has changed and is continuing to change. We understand that the Mainline may need to develop new products and services to respond to market changes. In our view, the current process for approving changes to Mainline products and services can be improved to allow the Mainline to better respond to its competitive environment. Accordingly, we have developed, and will implement, a streamlined regulatory process for new service and pricing proposals on the Mainline. The National Energy Board (Board or NEB) will issue its decision on new service and pricing proposals in as little as ten weeks from the date the application is filed. This will allow the Mainline to better respond to competition and alleviates concern that markets will change to make the multi-year fixed tolls uncompetitive on certain paths during the period of time in which they are fixed.

Opportunity to Recover Costs

13 We are not disallowing any Mainline investment from being recovered in tolls. In reaching this finding, we gave the most weight to TransCanada's forecast increase in Mainline throughput. Given that forecast, we are of the view that TransCanada should be afforded the time and tools to adapt to its business environment, and the time to take advantage of the opportunities offered by this Decision.

14 We recognize that throughput, cost and revenue forecasts may not be realized. We have compensated the Mainline through a higher allowed return for the increased variability risk it will face due to its cash flows being more dependent on the accuracy of its throughput forecast than in the past. We note that the Mainline's forecast of discretionary service revenue is conservative and was based on the Mainline having less discretion to set prices for IT and STFT. As a result, Mainline revenues and profits may be higher than forecast.

15 If larger-than-forecast cost deferrals were to occur, they could represent a materialization of the Mainline's fundamental risk and costs could be disallowed. If costs were disallowed, it would not mean that TransCanada did not have a reasonable opportunity to recover costs, but rather that events did not turn out as forecast or that this opportunity was not seized by TransCanada. A potential outcome is that the Mainline would suffer a loss -- just like any other business that faces competition.

Conclusion

16 The Mainline faces increased competitive risk. Accordingly, we have provided the Mainline with the tools to respond to this risk, coupled with regulatory oversight and regulatory process flexibility to effect changes as appropriate. We find this to be important regardless of what the future holds in terms of whether all or part of the facilities continue to provide gas services.

17 Our Decision enables TransCanada to meet market forces with market solutions. It is TransCanada's responsibility to ensure that the Mainline is economically viable and continues to be an important asset to connect the WCSB to markets in the east. The extent to which the Mainline is used as a supply option for consumers and a market option for producers can only be determined by a functioning free market. TransCanada must not look to regulation to shield the Mainline from its fundamental business risk. It must address the underlying competitive reality in which the Mainline operates.

18 We have provided TransCanada with the tools it requires to achieve positive outcomes for its investors and customers. Now, it must use those tools to construct a viable future.

Gaétan Caron
Presiding Member

Georgette Habib
Member

Lyne Mercier
Member

Calgary, Alberta

March 2013

Chapter 2

Introduction and Background

2.1 Overview of the Application and Hearing

19 On 1 September 2011, TransCanada PipeLines Limited (TransCanada), NOVA Gas Transmission Ltd. (NOVA or NGTL) and Foothills Pipe Lines Ltd. (Foothills) (collectively referred to as "TransCanada" unless the context otherwise requires) applied to the Board under Parts I and IV of the *National Energy Board Act* (NEB Act)1 for approvals required to implement a proposed restructuring of the services on the TransCanada Mainline pipeline system (Mainline), the TransCanada Alberta System (Alberta System) and the TransCanada Foothills System

the possible impacts such a service would have on Mainline contracting and the extent to which it could negatively impact the revenue generating capability of the Mainline.

561 TransCanada was concerned that a separate seasonal firm service with renewal rights could promote migration away from FT and STS and result in lost billing determinants. Further, TransCanada did not believe that a 10 per cent premium above the FT toll would be appropriate for a service that could be used on a renewable basis in the most valuable months of a year, as this would effectively prevent FT capacity from being sold on an annual basis, and contribute little to the annual cost of providing service in the peak period.

Views of the Board

We share TransCanada's concern that seasonal firm service with renewal rights could prevent FT capacity from being sold on an annual basis. Therefore, we do not approve a seasonal firm service with renewal rights.

Decision

We deny the request for a seasonal firm service with renewal rights.

Chapter 9

Mainline Fair Return and Business Risk

562 When tolls are determined pursuant to a cost-of-service methodology, the regulator is required to determine a fair return to be applied to the investment made by the regulated company. This fair return will determine, to a large extent, the earnings from regulated operations. Based on judicial and regulatory decisions, the return allowed to a regulated company needs to comply with the Fair Return Standard.

563 This chapter presents the business risk assessment for the Mainline and the determination of a fair return pursuant to the Fair Return Standard. First, the Fair Return Standard is presented in Section 9.1, which is followed by the business risk assessment in Section 9.2. Submissions regarding samples of comparable companies for the Mainline are analyzed in Section 9.3 and the methodologies used to estimate the cost of capital are assessed in Section 9.4.

564 Finally, the evidence submitted on the recommended return for the Mainline is considered in Section 9.5 to determine a fair return.

9.1 Fair Return Standard

565 The Fair Return Standard establishes the requirements that must be met by the return allowed to the utility. The Fair Return Standard requires that a return:

* be comparable to the return available from the application of the invested capital to other enterprises of like risk (comparable investment requirement);
* enable the financial integrity of the regulated enterprise to be maintained (financial integrity requirement); and
* permit incremental capital to be attracted to the enterprise on reasonable terms and conditions (capital attraction requirement).

566 In determining a utility's allowed return, the Board can only consider the company's cost of capital; the impact of any resulting toll increase on customers is an irrelevant consideration in that determination. Parties in this proceeding did not dispute the Fair Return Standard, which is well established by case law62 and set out in previous Board decisions.63 While individual components of the overall return (ROE, capital structure and cost of debt) need to be found reasonable, the Fair Return Standard needs to be applied to the overall return allowed to the company.

21

DECISION

IN THE MATTER OF an application by Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner, Liberty Utilities (Gas New Brunswick) Corp. for an order approving its return on equity, cost of debt and capital structure.

(Matter No. 491)

October 29, 2021

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

IN THE MATTER OF an application by Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner, Liberty Utilities (Gas New Brunswick) Corp. for an order approving its return on equity, cost of debt and capital structure.

(Matter No. 491)

NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

Acting Chairperson:	François Beaulieu
Members:	Patrick Ervin
	John Patrick Herron
Board Counsel:	Katherine McBrearty
Counsel for Board Staff:	Matthew Letson
Chief Clerk:	Kathleen Mitchell

APPLICANT:

Liberty Utilities (Gas New Brunswick) LP:	Len Hoyt, Q.C.

INTERVENERS:

J.D. Irving, Limited:	Christopher Stewart
PUBLIC INTERVENER:	Heather Black

A. Introduction

[1] Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner, Liberty Utilities (Gas New Brunswick) Corp. (Liberty), applied to the New Brunswick Energy and Utilities Board (Board) for a review of its cost of capital.

[2] Liberty is the general franchisee for gas distribution in New Brunswick under an Amended and Restated General Franchise Agreement, dated October 1, 2019. Prior to this date, Enbridge Gas New Brunswick Limited Partnership, as represented by its general partner, Enbridge Gas New Brunswick Inc. (EGNB), held the general franchise.

[3] During EGNB's tenure as general franchise holder, the Board considered its cost of capital on two occasions:

(a) In its June 2000 decision, the Board approved a return on equity (ROE) of 13 percent; a cost of debt equal to the borrowing rate of Enbridge Inc. (Enbridge) plus 100 basis points; and an equity ratio not exceeding 50 percent; and

(b) In its November 2010 decision (2010 Decision), the Board approved an ROE of 10.9 percent; a cost of debt set at the Enbridge borrowing rate plus 100 basis points; and an equity ratio not exceeding 45 percent.

[4] In its decision dated January 13, 2021 (Matter 478), the Board directed Liberty to file an application by March 31 to allow the Board to evaluate the ROE, the appropriate capital structure, and cost of debt applicable to Liberty.

[5] The current matter is the Board's first cost of capital review for Liberty and it is seeking the approval of:

(a) An ROE of 11.5 percent;

(b) A cost of debt of 3.315 percent;

(c) A capital structure with an equity ratio of 50 percent; and

(d) Any additional orders, decisions, or directions as the Board may deem necessary or appropriate.

[6] A notice of application (Notice) was published in several daily newspapers. The Notice was provided to certified gas marketers, all parties involved in Matter 453 (EGNB's application for approval of its 2018 Regulatory Financial Statements and 2020 General Rate Application) and Matter 478 (Liberty's application for approval of its 2019 Regulatory Financial Statements and 2021 General Rate Application), and all parties who participated in the Board's above referenced 2010 cost of capital hearing.

[7] The Board held a pre-hearing conference by video conference on April 27, where J.D. Irving, Limited was granted intervener status. It did not file any evidence, nor did it make any submissions in this proceeding.

[8] A hearing was conducted by video conference on July 19, 20 and 22.

[9] Liberty presented a witness panel which included Mr. Gilles Volpé, Vice President/General Manager, and Mr. David Lavigne, Director, Finance and Regulatory, both from Liberty; and Mr. James Coyne, Senior Vice President, and Mr. John Trogonoski, Assistant Vice President, both from Concentric Energy Advisors, Inc. (Concentric). Mr. Coyne and Mr. Trogonoski were declared experts in the area of cost of capital for regulated utilities and associated financial, market and risk analysis.

[10] Ms. Heather Black, the Public Intervener, submitted the written evidence of Dr. Laurence Booth, a Professor of Finance and CIT Chair in Structured Finance at the Joseph L. Rotman School of Management, University of Toronto. Dr. Booth appeared as the Public Intervener's witness and was declared an expert in corporate financing and valuation.

B. Legislative Framework

[11] The following provisions of the *Gas Distribution Act*, *1999*, S.N.B. 1999, c. G-2.11 (Act) are relevant to this proceeding:

> **52**(3) The Board may make an order approving or fixing just and reasonable rates and tariffs that a gas distributor shall charge its customers for the distribution of gas or for supplier of last resort services.

52(5) In approving or fixing just and reasonable rates and tariffs, the Board

(a) may adopt any method or technique it considers appropriate, including an alternative form of regulation,

71(1) The Board shall supervise the activities of gas distributors, gas marketers, customers of gas distributors and other persons subject to this Act and has full jurisdiction to inquire into, hear and determine any matter

(b) where it appears to the Board that the circumstances may require it, in the public interest, to make any order or give any direction, leave or approval that by law it is authorized to make or give, or concerning any matter, act or thing that by this Act or any regulation, rule, certificate, order or direction is prohibited or required to be done.

C. Issues

[12] Regulated utilities, such as Liberty, earn a return on their rate base. Such a return is referred to as their cost of capital.

[13] In evaluating Liberty's cost of capital, the Board is required to determine a fair ROE for Liberty, in satisfaction of the fair return standard, and establish its cost of debt and capital structure.

D. Analysis

1. Fair Return Standard

[14] Under the Act, the Board may make an order approving or fixing just and reasonable rates. In so doing, it may adopt any method or technique it considers appropriate in accordance with subsection 52(5) of the Act.

[15] In its seminal decision of *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] SCR 186, the Supreme Court of Canada stated:

> The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested.

[16] The decision further stated that a fair return means that a utility is allowed as large of a return on the capital invested as it would receive if it invested the same amount in other securities possessing an attractiveness, stability, and certainty equal to that of the utility.

[17] The determination of just and reasonable rates, as described above, requires a balance between the interests of both the utility and its customers. As part of its method for setting rates, the Board must exercise its judgment to determine a total return for the utility to establish rates that provide it a reasonable opportunity to earn a fair return on invested capital. It must do this while ensuring that rates are just and reasonable so that customers are not paying more than is required to maintain safe, reliable and economic service.

[18] The process of determining a fair return is referred to as the fair return standard. This standard is enshrined in numerous Canadian regulatory decisions. In their most recent decisions on cost of capital, both the Alberta Utilities Commission and the British Columbia Utilities Commission have applied the following requirements, as summarized by the National Energy Board (now Canada Energy Regulator) in *TransCanada PipeLines Ltd. (Re)*, 2013 LNCNEB 2, at paragraph 565:

> (a) be comparable to the return available from the application of the invested capital to other enterprises of like risk (comparable investment requirement);
>
> (b) enable the financial integrity of the regulated enterprise to be maintained (financial integrity requirement); and
>
> (c) permit incremental capital to be attracted to the enterprise on reasonable terms and conditions (capital attraction requirement).

[19] In final argument, Mr. Len Hoyt, counsel for Liberty, submitted that all three requirements must be satisfied, and none is less important than the other. No party disputed this interpretation or the applicability of the fair return standard in this proceeding.

[20] The Board considers that the fair return standard is satisfied when these three requirements are met and that this is an appropriate component of setting just and reasonable rates in the context of a general rate application.

2. Preliminary Considerations

[21] Prior to submitting his final argument, Mr. Hoyt raised two "fundamental issues" concerning Dr. Booth's evidence related to an appropriate ROE and capital structure for Liberty. First, Mr. Hoyt argued that Dr. Booth did not rely on market data, but instead inserted his own judgment. Second, he submitted that Dr. Booth did not appear to understand the challenges of Liberty's gas distribution business in New Brunswick.

[22] In response, Ms. Black submitted that Concentric relied too heavily on forward-looking estimates that tended to overstate the ROE and which ignored the relevant historical evidence. She maintained that Dr. Booth grounded his future estimates in reality and that judgment was an important part of a cost of capital analysis.

[23] Accordingly, the Board will exercise judgment in determining the appropriate ROE and capital structure for Liberty.

3. Return on Equity

a. Methods for Determining ROE

[24] In satisfying that the fair return standard is met, the Board is required to determine a fair ROE for Liberty. In order to provide an opportunity for public utilities to earn a fair return, several methods have been used by regulatory agencies in the process of reaching a decision.

[25] In *Principles of Public Utility Rates*, 2nd ed., co-authors James Bonbright, Albert Danielsen and David Kamerschen noted that "[no] single or group test or technique is conclusive. Therefore, it is generally accepted that commissions may apply their own judgment in arriving at their decisions."

[26] Both Dr. Booth and Mr. Coyne commented on different methodologies that can be used to arrive at a just and reasonable ROE estimate for a regulated utility.

[27] Dr. Booth, in his written evidence, suggested that the Capital Asset Pricing Model (CAPM) is the most common model utilized. He also suggested that he has traditionally viewed the Discounted Cash Flow (DCF) model estimates as "checks" on his CAPM estimates.

[28] In Concentric's Cost of Capital Report dated March 31, Mr. Coyne stressed that each model has inherent weaknesses, and relies on assumptions. As a result, he concluded that regulatory agencies

must use multiple models and employ reasonable judgment to be assured of a reasonable estimate of the required ROE.

[29] Mr. Hoyt stated in his final submission that it is now common for Canadian regulators to consider and rely upon the results of multiple models. He submitted that Concentric's estimation of the cost of equity for Liberty was obtained using the DCF, CAPM, and equity risk premium models, with alternative inputs in model specifications designed to test the reasonable range of the results. In his evaluation, Mr. Coyne combined the results from each of the models into averages to arrive at a reasonable range.

[30] The Board does not accept Concentric's approach. To average the result assumes that the weaknesses and strengths of each model are equivalent. The Board is not convinced that such an equivalency is appropriate. As a result, the Board will not consider the different models in this fashion.

[31] Instead, the Board will rely primarily on the CAPM method, with limited use of the other models, as a reasonableness check, as described below.

(1) Equity Risk Premium Model

[32] The equity risk premium model, as presented by Concentric, relies on an analysis of the allowed ROE from 677 gas distribution utilities from the United States (U.S.). The analysis concluded that the equity risk premium was a function of the long-term government bond rate. Using the analysis and the forecasted long-term U.S. government bond rates, the resulting ROE for a U.S. utility was 9.71 percent.

[33] Regulatory agencies in Canada do not commonly use this model. Liberty acknowledged that Concentric had to rely on a large sample of U.S. gas distribution companies, as there was an insufficient number of Canadian ROE decisions to develop a statistically meaningful analysis. There was no evidence related to this model as it pertains to Canadian companies, nor did Dr. Booth develop an equity risk premium estimate.

[34] In light of the above, the Board will not rely on this model.

(2) Discounted Cash Flow Model

[35] The DCF model relies on estimates of earnings growth over the long term.

[36] Dr. Booth presented the Board with evidence on the DCF model of estimating the ROE for a regulated utility, but noted several limitations with this method. He recommended that the DCF model should only be used for "[…] low risk dividend paying stocks or the market as a whole, where the expected dividends can be assumed to grow at some long run average growth rate […]."

[37] In his evidence, Dr. Booth provided an ROE estimate based on the DCF model. In using the long run growth rate of 3.0 percent and the median inflation target of 2.0 percent, he estimated the DCF required return on the equity market to be between 8.21 percent and 8.87 percent. In his view, he stated that there was spare capacity in Canada, as confirmed by the unemployment rate, and judged the DCF estimate for the market as a whole to be in the range of 8.50 percent to 9.50 percent.

[38] Nonetheless, Dr. Booth testified that any estimate derived from DCF estimates can be expressed as a risk premium estimate. He used, however, these DCF estimates to "bracket" a reasonable rate of return in this evidence.

[39] To arrive at a DCF estimate for a proxy group of Canadian and American utilities, Mr. Coyne used both the constant growth DCF model and the multi-stage growth DCF model.

[40] Ms. Black argued that the weakness in the constant growth DCF model is the assumption of perpetual growth, and submitted that Canadian regulators have rejected this model for that reason.

[41] The constant growth DCF model takes predictions from market analysts for each of the proxy companies and assumes that those growth rates will continue in perpetuity. This assumption, however, is a weakness and the Board finds that it is unreasonable to consider these results.

[42] The second model Mr. Coyne utilized was the multi-stage growth DCF model, which tempers the assumption of constant growth in perpetuity. The multi-stage model transitions from near-term growth for the first five years of the analysis to the long-term forecast of Gross Domestic Product (GDP) growth for the final stage of the analysis (i.e., years 11 and beyond). The second stage connects the near-term growth with the long-term growth by changing the growth rate each year on a "pro rata basis." In the final stage, the dividend cash flow then grows at the same rate as GDP into perpetuity.

[43] The Board finds the results from the multi-stage growth DCF model to be optimistic. This is because it overstates the ROE. It is, however, more reasonable than considering results from the constant growth DCF model.

[44] Another factor to consider in evaluating the multi-stage growth DCF model is the inclusion of AltaGas Ltd. (AltaGas) and Enbridge in the Canadian proxy group. As discussed in the section below concerning the beta coefficient (beta), the Board does not consider these companies to be appropriate in this proxy group.

[45] The evidence related to the multi-stage growth DCF model provides a range of ROEs for the Canadian proxy group, excluding AltaGas and Enbridge, from 7.33 percent to 9.69 percent, plus flotation costs. Additionally, the range for ROEs for Concentric's U.S. proxy group was 7.83 percent to 9.25 percent, plus flotation costs.

[46] As stated above, the Board considers these estimates to be optimistic. Accordingly, the Board will use the results from Concentric's multi-stage growth DCF model as a reasonableness check for the upper range of the return, against the Board's preferred method, as described below.

(3) Capital Asset Pricing Model

[47] The CAPM is based on assumptions that investors are willing to take more risk, as ROE increases. The model works by evaluating different levels of risk, including risk-free investments and regulated utilities.

[48] The model is also based on the ROE for a "benchmark utility." A benchmark utility serves as a comparator within the regulatory construct. It is a starting point for determining the appropriate ROE.

[49] In CAPM, the ROE for a benchmark utility includes a risk-free rate, a market risk premium and a beta. To this, flotation costs are added and a company-specific risk premium is added to represent the relative risk of the utility.

[50] Each component of the formula is determined independently to arrive at a reasonable ROE. The Board will rely primarily on the CAPM model for this proceeding, as this model has been widely used, well-accepted, and thoroughly vetted by various regulatory agencies in Canada.

i. Risk-Free Rate

[51] The risk-free rate is the return that an investor can expect without any risk of losing the investment. In most jurisdictions, a long-term government bond serves as a proxy for a risk-free rate.

[52] Both Mr. Coyne and Dr. Booth recommended the Government of Canada 30-year bond as the appropriate proxy. The Board accepts this proxy, but it must establish a reasonable estimate of the risk-free rate.

[53] Mr. Coyne and Dr. Booth agreed that the Board should begin with a forecast for the 10-year government bond, which is readily available. To this, the Board should then add the historical difference between 10-year and 30-year bonds.

[54] Mr. Coyne recommended using the 2022 through 2024 forecast produced by Consensus Economics Inc. He then added the average difference between the 10-year and the 30-year government bonds for February 2021, which was noted as the most recent data available at the time. Mr. Coyne concluded that a risk-free rate of 2.57 percent was reasonable.

[55] Dr. Booth proposed using the 10-year bond forecast of 2.70 percent by 2025, as found in the Government of Canada's 2021 budget. He added the average difference between the interest rates of the 10-year and 30-year bonds since 1987 to arrive at a base value of 3.07 percent. He recommended two adjustments to this base value.

[56] The first adjustment was for bond-buying by central banks, which he suggested lowered returns. The second was for an unusual decrease in long-term bond returns, as investors sell corporate bonds and buy government bonds during times of uncertainty. In combining these two adjustments, the risk-free rate would increase by up to 115 basis points. While Mr. Coyne acknowledged that returns on long-term government bonds were low, he made no adjustment on that basis.

[57] In final argument, Mr. Hoyt submitted that the use of the 2022 to 2024 forecast, as opposed to the current risk-free rate, reflected the current market reality that near-term bond yields remained near all-time lows. He further submitted that investors factor higher interest rate levels into their forward-looking return expectations.

[58] Ms. Black submitted that while she accepted Concentric's use of the 2022 to 2024 forecast as a basis for its risk-free rate estimate, its approach of adding the current spread between 10-year and 30-year government bonds was inappropriate. In her view, the method used by Dr. Booth, using the long-term average spread, resulted in a more appropriate estimate.

[59] Despite the differences in the forecasts and approaches regarding the spread used by Mr. Coyne and Dr. Booth, Ms. Black noted that other regulatory agencies had accepted both approaches in the past. As such, Ms. Black submitted that it would be reasonable for the Board to consider a risk-free rate between 2.57 percent and 3.07 percent.

[60] The Board acknowledges that interest rates on long-term bonds are lower than long-term historical levels. Rates have been low for a considerable amount of time, and no evidence was presented that this is likely to change.

[61] The Board accepts the range as submitted by Ms. Black. Considering the concerns about low interest rates, the Board sets the risk-free rate at 3.07 percent. The Board will not apply Dr. Booth's two recommended adjustments, which increases the risk-free rate by 115 basis points.

ii. Market Risk Premium

[62] The second component of CAPM is the market risk premium. This represents the extra return an investor can expect by investing in equities rather than bonds.

[63] Concentric submitted it was appropriate to develop a market risk premium based on forecasts. Using analysts' forecasts of returns and the constant growth DCF method, Concentric arrived at a forecasted market risk premium for North American companies of 9.84 percent.

[64] Dr. Booth, however, used a historical average of the difference between market returns and long-term government bond returns. This was calculated using roughly a century's worth of data. He also considered surveys of experts forecasting the market risk premium. Dr. Booth concluded that a range between 5.0 percent and 6.0 percent was reasonable.

[65] During final argument, Mr. Hoyt argued that using historical data to estimate the market risk premium was not appropriate under current market conditions. This is due to the historical data not accounting for the current low interest rate environment. Accordingly, its use in estimating the market risk premium resulted in an understated value.

[66] Additionally, Mr. Hoyt submitted that current interest rates are substantially lower than the Canadian government bond yields used to calculate the historical market risk premium presented by Dr. Booth. Under such circumstances, the market risk premium should be higher than the long-term historical average to reflect the current low interest rate environment.

[67] Ms. Black argued that if the Board uses a forward-looking estimate, as suggested by Liberty's expert witnesses, it should not use an estimate that relies on the constant growth DCF model, which depends on excessively high growth rates. Instead, she submitted that the Board could consider the results of a multi-stage DCF calculation, which, while still flawed, is more reasonable. Ms. Black further submitted that this forward-looking estimate should be combined with historical calculations to arrive at a reasonable market risk premium. The Board agrees with Ms. Black.

[68] The Board concludes that a forward-looking estimate should be combined with historical calculations to arrive at a reasonable market risk premium. The combination of the market risk premium that comes out of the multi-stage DCF calculations and the historical information supplied by Liberty will be used in this proceeding.

[69] This combined approach provides for a market risk premium of 6.23 percent, which the Board finds to be reasonable.

iii. Beta Coefficient

[70] The third component in the CAPM calculation is the beta, which captures the riskiness of a company or group of companies, compared to the market as a whole.

[71] Mr. Coyne and Mr. Trogonoski arrived at an average beta of 0.86, while Dr. Booth recommended a beta between 0.45 and 0.55.

[72] The Board must resolve several methodological issues to arrive at an estimate of the beta. The first issue deals with the proxy group. Concentric arrived at its beta based on a Canadian proxy group that included six companies and an American proxy group that used four companies.

[73] During cross-examination, Dr. Booth questioned the inclusion of AltaGas and Enbridge in the Canadian proxy group. He suggested that changes in both companies in recent years meant that they were no longer reasonably representative of Canadian utilities.

[74] The Board is satisfied that excluding AltaGas and Enbridge from the Canadian proxy group results in a more appropriate beta. The Board is not convinced that these two companies are reasonably representative of Canadian utilities. AltaGas' utility operations are no longer primarily based in Canada. As a company with significant pipeline assets, Enbridge has a much different risk profile than that of a regulated utility, such as Liberty. The Board finds that the appropriate beta is one that reasonably represents the relative risk of Canadian utilities.

[75] A second issue is whether the beta should be calculated on a weekly or monthly basis. While Concentric used a beta calculated weekly, Dr. Booth submitted that this introduces a bias into the calculation, and suggested that a monthly beta calculation is more appropriate.

[76] The Board has previously used a beta calculated monthly, and is not persuaded that a shift in calculating beta values to a weekly basis is required. Accordingly, the Board will use monthly beta values.

[77] During the hearing, the use of the Blume adjustment was raised. Mr. Coyne testified that the Blume adjustment was used in every regulatory proceeding where CAPM was involved across 50 U.S. states and the U.S.-based Federal Energy Regulatory Commission. He submitted that this adjustment corrects the tendency for a beta to revert towards the market mean of one over time.

[78] Dr. Booth, however, submitted that the adjustment was meant for an evaluation for specific stocks. He further submitted that there was no justification for the Blume adjustment in the context of utilities.

[79] The Board is not convinced that the Blume adjustment is appropriate, since an adjustment is not warranted for the betas of regulated utilities.

[80] In addition, Mr. Hoyt submitted that Dr. Booth's beta estimates failed to reflect current market conditions. He stated that both raw and adjusted betas for regulatory utilities in the last five years in Canada and the U.S. have increased substantially. He argued that utility companies were experiencing pressures that they had not in the past. He submitted that this could be explained by the shift in public policy towards decarbonization.

[81] Mr. Hoyt argued that the risks associated with decarbonization call into question the future growth prospects for gas distributors such as Liberty. This greater risk concerning the overall market translated to higher betas. He stated that even raw unadjusted betas were 0.79 and 0.77 for the Canadian and U.S. proxy groups based on the last five years.

[82] In final argument, Ms. Black pointed to the range of betas found in Concentric's Canadian proxy group. While the information is still adjusted, the weekly betas show an average beta for Canadian companies of 0.87, and if AltaGas and Enbridge were removed, the average would be lower. Referring to monthly betas contained in Concentric's interrogatory responses, Ms. Black noted

that the Canadian companies, excluding AltaGas and Enbridge, would have an average beta of approximately 0.50. She submitted that a range of 0.50 to 0.87 was reasonable.

[83] While the Board recognizes that Liberty is facing risks related to decarbonization and electrification, it notes that beta estimates become overstated by relying too heavily on the short-term data. Beta estimates must be viewed in the context of historical data to avoid getting caught up in daily volatility, which is reflected when the beta is set in the short term.

[84] Therefore, in reviewing the monthly betas as presented, excluding the values for AltaGas and Enbridge, the Board finds that a beta within the range of 0.34 and 0.66 is reasonable. The Board is not persuaded that a change to the beta is warranted from 2010 and will maintain the value at 0.55.

iv. Flotation Costs

[85] Another component in CAPM is an allowance for flotation costs which represent the costs associated with issuing equities.

[86] Both Mr. Coyne and Dr. Booth agreed that a flotation allowance of 0.50 percent was reasonable. The Board agrees with this assessment and will add 0.50 percent to the resulting calculation.

v. Benchmark ROE

[87] As mentioned above, the primary model for arriving at a benchmark ROE is CAPM. The Board, however, has used in its analysis the multi-stage growth DCF model as a reasonableness check.

[88] Considering the above components, CAPM indicates that the appropriate ROE, before adding Liberty's risk premium, is 7.0 percent. The calculation is summarized below:

CAPM Components	Percentage	Total
Risk-Free Rate	3.07 %	3.07 %
(Market Risk Premium * Beta)	(6.23 % * 0.55)	3.43 %
Flotation Costs	0.50 %	0.50 %
Total ROE, not including Company-Specific Risk Premium		7.0 %

[89] Comparing the above result to the multi-stage growth DCF model, which represents the optimistic upper end of the range of reasonableness, the Board concludes the result from CAPM to be a reasonable estimate of a benchmark utility.

[90] Some adjustments to the ROE for a benchmark utility must be made to account for the specific risks facing Liberty's New Brunswick operation. These risks are reviewed below.

b. Company-Specific Risk Premium

[91] The final component for determining the ROE is Liberty's company-specific risk premium. It is the difference between the risk premium for a benchmark utility and the premium that Liberty requires to attract investment capital.

[92] In its 2010 Decision, the Board examined five categories of risk for EGNB, which included: (a) market risk; (b) competitive risk; (c) supply risk; (d) regulatory risk; and (e) deferral account recovery risk. The Board stated that, while the relative risk in most categories had remained stable or declined, EGNB's "large and growing" deferral account made the utility far riskier than other mature utilities. This was because its ability to pay the debt in the deferral account was "[…] dependent on market forces which are out of EGNB's control." Considering the evidence and risk factors, the Board determined that a company-specific risk premium of 2.75 percent was appropriate.

[93] As it relates to this proceeding, the Board will examine the same five categories of risks as in 2010, as well as a new category relating to Liberty's peer group risk. All of these categories have been factored in the Board's determination of Liberty's company-specific risk premium.

(1) Market Risk

[94] Mr. Coyne submitted that Liberty has greater market risk than in 2010 and had not added as many customers as it had forecasted.

[95] Liberty argued that the size and nature of the New Brunswick market continue to restrict its ability to expand its customer base and increase its average throughput per customer. Specifically, Liberty noted that its growth has been limited to new home construction in areas currently served by natural gas pipeline.

[96] Liberty submitted that approximately 60 percent of the home heating market currently served by electricity is no longer a viable expansion target for Liberty. This is because the availability of heat pumps has saturated the market, further encouraging customers to adopt electricity as the primary heating source for new homes. It further submitted that New Brunswick consumers' rapid adoption of heat pumps has contributed to a reduction in the consumption of all fossil fuels. As a result, 2014 remains the high point in terms of customers and throughput for Liberty.

[97] Additionally, Liberty argued that the political and environmental trends towards decarbonization make it increasingly difficult for the utility to expand its operations in New Brunswick.

[98] Liberty also argued that the existence of Single End-Use Franchises (SEUFs), which it estimates represent as much as 80 percent of the natural gas consumed in New Brunswick, exposes Liberty to greater market risk than would otherwise be the case.

[99] The Board finds that the conditions identified above do not represent a material change from the market conditions in 2010, but notes that the risk associated with the SEUFs has decreased since 2010. Liberty now receives per-GJ payments from SEUF customers, which had been unavailable in the 2010 proceeding.

[100] While Mr. Lavigne suggested that the revenue from SEUF fees would roughly cover the cost of taxes that Liberty will now start paying as a profitable company, these are not related. Liberty's tax burden exists regardless of the SEUF fees and is the same as other profitable utilities.

(2) Competitive Risk

[101] Mr. Coyne submitted that Liberty has greater competitive risk than it had in 2010. He further submitted that the relative differential between natural gas and electricity prices had been lower than anticipated.

[102] Liberty identified challenges to growing its operations in New Brunswick, namely, the greater efficiency of heat pumps, and competition from the propane and fuel oil markets.

[103] With respect to heat pumps, Liberty noted that their greater efficiency has not only made it difficult to attract new customers but has also reduced demand for gas in non-peak winter months when they are cost-competitive against natural gas.

[104] Falling prices for propane, beginning in 2014, caused some natural gas customers to switch over, leading to a reduction in natural gas customers for Liberty. This switch-over from natural gas to propane remains an ongoing challenge.

[105] As for the fuel oil market, Liberty submitted that price fluctuations have led to a reduction in throughput for Liberty, as some Contract General Service and Industrial Contract General Service customers retain the ability to "fuel switch" when market prices make it advantageous.

[106] The Board therefore finds that Liberty's competitive risk has increased since the 2010 Decision due to greater competition.

(3) Supply Risk

[107] In 2010, EGNB identified the acquisition of sufficient natural gas supplies as a potential risk for the utility, as the Sable Offshore Energy Project (Sable Project), had an uncertain production life. The Sable Project has since closed and Liberty currently sources its natural gas mainly from Ontario and Western Canada.

[108] Mr. Volpé testified that Liberty's supply risk has moderated "to some degree" since 2010 because natural gas supply is being provided from more stable markets. He further testified that this has resulted in more stable pricing and lower overall prices than in 2010.

[109] The Board finds that Liberty's supply risk is now lower than in 2010.

(4) Regulatory Risk

[110] Mr. Coyne submitted that Liberty's risk related to regulation had not materially changed since 2010. He noted that Liberty incurs a higher regulatory risk than the other gas distribution utilities in its North American proxy group, as it lacks protection against volumetric risk.

[111] During cross-examination, Mr. Coyne testified that Liberty lacks revenue decoupling or weather normalization mechanisms, which are common for other gas distribution utilities. In final argument, Mr. Hoyt noted that the utility had applied for a revenue smoothing mechanism in 2014, but that this request had been denied.

[112] Ms. Black took issue with Liberty's alleged lack of regulatory options to address volumetric risk. She submitted that Liberty comes before the Board annually and is not precluded from requesting further regulatory tools to address volumetric risk.

[113] The Board finds that the regulatory risk has remained unchanged since 2010.

(5) Deferral Account Recovery Risk

[114] In the 2010 Decision, the Board viewed the risk of EGNB being unable to recover its large deferral account to be the utility's most pressing risk, and set the company-specific risk premium at 2.75 percent, largely to address this issue. Mr. Coyne submitted that this was Liberty's most important risk at that time.

[115] Liberty submitted that in 2016, EGNB and the Province of New Brunswick negotiated a settlement that included a 25-year extension of the gas distribution franchise and a settlement of the deferral account, of which $100 million will be recovered over the duration of the franchise agreement. In its evidence, Liberty stated that, while the deferral account recovery risk is lower in absolute terms, there remains a danger that some portion of Liberty's deferral account will not be recovered.

[116] The Board finds that the deferral account recovery risk has decreased substantially since 2010, as some issues around a large deferral account balance were settled in 2016.

(6) Peer Group Risk

[117] While the Board did not consider the issue of peer group risk in 2010, both Liberty and the Public Intervener raised this issue in this proceeding.

[118] Liberty characterized the New Brunswick marketplace as one with a small population and industrial base spread over a broad area, compared to other natural gas markets. It stated that New Brunswick's dispersed population makes it more expensive or even uneconomic to serve a significant portion of the franchise area, limiting further growth into communities not already served by Liberty.

[119] Liberty submitted that it would not be appropriate to treat small, regional gas distribution utilities as if they were large mature utilities that serve a much larger customer base. Accordingly, it argued that the Board should assess Liberty's ROE against the ROEs of similar local gas distributors in terms of customers and throughput.

[120] In his view, Dr. Booth stated that Pacific Northern Gas (PNG) was the riskiest gas distribution utility in Canada, and that Liberty's peer group risk premium should not be greater than PNG's.

[121] Mr. Hoyt argued that it was "troubling" to hear Dr. Booth state that PNG is the riskiest gas distribution utility in Canada, based on information he has not revisited in 10 years. He added that there was no comparison provided of Liberty to risky gas distribution companies in Canada.

[122] In the Board's view, assessing risk against a peer group is an appropriate step to take in this proceeding. Liberty's risk will be assessed against Heritage Gas Limited and PNG.

[123] The lack of population density found within the New Brunswick marketplace magnifies Liberty's risk. Further, the dispersed population and relatively small industrial market present significant challenges for growth. The Board concludes that Liberty's smaller annual throughput and less diverse and smaller customer base cause Liberty to be a riskier utility than its peer group.

(7) Conclusion – Company-Specific Risk Premium

[124] Dr. Booth submitted that Liberty's company-specific risk premium should be 0.75 percent. Concentric recommended a premium reduction from 2.75 percent to 1.60 percent.

[125] Ms. Black argued that an additional reduction to this risk premium to 0.80 percent was warranted and reasonable. She stated that Concentric has vastly overstated Liberty's regulatory risk, and the Board's 2010 risk premium would have been based on its small size.

[126] The Board has considered the various risks, including that Liberty has more competitive risk since 2010. The Board finds that an appropriate company-specific risk premium for Liberty lies between 0.75 percent and 1.60 percent.

[127] As noted above, the Board finds the lack of population density within the New Brunswick marketplace magnifies Liberty's risk compared to its peer group. Its dispersed franchise area impacts Liberty's growth. Given the challenges presented above, the Board sets Liberty's company-specific risk premium at 1.50 percent.

c. Board Conclusion on ROE

[128] In closing argument, Mr. Hoyt submitted that an ROE of 8.25 percent, as recommended by Dr. Booth was "simply untenable" for Liberty. He further submitted that this would be the lowest

authorized ROE for a regulated gas utility in both Canada and the U.S. and would not meet the fair return standard.

[129] In her view, Ms. Black submitted that while it is tempting to look at other ROEs from other Canadian utilities, it is important for the Board to apply its own judgment.

[130] Considering the foregoing, Liberty's ROE is set at 8.50 percent, to be effective as of January 1, 2022, as detailed below:

CAPM Components	Percentage	Total
Risk-Free Rate	3.07 %	3.07 %
(Market Risk Premium * Beta)	(6.23 % * 0.55)	3.43 %
Flotation Costs	0.50 %	0.50 %
Total ROE, not including Company-Specific Risk Premium		7.0 %
Company-Specific Risk Premium	1.50 %	1.50 %
Total ROE		8.50 %

4. Cost of Debt

[131] Liberty proposes that the Board approve a cost of debt of 3.315 percent.

[132] The Board last approved the cost of debt in its 2010 Decision. In that Matter, EGNB, now Liberty, had proposed that the cost of debt be limited to the actual borrowing rate of its parent, Enbridge, plus 100 basis points.

[133] Mr. Coyne submitted that the current cost of debt is based on a 30-year debt issuance by Liberty's parent company, Liberty Utilities (Canada) LP, of $200 million in February 2020, with a 3.315 percent interest rate. This issuance is the lowest of the average embedded cost for the North American proxy group of 4.06 percent.

[134] Dr. Booth testified that Liberty is financed with a very favourable rate and took no issue. Ms. Black had no comments on the proposed cost of debt.

[135] Liberty is not seeking a premium above the cost of debt of its parent company. Liberty's proposal represents the actual cost of debt related to its acquisition by Liberty Utilities (Canada) LP.

[136] The Board finds that the cost of debt is favorable to ratepayers and is reflective of interest rates in current capital markets. Based on the foregoing, the Board concludes that the proposed cost of debt of 3.315 percent is reasonable, and is approved.

5. Capital Structure

[137] To satisfy the fair return standard, the Board must also establish Liberty's capital structure. The capital structure of a business includes both its debt and equity. The debt-to-equity ratio caps the equity percentage upon which Liberty may earn a return.

[138] In its 2010 Decision, the Board approved a capital structure with an equity ratio not exceeding 45 percent. As stated earlier, Liberty is seeking the approval of a capital structure with an equity ratio of 50 percent.

[139] Mr. Coyne recommended an equity ratio of a minimum of 45 percent, noting that 50 percent was "not an unreasonable target." His analysis was based on a comparison of the equity ratios of other investor-owned gas distributors in both Canada and the U.S., in addition to assessing Liberty's risk compared to 2010.

[140] Mr. Coyne submitted that Liberty's risk should be evaluated through two principal sources: business risk and financial risk. Both risks need to be considered in setting the capital structure. Concentric's evidence characterized business risk as the risk inherent in the company's operations, regardless of how the company is financed. Financial risk exists to the extent that a company incurs fixed obligations in financing its operations.

[141] The Concentric report stated that Liberty is at a higher risk than most other investor-owned gas distributors in Canada and the Canadian and North American proxy group companies. It further stated that:

> […] Liberty is significantly smaller both in terms of customer count and implied market capitalization than its peer group; Liberty has greater volumetric risk and declining average use per customer; and Liberty's competitive risk and supply risk both have increased since 2010.

[142] Accordingly, Mr. Coyne recommended that it was reasonable for Liberty to have an above-average deemed equity ratio.

[143] Dr. Booth, on the other hand, recommended that the Board approve a capital structure with an equity ratio of 40 percent. In his view, evaluating the business risk was important because "[…] it is the primary driver of any company's overall risk, that is financial risk, and how much debt a firm uses, is layered on top of its business risk."

[144] Dr. Booth argued that, for regulated utilities, the underlying business risks were extremely low since they are regulated. In Liberty's case, he stated that "[…] its small size is more than offset by the amortisations in [its] revenue requirement that increase its credit worthiness." He also stated that short and long-term business risks could largely be managed by regulatory tools.

[145] In final argument, Mr. Hoyt noted that, while some risks had diminished since 2010, others had increased. In particular, the risk associated with environmental regulations on carbon emissions and the political desire to achieve decarbonization targets had since become significant risks.

[146] Mr. Hoyt argued that, not only was Liberty's overall business risk not much different than in 2010, but it was also higher in comparison to most of the operating utilities held by the Canadian, the U.S. and the North American proxy groups of companies.

[147] Ms. Black submitted that Liberty's equity ratio should remain at 45 percent. She argued that, in determining the capital structure, the Board must consider the relationship between the ROE and the equity ratio. A utility with a higher equity ratio requires a lower ROE to be compensated equally for the same risk.

[148] Ms. Black argued that an equity ratio of 50 percent was not justified and not consistent with the above concept. She submitted that Mr. Coyne relied on an increased business risk that could not be demonstrated, either compared to 2010 or to its peers. There was no evidence of any other risk which warranted an increased ratio that was not already considered in the ROE analysis.

[149] Ms. Black further argued that the Board should disregard the U.S. comparators offered by Concentric to evaluate the reasonableness of Concentrics's recommended equity ratio for Liberty, since it was lower than all the U.S. comparators. She submitted that in its 2018 Decision, the Alberta Utilities Commission found that allowed capital structures for U.S. utilities should not be held up as representative of the capital structures required by Canadian utilities to satisfy the fair

return standard. She explained that U.S. equity ratios are higher than Canadian equity ratios, due to differences in the U.S. regulatory process, which relies more on actual capital structures compared to peers versus the Canadian regulatory process that uses deemed ratios.

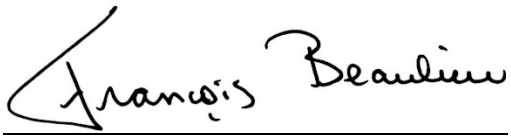
[150] The Board agrees with Ms. Black. It is not satisfied that there is sufficient evidence of a change in circumstances, including Liberty's business and financial risks, which would justify a change in the equity ratio. As a result, the Board approves a capital structure with an equity portion of 45 percent.

E. Conclusion

[151] The following table summarizes Liberty's ROE, cost of debt, and capital structure of Liberty's debt to equity ratio, prior to this hearing, and reflects the approved adjustments made in this proceeding. These adjustments are to be effective as of January 1, 2022.

	As of January 1, 2011	**Approved**
Return on Equity	10.9 %	**8.50 %**
Cost of Debt	Enbridge Inc. borrowing rate plus 100 basis points	**3.315 %**
Capital Structure	45 %	**45 %**

Dated at Saint John, New Brunswick, this 29th day of October 2021.



François Beaulieu
Acting Chairperson

Patrick Ervin
Member

John Patrick Herron
Member

22

QUÉBEC **RÉGIE DU GAZ NATUREL**
R-3351-96
PHASE II

SOCIÉTÉ EN COMMANDITE
GAZ MÉTROPOLITAIN (SCGM)

Requérante

ASSOCIATION DES CONSOMMATEURS
INDUSTRIELS DE GAZ (ACIG)
GAZODUC TRANS QUÉBEC & MARITIMES INC. (TQM)
ASSOCIATION CANADIENNE INDÉPENDANTE
DE MARKETING DE GAZ (CIGMA)
MULTI-ÉNERGIES INC.
MOUVEMENT AU COURANT (MAC)
HYDRO-QUÉBEC
ENTREPRISES TRANSCANADA GAS LIMITÉE (ETCGL)

Intervenantes

DÉCISION D-96-31

9 octobre 1996

OBJET : Requête pour faire modifier les tarifs de Société en commandite Gaz Métropolitain à compter du 1er octobre 1996
[Articles 19, 20, 31, 32 et 61 de la *Loi sur la Régie du gaz naturel*, L.R.Q., c. R-8.02]

Jean-Paul Théorêt
René Brisebois
Bernard Langevin

Régisseurs

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1. REQUÊTE

Le 3 mai 1996, la Régie recevait de la Société en commandite Gaz Métropolitain (SCGM) la requête originale, R-3351-96, Phase II; cette requête fut amendée le 13 août 1996 et les conclusions se lisent comme suit :

– **autoriser** les projets d'extension et de modification du réseau compris dans le budget d'immobilisation 1997;

– **reconnaître** à Gaz Métropolitain le droit à un taux de rendement de 10,36 % sur une base de tarification de 1 354 850 000 $;

– **modifier**, à compter du 1er octobre 1996, les tarifs de Gaz Métropolitain de façon à ce qu'ils génèrent des revenus de 1 090 736 000 $, pour permettre de rencontrer le coût total de la prestation de services et d'atteindre le taux de rendement demandé;

– **autoriser** la reconduction permanente du programme de flexibilité tarifaire bi-énergie, conformément à la pièce GMi-103, document 2;

– **autoriser** les modifications des programmes commerciaux PRC et PRRC et le programme commercial d'acquisition des clients potentiels utilisant le mazout, conformément à la pièce GMi-103, document 3;

– **autoriser** la reconduction du tarif modulaire et du tarif interruptible volet 2, conformément à la pièce GMi-117, document 1;

– **reconduire** les indices de performance approuvés par la Régie dans sa décision D-93-51;

– **approuver** le texte des tarifs proposé à la section 119 du présent dossier.

2. PROCÉDURES

À la suite de la décision procédurale D-96-17R du 21 mai 1996, un avis public a paru le 27 mai 1996 dans les journaux suivants : La Presse, Le Devoir, The Gazette, Le Soleil et La Tribune.

Sont intervenus par écrit :

– l'Association canadienne indépendante de marketing de gaz (CIGMA), par l'intermédiaire de Me Pierre Tourigny;

– Multi-Énergies Inc., par l'intermédiaire de Me Pierre Tourigny;

– l'Association des consommateurs industriels de gaz (ACIG), par l'intermédiaire de M[e] Guy Sarault;

– Gazoduc Trans Québec & Maritimes Inc. (TQM), par l'intermédiaire de M[e] Louise Tremblay;

– Entreprises TransCanada Gas Limitée (ETCGL), par l'intermédiaire de M[e] Louis A. Leclerc;

– Hydro-Québec, par l'intermédiaire de M[e] René Piotte; et

– le Mouvement au courant (MAC), par l'intermédiaire de son porte-parole, M. John Burcombe;

Ont témoigné pour la requérante :

– M. André Caillé, Président
– M. Robert Normand, Vice-président – Finances
– M[me] Ghislaine Larocque, Vice-présidente – Service à la clientèle
– M. Pierre Despars, Directeur – Comptabilité et budget
– M[me] Nicole Bessette, Chef de service – Marketing
– M. Michel Roy, Directeur – Marketing
– M[me] Johanne Paquin, Économiste
– M. Yves D'Amour, Conseiller principal – Administration et planification – Ventes
– M. Jacques Larose, Directeur – Ventes, grandes entreprises
– M. Jean-Pierre Noël, Chef de service – Tarification
– M[me] Sylvie Durand, Conseillère à la tarification
– M. André Gougeon, Directeur – Construction – Ingénierie
– M. Gérard Forget, Chef de service – Approvisionnements gaziers – Planification
– M[me] Carole Beaucage, Conseillère spéciale – Gestion fiscale
– M[me] Sylvie Desrochers, Conseillère principale – Tarification

Toutes ces personnes sont à l'emploi de SCGM.

Le D[r] Roger André Morin, professeur distingué en finance, du College of Business, Georgia State University, a témoigné à titre d'expert pour SCGM.

Ont témoigné à titre d'expert pour l'ACIG :

– M. Peter Milne, Consultant en gaz naturel pour la firme Peter Milne & Associates Inc.
– D[r] Michael K. Berkowitz, Professeur et adjoint au président à l'Université de Toronto, département d'économie
– D[r] Laurence D. Booth, Professeur de finance et d'affaires économiques à la faculté de Management de l'Université de Toronto.

Le procureur de la partie requérante fut M[e] François G. Hébert.

Les procureurs de la Régie furent M[e] Pierre Théroux et M[e] François Laurier.

Les audiences ont eu lieu les 14, 17, 18, 19, 25, 26, 27, 28 juin et le 5 août 1996.
Le procureur de la requérante a fait parvenir sa réplique le 9 août 1996.

Le 17 juin dernier, la Régie, dans une décision rendue sur le Banc, ordonnait à SCGM le retrait de la section 120 du dossier de la présente instance, les sujets devant être traités dans une cause spécifique.

Le 28 juin 1996, dans une décision rendue sur le Banc, la Régie refusait le dépôt d'une demande de modification au Tarif 5 concernant les défauts de livrer par les clients en achat-revente. La Régie recommandait à la requérante de reporter cette demande dans la Phase II du service de livraison.

Le 5 juillet 1996, la Régie a émis une décision partielle (D-96-24) sur des programmes commerciaux et le volet 2 du tarif interruptible.

3. PREUVE ET POSITION DES PARTIES

3.1 Preuve de SCGM

Le premier témoin de la requérante fut son président, M. André Caillé. Celui-ci a souligné les faits marquants survenus chez SCGM durant l'exercice 1995-1996 tant à l'externe qu'à l'interne. L'analyse des résultats a amené SCGM aux conclusions suivantes, mentionne M. Caillé :

– la prévision de l'augmentation des livraisons aux petit et moyen débits devait être ramenée de 6,9 Bcf à 2,4 Bcf, entraînant ainsi un manque à gagner de l'ordre de 20 millions $ pour l'exercice 1996;

– la plus grande partie des éléments identifiés dans leur analyse de la situation devaient être considérés non pas comme conjoncturels mais structurels.

Selon M. Caillé, ces conclusions exigeaient des décisions draconiennes. Elles furent prises en temps opportun. Avec pour résultat que le manque à gagner par rapport au bénéfice autorisé, a été ramené à 1 million $ selon leur plus récente prévision.

Parmi les décisions importantes prises au cours de l'exercice, il souligne :

– l'abandon du plan accéléré de vente et la poursuite du plan de maintien de la clientèle;

– le rapprochement du point mort tarifaire pour les projets de développement;

– la compression des immobilisations ne générant pas de revenus; et

– une troisième rationalisation de l'effectif en moins de dix ans, avec l'abolition de plus de 200 postes et le licenciement de quelque 150 employés.

Ces gestes viennent s'ajouter aux dispositions prises dans le cadre de la préparation de la cause tarifaire 1996 et permettront de réduire de quelque 11 millions $ les dépenses d'exploitation pour l'année 1995-1996, déclare M. Caillé.

Bien que l'abolition de postes et les licenciements aient entraîné des perturbations dans la qualité des services rendus à la clientèle, M. Caillé déclare que la qualité de service s'améliore et devrait retrouver son niveau historique.

Par ailleurs, faisant une rétrospective du développement des affaires de SCGM, son président estime que le réseau gazier a maintenant atteint son extension géographique optimale compte tenu du potentiel de marché et de l'évolution de la situation concurrentielle, et que le gaz naturel est l'énergie thermique de choix pour les consommateurs situés sur le réseau.

Quant aux orientations stratégiques futures de SCGM, son président les résume comme suit :

– accroître la part de marché du gaz naturel tout en préservant sa position concurrentielle;

– développer les activités complémentaires à la distribution du gaz naturel comme élément déclencheur de nouvelles ventes;

– poursuivre l'effort de développement et de transfert technologiques pour maximiser le recours au gaz naturel grâce à des appareils efficaces, fiables, modernes et esthétiques;

– maintenir la recherche de l'amélioration de la performance organisationnelle globale de l'entreprise.

Dossier tarifaire 1997

En tenant compte des contextes externe et interne dans lesquels l'entreprise évoluera au cours du prochain exercice, M. Caillé a fait le point sur les prévisions financières de l'entreprise pour 1997 ainsi que sur la stratégie tarifaire proposée.

Selon le président de SCGM, la présente requête s'inscrit dans une tendance de stabilisation tarifaire. En effet, entre 1990 et 1995 le coût moyen du gaz, c'est-à-dire la marchandise et le transport, a baissé de 6 %. Pendant cette période, le coût de distribution, soit celui qui est le plus directement sous le contrôle de l'entreprise, baissait de 0,6 %. Cette stabilité est d'autant plus significative que la base de tarification croissait en même temps de 19 % pour rendre le réseau à maturité.

M. Caillé rappelle que l'objectif de la Société est de faire de la franchise de SCGM une plaque tournante du transport du gaz naturel dans le Nord-Est du continent.

Il souligne à cet égard le dépôt auprès des autorités fédérales américaines, d'une requête de système de transport de gaz naturel Portland (PNGTS) qui vise à relier par un gazoduc le Québec, le Vermont, le New-Hampshire, le Maine et le Massachusett. Ce nouveau lien ajouterait à la panoplie des moyens dont disposent les services gaziers pour assurer à la clientèle du Québec le meilleur rapport qualité/prix en matière de transport et d'entreposage.

SCGM essaie également de concrétiser un concept du début des années 1980 visant à étendre au Nouveau-Brunswick et à la Nouvelle-Écosse, par l'entremise de TQM, le gazoduc qui origine à la frontière de l'Alberta et de la Saskatchewan. L'éventuelle mise en valeur des réserves gazières de l'Île de Sable permettrait de renverser le flux du gazoduc et d'approvisionner, en plus des marchés locaux, une partie des marchés du Québec, de l'Ontario et de la Nouvelle-Angleterre.

Dotée de tels moyens, SCGM serait encore plus en mesure d'offrir aux Québécois et aux Québécoises l'énergie de choix en Amérique du Nord pour satisfaire les besoins thermiques, de conclure M. Caillé.

3.1.1 Projection des ventes et plan de développement

Selon la requérante, le contexte énergétique dans lequel le plan de développement de 1996-1997 a été établi démontre que la concurrence demeurera vive.

Au niveau des ventes grandes entreprises, le mazout nº 6 constitue la principale source de concurrence au gaz naturel qui connaîtra un désavantage pouvant atteindre jusqu'à 22 % au service continu. Toutefois, cette clientèle considère favorablement d'autres facteurs intrinsèques au gaz naturel (fiabilité, environnement, entreposage, etc.) avant de reconsidérer son choix énergétique.

Par ailleurs, le gaz naturel continuera à offrir un avantage économique à la clientèle en service interruptible, mais l'entreprise demeure vulnérable quant à l'évolution des prix de ce type d'énergie sur le marché compte tenu que près de 50 % des volumes de la clientèle grandes entreprises sont effectués en service interruptible.

Le gaz naturel, face à l'électricité, maintient un avantage significatif qui en fait le combustible de choix pour le chauffage et le procédé thermique, souligne les témoins de SCGM.

L'ensemble des retraits prévus dans le marché grande entreprise en 1996-1997 est de 126,3 Bcf après interruptions. Ce volume inclut des nouvelles ventes de 4,4 Bcf qui proviendront presque entièrement des conversions d'équipement.

Quant au niveau des clients petit et moyen débits, les retraits prévus sont de 89,5 Bcf dont 3,47 Bcf provenant de la signature de 2 500 nouveaux clients.

La majorité de ces nouveaux clients seront sur ou à proximité du réseau, donc des ventes provenant de la densification du réseau gazier. SCGM croit que cet objectif est réaliste compte tenu du contexte économique et concurrentiel projeté par l'entreprise en 1996-1997.

Les retraits totaux prévus pour 1996-1997 sont de 215,8 Bcf, soit une augmentation de 5,2 Bcf sur l'année précédente et pour atteindre ces objectifs, SCGM priorisera les secteurs commercial, industriel et institutionnel.

Par ailleurs, au cours de la dernière année, SCGM a entrepris différentes actions dans le marché résidentiel. Ces actions, destinées à acquérir ou à maintenir la clientèle résidentielle, ont visé des projets de nouvelles constructions et de rénovation (unités individuelles et condominiums). À ce jour, six ententes ont été entérinées avec des constructeurs ou des entrepreneurs généraux.

L'ensemble des projets prévoit le raccordement de 1 198 unités de logements, condominiums et unifamiliales.

D'autre part, SCGM mentionne que les projets de développement de réseaux seront très limités au cours des prochaines années. Ils se situeront autour des sept projets d'extension de réseau compris dans le programme d'infrastructures Québec-Canada et le projet de la Rive-Sud de Québec.

3.1.2 Mesures d'efficacité énergétique

Selon SCGM, malgré le marché hautement concurrentiel qui prévaut actuellement, la Société continue de s'impliquer activement dans le domaine de l'efficacité énergétique. À cet effet, la Société, par l'entremise de ses représentants et de son groupe Datech, incite les clients à effectuer le meilleur choix tant au chapitre des équipements au gaz naturel qu'à celui du mode de gestion de l'énergie à adopter.

Pour la requérante, la promotion de ces équipements par le biais de ses programmes commerciaux est nécessaire au maintien de la compétitivité du gaz naturel et des entreprises qui l'utilisent. À titre d'exemple, elle souligne qu'en 1995, les nouvelles ventes signées à la suite de la réalisation d'études « PAIRE » ont permis de faire réaliser aux clients visés des économies annuelles de l'ordre de 7,5 millions $ en énergie, ce qui correspond à une réduction de 13 % de leur facture annuelle d'opération.

De plus, le Centre des Technologies du gaz naturel (CTGN) travaille activement au développement et à l'intégration de différentes technologies gazières offrant des potentiels d'amélioration à l'efficacité énergétique. Ces nouvelles technologies serviront à développer par leurs avantages intrinsèques d'autres marchés, améliorant ainsi l'efficacité énergétique des applications visées, soumet SCGM.

D'autre part, le groupe service à la clientèle a également développé au cours des derniers mois une expertise de gestion de l'énergie. Cette technologie fait appel à la micro-informatique afin d'optimiser l'utilisation et la diffusion de la chaleur obtenue des équipements au gaz naturel. Utilisée à titre de projet pilote, l'installation de ces équipements a permis de maintenir au gaz naturel des clients en améliorant sensiblement leur efficacité énergétique. L'entreprise travaillera à l'introduction de cette technologie auprès de leur clientèle, déclare la requérante.

Dans les mesures d'efficacité énergétique qu'elle propose, SCGM veut inciter sa clientèle à utiliser d'une manière judicieuse l'énergie et poursuit ses efforts dans le but de limiter l'interfinancement entre les différentes classes tarifaires. L'objectif visé est de faire le rapprochement entre le tarif et les coûts de distribution réellement en cours. Il est important de sensibiliser la clientèle aux vrais coûts de l'énergie en les incitant par le fait même à faire un choix optimal.

3.1.3 Coût du gaz et plan d'approvisionnement gazier

Le coût du gaz (marchandise, entreposage et transport) projeté par SCGM pour l'année financière 1997, s'établit à 684 234 000 $. Le coût moyen projeté du gaz de réseau se situe à 1,665 $/GJ pour l'année 1997. Le prix moyen du gaz de compression est estimé à 1,673 $/GJ pour la même année.

Dans le cadre du budget 1996-1997, la demande en gaz avant interruption pour l'ensemble de la clientèle en service continu et interruptible totalise 221,9 Bcf dont 1 Bcf pour les ventes destinées au client en service de livraison. La Société prévoit également réaliser 1,2 Bcf de vente à l'extérieur de la franchise en plus de transporter 1,5 Bcf de gaz pour Vermont Gas Services (VGS) (service d'entreposage), au cours de l'hiver. En incluant le gaz non comptabilisé (gaz perdu) et celui utilisé par la compagnie (1,6 Bcf), la demande s'élève donc à 226,2 Bcf. Si on inclut les interruptions et les volumes requis à des fins d'inventaire et d'échange de gaz, la demande totale s'élève à 252,9 Bcf.

Au cours de l'année, la Société approvisionnera la demande totale (252,9 Bcf) en utilisant le gaz entreposé et le gaz d'échange (30,9 Bcf), le transport ferme (FT) (209,3 Bcf) et le Winter Firm Service (WFS) entre Parkway et Montréal (5,0 Bcf) que la Société prévoit contracter sur le réseau de TCPL et celui provenant de l'entente avec VGS (1,5 Bcf). De plus, des achats de gaz livré dans la région Est sont requis (6,2 Bcf).

Les fournisseurs de gaz auprès de qui la Société s'approvisionne pour alimenter les clients en gaz de réseau, procurent le gaz de compression nécessaire au transport de la marchandise. Le pourcentage de gaz de compression nécessaire, la formule du prix d'achat, ainsi que le processus d'approvisionnement en gaz des clients en achats directs sont traités en détail à la pièce GMi-105, document 1.

3.1.4 Transport

Tout comme l'an dernier, SCGM n'a réservé que 141,6 mmpc/jour de capacité de transport M12 reliant Dawn à Parkway, bien que la capacité totale en vertu de ses contrats de transport M12 s'élève à 254,6 mmpc/jour. La Société envisage l'alternative suivante afin de réduire sa capacité M12 à 141,6 mmpc/jour :

– remettre à Union Gas le surplus de transport, soit en totalité, soit en partie;

– offrir l'excédent de transport sur le marché secondaire.

Selon SCGM, cette réduction permet d'optimiser les outils de transport et les solutions qui précèdent de récupérer en partie les coûts reliés à la prime fixe. La capacité de Transport STS a elle aussi subi une réduction équivalente. La capacité contractée pour les autres formes de transport demeure inchangée. La Société dispose d'une capacité journalière de transport ferme de 570,7 mmpc soit, 208,3 Bcf pour l'année témoin en excluant 1 Bcf (2,7 mmpc/jour) destiné au client en service de livraison situé à l'intérieur de sa franchise. Le coefficient d'utilisation projeté est de 100 %.

En ce qui concerne le coût du transport, la requérante informe la Régie que les tarifs en vigueur depuis le 1er janvier 1996 sont appliqués pour le calcul des dépenses affectées au transport sur le pipeline de TCPL. Dans le dossier tarifaire 1996-1997, ces dernières sont réduites de 4 MM $ à la suite d'une décision favorable à TCPL rendue par le Federal Energy Regulatory Commission.

Quant au transport par Union Gas, les tarifs publiés le 1er avril 1995 par cette entreprise servent à l'estimation des coûts d'utilisation du réseau ontarien (M12 et C1). Pour le transport M12 entre Dawn et Parkway, la Société fournit à Union Gas depuis le mois de septembre 1992, le gaz de compression dont le pourcentage est spécifié dans la grille tarifaire. Aucune prime variable additionnelle n'est alors imposée.

Pour ce qui est du transport sur MichCon, aucune révision des tarifs n'a été apportée par le transporteur américain depuis la signature du contrat conclu entre SCGM et MichCon le 1er novembre 1990.

3.1.5 Entreposage

Au cours de l'année 1996-1997, SCGM retirera du gaz de trois sites d'entreposage. Deux sont à l'intérieur de sa franchise, soit un espace souterrain à Pointe-du-Lac (Intragaz Inc.) et deux réservoirs de gaz naturel liquide (GNL) sur le territoire de la ville de Montréal. Le troisième consiste en un espace souterrain situé dans le Sud-Ouest ontarien (Dawn), chez Union Gas.

La capacité d'entreposage de chacune des trois sources disponibles durant l'année est la suivante : Intragaz (PdL), 0,68 Bcf – GNL, 2,08 Bcf – Union Gas (Dawn), 21,2 Bcf.

Par ailleurs, SCGM anticipe l'utilisation d'un espace souterrain additionnel à partir de l'été 1997. Dans un tel contexte, la Société pourra injecter 3 Bcf de gaz à St-Flavien (Intragaz), au cours de la saison estivale.

De plus, 4 Bcf de gaz seront échangés avec CoEnergy durant l'année. Les livraisons auront lieu entre le 1er novembre 1996 et le 31 mars 1997 pour répondre à la demande de la saison hivernale. Ces volumes devront être remboursés à CoEnergy entre le 1er mai et le 31 octobre 1997.

Une entente similaire fut conclue entre SCGM et AIG Trading Group (AIG) dans le cadre du service d'entreposage offert à VGS. AIG prend possession de la marchandise (1,5 Bcf) durant l'été et la livre à la Société au cours de l'hiver. Les frais reliés à cet échange de gaz seront imputés à l'activité non réglementée.

Les tarifs d'entreposage de Union Gas et Intragaz (PDL et St-Flavien) sont précisés à la pièce GMi-105, document 6.

De même que pour le transport M12, SCGM fournit à Union Gas, depuis le mois de septembre 1992, le gaz de compression pour injecter et retirer la marchandise entreposée. Les taux sont spécifiés dans la grille tarifaire. Elle doit débourser en sus une prime variable.

3.1.6 Interruption

La preuve démontre qu'une demande accrue de clients en service interruptible combinée à un resserrement de la capacité de transport a eu pour résultat un niveau plus élevé d'interruption depuis 1995. Le niveau d'interruption prévu pour l'hiver 1996-1997 se chiffre à 6,1 Bcf.

À nouveau cette année, la Société prévoit offrir un service saisonnier de 5 Bcf de WFS entre Parkway et Montréal aux clients enregistrés au volet 2. Ce service est conditionnel à la disponibilité du transport sur le réseau de TCPL.

Par ailleurs, le plan de TCPL pour contrer le « stress corrosion » entraînerait, dans l'éventualité d'un tel événement, une réduction de la pression garantie. On observerait donc une baisse des volumes disponibles destinés aux ventes, ce qui augmenterait par le fait même les interruptions, soutient SCGM.

3.1.7 Dépenses d'exploitation

Pour l'exercice financier 1997, SCGM projette des dépenses totales de 249 329 000 $, dont 95 282 0000 $ au chapitre des dépenses d'exploitation, pour lesquelles une baisse de 12 584 000 $ est observée par rapport au budget 1996. Cette baisse est attribuable essentiellement à la restructuration effectuée au cours de l'exercice financier 1996.

Pour l'exercice 1997, le taux d'inflation prévu est de 1,8 % pour les salaires et les autres dépenses, ce qui représente 1,7 million $. De plus, SCGM poursuit le projet de radiométrie qui générera des économies de 0,4 million $. Par ailleurs, SCGM a prévu générer 1,7 million $ d'économies qui proviendront de la poursuite de la révision de ses processus d'affaires, mentionne M. Despars, témoin de SCGM.

Quant à l'allocation des coûts aux activités non réglementées, la position de SCGM est de maintenir pour 1997 l'approche utilisée actuellement et basée sur la méthode des coûts marginaux. Le témoin précise qu'une étude est en cours sur la révision de la capitalisation des frais généraux qui comporte un volet sur la juste allocation des coûts reliés aux activités non réglementées. Les résultats de cette étude seront communiqués lors d'un prochain dossier tarifaire.

3.1.8 Base de tarification

SCGM projette, pour son exercice financier 1997, une base de tarification moyenne de 1 354 850 000 $. Les investissements additionnels inclus dans la base de tarification sont de 59 974 000 $, dont 13 741 000 $ au chapitre des frais reportés et 46 233 000 $ pour les immobilisations. À ces additions aux immobilisations, il faut ajouter 2 000 000 $ à la suite de la décision D-96-16 portant sur la capitalisation des frais généraux capitalisés.

Par ailleurs, l'amortissement prévu aux immobilisations s'élèvera à 49 970 000 $ et la dépense d'amortissement prévue aux frais reportés s'élèvera à 23 254 000 $ pour l'année 1997.

3.1.9 Fonds de roulement

Le fonds de roulement a été établi en utilisant les données réelles les plus récentes à la date de préparation du dossier, soumet SCGM. Le fonds de roulement total, selon la moyenne des 13 soldes, s'élève à 78 336 000 $ pour la période se terminant le 30 septembre 1997, comparativement à 80 108 000 $ l'an passé.

SCGM explique que le point majeur est la réduction de l'encaisse qui passe de 27 289 000 $ à 18 615 000 $ selon la moyenne mensuelle, soit une réduction de la base de tarification de 8 674 000 $.

La requérante explique que cette baisse importante de l'encaisse provient principalement de la diminution du délai de perception des comptes à recevoir et est reflétée principalement au niveau du coût du gaz.

Quant au compte matériaux et approvisionnement, il est demeuré relativement stable passant de 53 860 000 $ à 55 245 000 $ alors que le calcul du flux monétaire d'impôt fait augmenter le solde de la moyenne mensuelle dudit compte de moins 441 000 $ à 4 476 000 $.

3.1.10 Impôts sur le revenu

La dépense d'impôt présumé pour l'exercice financier se terminant le 30 septembre 1997 s'élève à 50 163 000.

Selon le témoin de la requérante, M^{me} Beaucage, la dépense d'impôt a été calculée en utilisant les taux de base de l'impôt fédéral de 28 % et du Québec de 8,9 % pour un taux d'imposition global de 36,9 %. Elle inclut aussi l'impôt des grandes sociétés de 2 979 000 $ au taux de 0,225 %.

De plus, la dépense d'impôt inclut un aspect fiscal créditeur de 874 530 $ relié à l'amortissement du compte de stabilisation pour un montant de 2 370 000 $. Cet aspect fiscal fait suite au changement de méthode proposé dans la Phase I de la présente cause relativement au traitement des comptes de stabilisation.

Par ailleurs, en ce qui concerne le projet de cotisation au montant de 11 millions $ pour la transaction en dollars australiens effectuée en 1990, le témoin Despars confirme à la Régie qu'il n'a aucune objection à l'exclusion de la base de tarification du montant inclus dans le présent dossier, si la Régie le juge opportun, puisque SCGM n'a reçu aucune demande de paiement à ce jour.

Enfin, en réponse à une question de la Régie, SCGM confirme qu'une erreur de classification sur un élément concernant les activités non réglementées sera corrigée et un montant de 359 764 $ sera crédité au secteur réglementé.

3.1.11 Indices de performance

Pour l'exercice financier 1997, SCGM propose de maintenir les mêmes indices de performance que ceux approuvés par la Régie dans sa décision D-93-51 puisque ces indices permettent à la Régie de s'assurer qu'un trop-perçu éventuel n'est pas fait au détriment de la sécurité du réseau ni du service à la clientèle.

Selon le témoin Ghislaine Larocque, la baisse des activités particulièrement dans le domaine de la construction, les nouvelles technologies importantes au niveau du service à la clientèle et l'amélioration continue de la planification du travail des employés qui, grâce à leur collaboration permet une plus grande flexibilité, font en sorte que malgré les soubresauts du départ, le programme de restructuration mis en place en cours d'année n'a pas diminué de façon significative la qualité de service offert à la clientèle, ni réduit la sécurité du réseau.

3.1.12 Risque de l'entreprise

Le témoignage de Robert Normand sur le taux de rendement a consisté à faire l'analyse du risque de l'entreprise et de le comparer avec celui de l'année précédente et ceux des autres distributeurs gaziers. L'analyse de ce risque est regroupée sous trois volets : le risque financier, le risque réglementaire et le risque d'affaires.

Ces constatations sont subséquemment prises en compte par le témoin expert de SCGM, le D^{r} Morin dans l'élaboration de sa preuve. Le témoin Normand fait l'analyse suivante des trois volets.

Risque financier

Selon le témoin, le risque financier continue d'être fonction de l'habileté de l'entreprise à respecter ses engagements, à rencontrer les attentes des investisseurs actuels, et de sa capacité d'obtenir de nouveaux financements à des conditions avantageuses.

Or, les attentes des investisseurs sont satisfaites, dans la mesure où l'entreprise génère des revenus d'exploitation qui permettent le maintien d'une couverture suffisante des charges financières et fournissent un rendement satisfaisant et stable dans le temps.

Selon le témoin, les revenus d'exploitation de 1996 permettront de maintenir une couverture de 2,8 fois la charge financière, soit une position relativement constante au cours des cinq dernières années.

Néanmoins, les prévisions de la Société pour 1996 indiquent pour une deuxième année que le bénéfice autorisé pourrait ne pas être atteint. Ce manque à gagner n'est pas suffisant pour compromettre la santé financière de la Société et n'aura sans doute pas d'impact sur l'évaluation des prêteurs car les déficiences découlent d'enjeux ponctuels plutôt que structurels, mentionne M. Normand.

Le recul du pourcentage de l'avoir des associés en 1995-1996 dans la structure financière est considéré comme temporaire et SCGM propose de le compenser par une surpondération en 1996-1997. Selon M. Normand, le niveau d'endettement est comparable à la moyenne des autres distributeurs et les cotes de crédit le reflètent bien.

En conclusion, le témoin est d'avis que le risque financier n'a pas subi de changement appréciable par rapport à l'année précédente car il est demeuré stable et il continue de rencontrer favorablement les attentes du marché.

Risque réglementaire

Pour Robert Normand, le risque réglementaire est fonction de l'évaluation faite par les marchés financiers de l'encadrement auquel est soumis l'entreprise, des principes soulevés dans les décisions rendues, de la continuité dans l'application des principes réglementaires, des décisions comme telles et de la perception générale quant au fonctionnement du processus.

Selon le témoin, les décisions rendues par la Régie depuis la cause tarifaire de l'an dernier l'ont été dans la continuité des principes qu'elle avait suivis historiquement. Il estime que SCGM oeuvre dans un contexte réglementaire bien adapté aux besoins des clients et équitable pour les investisseurs et que ce contexte est perçu favorablement dans l'industrie canadienne lorsqu'il est comparé aux autres. Le témoin fait cependant état des préoccupations de la Société à l'égard de la prime de risque de l'entreprise mentionnée dans la décision tarifaire de l'exercice 1995-1996.

Risque d'affaires

Le risque d'affaires à court terme

Le risque d'affaires à court terme est fonction de la capacité et l'habileté du distributeur à réaliser ses objectifs financiers de l'année courante. Cette capacité est reliée surtout aux moyens dont dispose l'entreprise en début d'exercice d'assurer la réalisation de ses budgets. Cette habileté est reliée à la façon dont la Société gère ses activités pour ajuster son tir en fonction des événements non prévus.

Selon M. Normand, il est difficile de comparer ce risque à court terme avec les autres distributeurs car il faudrait porter un jugement sur le niveau des contraintes budgétaires qu'ils incorporent dans leurs causes tarifaires. Il estime néanmoins que le niveau élevé des ventes dans le secteur industriel, combiné à la volatilité des prix du mazout et du gaz naturel, rend SCGM beaucoup plus vulnérable à la perte rapide et imprévue de revenus. De plus, la situation concurrentielle du gaz, qui est beaucoup plus avantageuse en Ontario qu'au Québec, maintient la Société à un niveau de risque comparatif très supérieur, soutient le témoin.

Le risque d'affaires à long terme

Sur le long terme, c'est plus l'habileté de la compagnie de demeurer compétitive dans son marché et de faire en sorte que ses installations d'une durée de vie de quarante ans et les investissements faits pour une longue période soient rentables.

Par rapport aux autres distributeurs, le témoin est d'avis que SCGM se démarque très négativement en raison des quatre facteurs suivants qui constituent un facteur de risque additionnel :

– la proportion très élevée des ventes industrielles par rapport aux ventes totales comporte le plus haut risque sur la durée de vie du réseau;

– la marge concurrentielle du gaz naturel par rapport aux sources d'énergie au Québec est moins importante que celle constatée dans les autres provinces;

– les pratiques tarifaires d'Hydro-Québec qui créent une concurrence beaucoup plus vive qu'en Ontario, à preuve les tarifs bi-énergie;

– la perte de volumes vendus aux clients existants, dont une partie est attribuable à la rénovation d'immeubles, combinée aux pratiques tarifaires d'Hydro-Québec.

Ces quatre éléments négatifs demeurent la raison principale qui fait que le risque d'affaires est nettement plus élevé chez SCGM, soutient M. Normand.

En conclusion, il est d'avis que le risque global demeure le même que l'an dernier en raison du maintien du risque réglementaire et financier et d'une stabilisation du risque d'affaires à court et long terme. Mais, le risque global demeure plus élevé que les autres distributeurs canadiens en raison du risque d'affaires plus élevé à court et long terme.

3.2 Preuve de l'ACIG – Sur le risque de l'entreprise

Selon le témoin de l'ACIG, Peter Milne, le risque global de l'entreprise peut se subdiviser en trois parties, soit les risques associés à la demande, à l'offre et à la réglementation.

3.2.1 Risques associés à la demande

Pour M. Milne, le risque associé à la demande est fonction de la volatilité des volumes de vente et des prix des produits ou, plus précisément, du niveau de la compétition sur le marché et de la stabilité des revenus générés.

Selon le témoin, le marché québécois présente de grandes possibilités pour la vente de gaz naturel. Il mentionne que les ventes totales de gaz au Québec se situent à environ 220 Bcf comparées à 800 Bcf pour l'Ontario. SCGM jouit donc d'un plus grand potentiel de vente que tous les autres distributeurs de gaz canadiens. Elle a donc une plus grande possibilité d'augmenter ses ventes et revenus. Il estime ce potentiel à 200 Bcf.

Quant à la prétention de SCGM, à l'effet que le pourcentage élevé de ses ventes au secteur industriel augmente son risque d'affaires comparativement aux autres distributeurs canadiens, M. Milne soumet que SCGM n'est pas unique en cette matière puisque la clientèle industrielle de Centra Gas Ontario représente 70 % des ventes totales et celle de Northwest Utilities représente 64 % de ses ventes.

De plus, bien que la clientèle industrielle de SCGM représente 62 % de ses ventes, elle ne génère que 35 % des revenus totaux de l'entreprise, soutient le témoin.

Par ailleurs, M. Milne est d'avis que le secteur industriel au Québec est relativement diversifié, ce qui diminue les écarts dus aux cycles économiques et procure un élément important de stabilité, réduisant ainsi le risque associé à la demande.

Il soumet également que l'économie du Québec est plus diversifiée que celle de Toronto ou du sud-ouest et du nord de l'Ontario qui sont desservis par plusieurs distributeurs, et donne en exemple le cas de Centra Gas dont la clientèle industrielle est limitée au secteur des mines et forêts.

Quant à la demande des marchés résidentiels, elle est soumise aux aléas de la température. Ce phénomène affecte moins proportionnellement SCGM que les autres distributeurs et de plus, elle bénéficie d'un compte de stabilisation qui diminue ce risque, soutient M. Milne.

À cet égard, il mentionne le cas de Consumer's Gas qui n'a pu atteindre son rendement autorisé en 1994-1995 à cause d'un hiver anormalement chaud et la décision récente de l'Ontario Energy Board (OEB) qui a imputé un montant de 5 millions $ aux actionnaires pour l'achat de gaz additionnel rendu nécessaire par l'hiver extrêmement froid de 1995-1996.

Par ailleurs, le niveau des ventes de gaz dans le secteur industriel, où plusieurs usagers peuvent alterner entre le gaz naturel et le mazout lourd, est directement affecté par les prix relatifs du gaz et des produits pétroliers. Or, selon M. Milne, le niveau de risque établi par le mazout lourd dans la franchise de SCGM est plus faible aujourd'hui comparativement à l'automne dernier. Il donne en exemple que le prix du mazout a augmenté de 20 % depuis le mois de novembre 1995, alors que pour la même période le prix du gaz demeurait stable à environ 1,30 $/GJ.

D'autre part, M. Milne est d'avis que la situation de monopole de SCGM fait en sorte qu'il n'a pas à faire face à la compétition avec les autres distributeurs, comme c'est le cas des distributeurs américains et ceux de l'Alberta.

De plus, M. Milne affirme que SCGM est moins à risques que d'autres compagnies non réglementées oeuvrant dans le secteur industriel puisqu'elle peut fixer ses propres tarifs en relation avec ses coûts.

SCGM bénéficie également des comptes de stabilisation, des procédures de « pass on » pour les coûts non prévus, de programmes de flexibilité tarifaire ainsi que de la garantie du maintien de ses tarifs durant l'année témoin.

Il faut ajouter à cela les contrats à long terme pour les clients des tarifs 4 et 5, ce qui permet à SCGM une stabilité de ses revenus dans ce secteur de clientèle, avantage que les autres distributeurs canadiens n'ont pas, soutient M. Milne.

En conclusion, le témoin est d'avis que le risque relié à la demande pour SCGM est moindre que celui de Centra Gas et similaire ou légèrement moindre que ceux de Union Gas et Consumer's Gas.

3.2.2 Risques associés à l'offre

Ces risques assumés par SCGM sont reliés directement à l'existence d'une source adéquate et suffisante de gaz naturel et à des systèmes de transport capable de transporter le gaz naturel nécessaire pour sa franchise. La déréglementation est un facteur qui contribue à diminuer le risque de SCGM, soutient M. Milne, puisqu'elle lui permet d'avoir accès à un groupe varié de fournisseurs qui ont un important bassin de réserves et peut également avoir accès aux réserves américaines.

Quant à la prétention de SCGM à l'effet que sa position en bout de ligne sur TCPL soit plus risquée en raison de possibilités de bris sur le réseau, le témoin est d'avis que c'est là un risque hypothétique, que Centra Gas Ontario fait face également à ce risque qui, en réalité, est très minime.

Comparés à d'autres utilités, les risques associés à l'offre de SCGM devraient être considérés équivalents à ceux de Consumer's Gas et Union Gas et TransCanada, et être considérés inférieurs à ceux de Centra Gas Ontario dont la franchise est répartie sur 2 000 km et trois zones tarifaires, soumet M. Milne.

3.2.3 Risque réglementaire

M. Milne est d'avis que les décisions antérieures de la Régie démontrent que SCGM évolue dans un système réglementaire favorable.

Par ailleurs, le témoin est d'avis que bien qu'on accepte que les entreprises réglementées puissent être compensées pour les risques sur lesquels elles n'ont aucun contrôle, ce n'est pas le cas lorsque les risques existent en raison de facteurs qui sont sous le contrôle des dirigeants, tels que les coûts en capital élevés de SCGM.

En complément de preuve sur le risque d'affaires de SCGM, les témoins experts de l'ACIG, les D^{rs} Booth et Berkowitz, font l'évaluation suivante : la taille d'entreprise de SCGM réduit le risque particulièrement du point de vue des sociétaires. Cette affirmation s'explique par le fait qu'une plus grande entreprise bénéficie d'un plus grand pouvoir d'achat et une force de vente lors de la recherche de clients. Elle bénéficie également d'un accès plus favorable aux marchés des capitaux et aux divers instruments financiers lors des besoins de liquidités.

Bien qu'à long terme les tarifs élevés de distribution de SCGM pourraient, advenant une situation concurrentielle défavorable du gaz naturel dans le secteur industriel, rendre l'entreprise beaucoup plus risquée, les témoins soulignent que les ventes industrielles du distributeur ont connu une croissance moyenne annuelle de 6 % durant les 12 dernières années et que, pour l'année en cours, les ventes industrielles ont progressé de 12 Bcf. Cela démontre qu'il y a un potentiel de croissance dans ce secteur, affirment-ils.

Même si SCGM a dû implanter des mesures tarifaires et des programmes pour maintenir ses ventes dans ce secteur, elle est capable d'atteindre régulièrement son taux de rendement autorisé, ce qui, à court terme, ne rend pas son risque d'affaires plus élevé que ceux des autres distributeurs.

Selon leur évaluation, les experts de l'ACIG placent Consumer's Gas comme l'entreprise la moins risquée suivie de près par Union Gas, SCGM aurait la moyenne de risque de BC Gas et Centra Gas Ontario parce qu'elle a un profil similaire sur la demande à celui de Centra Gas Ontario et se situe près de BC Gas quant à la taille de l'entreprise.

3.3 Contre-preuve de SCGM sur le risque d'entreprise

La requérante réfute les affirmations de M. Milne, témoin de l'ACIG, sur les éléments suivants :

– dans les secteurs résidentiel, commercial ou industriel, que le gaz soit en mode continu ou en mode interruptible, la situation concurrentielle chez Consumer's Gas présente toujours un avantage par rapport à la situation concurrentielle dans la franchise au Québec. L'analyse de M^{me} Bessette, produite à la pièce GMi-114, document 19 le démontre clairement, soutient SCGM.

  La requérante admet que les tarifs de distribution sont substantiellement plus élevés au Québec qu'en Ontario mais ce résultat s'explique par la construction plus récente du réseau et les niveaux d'inflation de 12 % entre 1970 et 1982. Le deuxième facteur est la faible densification du réseau qui répartit le coût moyen de l'infrastructure sur une plus petite base. Finalement, elle souligne l'obligation de donner des rabais à la consommation, des subventions, ainsi que la concurrence plus sévère de l'électricité.

  Elle dépose à cet effet l'analyse du professeur Yves Rabeau : *Les politiques déterminantes dans l'évolution du gaz naturel au Québec versus Ontario* (GMi-114, document 2) qui explique les raisons des coûts plus élevés de distribution au Québec.

– La requérante qualifie le potentiel de développement des ventes identifié par M. Milne de 200 Bcf comme étant irréaliste puisque la connaissance de son marché l'amène à une estimation de ce potentiel à environ 80 Bcf.

– La requérante rejette l'affirmation faite en audiences par M. Milne à l'effet que SCGM était à l'abri du risque puisqu'elle récupère ses coûts liés à la demande par l'entremise de 70 % de frais fixes. Elle soutient que la preuve démontre que la Société récupère au maximum 31,7 % des coûts via des primes fixes. Alors que la même comparaison chez TransCanada Pipelines indique un résultat de 98,7 %.

– M. Milne ignore totalement dans son témoignage la concurrence de l'électricité par Hydro-Québec. M^{me} Bessette rappelle à cet égard que le taux de pénétration de l'électricité est de 80 % au Québec. Elle est d'avis que M. Milne aurait dû en tenir compte dans son analyse sur le risque d'affaires de SCGM.

3.4 Structure de capital

3.4.1 Preuve de SCGM

Stratégie financière

La stratégie financière de la Société découle des objectifs financiers suivants :

– minimiser le coût en capital pour les clients;

– obtenir des notations de crédit permettant l'accès aux marchés en tout temps à des conditions avantageuses;

– obtenir un rendement juste et raisonnable sur l'avoir des associés et le réaliser;

– élaborer et réaliser une politique de distribution des bénéfices qui assure le maintien d'une structure financière saine et qui répond aux attentes des investisseurs;

Le témoin Robert Normand explique les stratégies mises en place par SCGM pour atteindre ces objectifs qui reposent, entre autres, sur une structure de capital composée de 54 % de dette, 7,5 % d'avoir privilégié et 38,5 % d'avoir ordinaire.

Selon M. Normand, le type de capitalisation proposé dans le présent dossier est le même qui a été maintenu au cours des dernières années et permis à SCGM d'atteindre le plus bas coût en capital depuis les 15 dernières années. Cela a été un des facteurs déterminant dans l'atteinte des cotes de crédit visées par la Société, soit les cotes A et A élevé maintenues par les maisons de notation CBRS et DBRS dans leur dernière évaluation de la Société. À cet égard, le témoin souligne que des cotes de crédit de A et A élevé sur la dette à long terme et le crédit à terme rencontrent l'objectif visé en matière de santé financière.

La Société doit donc veiller à conserver ses notations de crédit car ce sont des indicateurs déterminants sur le marché financier. Elles lui permettent de maintenir une solide crédibilité auprès de la communauté financière, soutient M. Normand qui rappelle que l'évaluation des agences de notation est influencée par la protection de l'actif, la couverture des intérêts et la force des flux de trésorerie qui découlent en très grande partie de la structure de capital, bien que l'évaluation de l'encadrement réglementaire, du risque d'affaires à court et long terme et la qualité des bénéfices réalisés soient également analysés.

Bien que la croissance de la composante dette permettrait à court terme une réduction du coût en capital, le témoin est d'avis qu'il existe un niveau qui ne peut être atteint sans compromettre la santé financière de la Société et entraîner une augmentation du coût unitaire de la dette et de l'avoir, stratégie qui devient alors plus onéreuse. Il souligne à cet égard que le niveau d'endettement de 54 % du distributeur est comparable à ceux des autres distributeurs canadiens.

Par ailleurs, la protection du capital investi par les prêteurs et les associés qui détiennent présentement les titres de la Société est également un facteur très important à considérer dans l'examen de la structure de capital. Un affaiblissement de la structure se traduirait par une dévaluation des cotes de crédit qui entraînerait automatiquement une perte de capital pour les détenteurs.

Une telle éventualité, en plus de causer un préjudice important aux détenteurs, laisserait des séquelles qui se feraient sentir lors des futurs financements sur une très longue période et risqueraient de compromettre l'accès au capital dans un marché serré, soutient M. Normand.

Selon lui, l'accès aux marchés financiers en tout temps est possible grâce à la réalisation des objectifs mentionnés ci-haut, à savoir le maintien d'une saine structure de capital, l'obtention et l'atteinte d'un rendement raisonnable sur l'avoir et le respect des engagements pris auprès du public investisseur.

Si la Régie changeait régulièrement les principes qu'elle a établis dans les décisions antérieures sur la section financière de la Société, cela augmenterait de toute évidence le risque financier parce qu'il n'y aurait pas de stabilité dans l'encadrement réglementaire, soutient le témoin.

En ce qui concerne la politique de distribution des bénéfices, le témoin mentionne que les principaux critères visés par la politique de distribution de la Société n'ont pas changé : distribuer la quasi-totalité des bénéfices, conserver un certain montant de bénéfices non répartis pour éviter d'entamer le capital, favoriser une légère croissance et effectuer une distribution en quatre versements trimestriels égaux. Pour 1997, la Société prévoit qu'environ 0,04 $ par part seront conservés comme bénéfices non distribués créant ainsi une partie de la réserve souhaitée.

Le plan de financement pour l'exercice financier 1997

Le plan de financement de SCGM ne prévoit pas d'émission de dette à long terme, considérant que la prime de 250 points de base par rapport au court terme est élevée puisque les projections prévoient une certaine stabilité des taux long terme . En effet, la Société prévoit que les taux court terme seront autour de 6 % et le taux Canada 30 ans autour de 8,5 % au cours de l'exercice financier 1997.

La dette constituerait 53,44 % de la structure de capital en 1996-1997 et le coût de la dette serait de 9,38 %.

La proportion des actions privilégiées incluse dans la structure de capital a été fixée à 7,56 % à un taux moyen de 6,28 %.

Quant à la portion de l'avoir ordinaire, le taux demandé est de 12,5 % après impôts. Il est établi en fonction d'une proportion d'avoir ordinaire de 39 %. La révision du niveau d'avoir ordinaire prévu dans le présent dossier tarifaire à 39 % au lieu de 38,5 % ne constitue pas une demande de modification du niveau autorisé par la Régie mais plutôt une mesure temporaire permettant d'atteindre sur une période de deux ans une moyenne de 38,5 %.

À cet égard, M. Normand explique que certaines années il peut y avoir un dépassement, d'autres années, un léger manque dans la capitalisation mais que sur un horizon à moyen et long terme, on peut démontrer qu'on maintient la structure de capital au niveau moyen visé de 38,5 %.

M. Normand souligne que SCGM a renforcé sa gestion financière au cours des dernières années en maximisant l'usage des obligations moyen terme. La gestion de ses emprunts à court terme est également faite de manière de plus en plus serrée et apporte de bons résultats, surtout par la force du papier commercial de la Société et le processus de négociation quotidienne.

En résumé, la gestion financière a été menée de façon à maintenir le coût en capital à un niveau de plus en plus bas. De plus, tel qu'on peut le constater à la pièce GMi-114, document 1, page 22, ce taux de 10,17 % est comparable à celui des autres sociétés qui est en moyenne de 10,09 %. Ce taux, qui incorpore l'effet de la structure de capital et du niveau de rendement demandé par la Société, représente donc sur cette base un coût raisonnable pour les clients, soutient le témoin.

3.4.2 Preuve de l'ACIG sur la structure de capital

Selon les experts de l'ACIG, les D[rs] Laurence et Booth, la Régie peut utiliser trois outils pour compenser le risque de l'entreprise, soit les comptes de frais reportés, le ratio dette / équité et le taux de rendement.

L'utilisation des comptes de frais reportés limitée aux éléments non contrôlés par l'entreprise est bénéfique tant pour les clients que les actionnaires. Toutefois, entre le choix d'ajuster la structure de la dette et le taux de rendement sur l'avoir ordinaire des actionnaires, ils préfèrent l'ajustement de la structure de la dette.

À cet effet, ils recommandent à la Régie de modifier la structure de capital de SCGM selon un ratio d'avoir ordinaire de 36 % et 64 % de dette, ce qui impliquerait la conversion des actions privilégiées et d'une partie de l'avoir ordinaire de SCGM en dette.

Leur recommandation est basée essentiellement sur les arguments suivants :

– les clients de SCGM bénéficieraient de l'augmentation du ratio d'endettement de l'entreprise parce que les coûts d'intérêts sur la dette sont déductibles d'impôts alors que les coûts sur l'équité ne le sont pas;

– les entreprises d'utilité réglementées ont les plus bas niveaux de risque d'entreprise parmi tous les secteurs de l'économie canadienne;

– parce qu'il existe un avantage fiscal pour les intérêts sur la dette, les entreprises réglementées devraient être financées autant que possible par la dette, sous réserve de maintenir un accès suffisant au marché des capitaux sur l'ensemble du cycle économique de manière à préserver l'intégrité financière et l'activité de l'entreprise.

À cet effet, les témoins de l'ACIG soulignent que :

– les marchés financiers considèrent que les changements apportés à la structure de capital sont de nature plus permanente que les changements apportés aux taux de rendement;

– une fois les changements apportés à la structure de capital, la Régie pourrait entendre les parties uniquement sur le taux de rendement à accorder au distributeur. Cela permettrait de réduire le temps d'audience et conséquemment, les coûts inhérents;

– la moyenne des ratios d'équité des autres distributeurs canadiens est d'environ 36 %, bien qu'elle puisse varier de 27,3 % à 42,5 % selon l'utilisation de l'impôt différé et l'importance d'actions privilégiées pour se financer.

Ils citent en exemple Centra Gas Ontario qui a un ratio d'avoir ordinaire de 36 % et BC Gas de 33 %, la composante d'actions privilégiées étant peu importante pour les deux entreprises;

– ces ratios d'équité supportent en moyenne une cote A et dans le cas de Consumer's Gas une cote A élevé. Seul Pacific Northern a une cote B^{++} en raison de sa plus petite taille;

– l'action privilégiée est un hybride entre l'avoir ordinaire et la dette.

En conséquence, les témoins experts recommandent que les actions privilégiées présumées soient remplacées par la dette lors des échéances, en raison notamment de l'abrogation des rabais de taxes fédérales et provinciales qui étaient consentis en vertu du Public Utilities Income Tax Transfer Act (PUITTA) et que les actions privilégiées traditionnelles restent dans la structure de capital mais que, lors des échéances, celles-ci soient refinancées par 25 % d'avoir ordinaire et 75 % dette.

Selon ces témoins experts, le ratio de la couverture d'intérêts est très important pour les sociétés non réglementées car leurs bénéfices sont volatiles. Ce n'est cependant pas le cas pour les entreprises réglementées.

En ce qui concerne l'impact sur la cote de crédit de SCGM que pourrait avoir la réduction du ratio d'équité à 36 %, les experts, bien que se disant incapables de prédire l'évaluation qu'en feraient les maisons de notation, sont d'avis que CBRS pourrait abaisser la cote de SCGM de A^{+} à A pour la ramener au même niveau que DBRS, mais qu'une telle baisse maintiendrait SCGM dans la cote d'investissement de qualité.

3.5 Contre-preuve de SCGM sur la structure de capital

Selon M. Normand, maintenir un crédit de qualité nécessite une cote A sur les obligations et pour la maintenir, SCGM doit être dans la médiane de la fourchette des critères établis par CBRS, notamment sur les couvertures d'intérêts qui doivent se situer entre 2,0 et 3,2 de la dépense d'intérêt et le ratio de la dette qui doit se situer entre 50 % et 65 %.

À cet égard, le témoin expert de SCGM, M. Morin, explique que la recommandation de l'ACIG sur une structure de capital comprenant 64 % de dette, placerait SCGM dans les normes d'une cote triple B qui, jumelée avec le taux de rendement recommandé par l'ACIG, donnerait pour résultat une couverture d'intérêts inférieure à 2,0 fois.

C'est là une recommandation radicale qui conduirait à une détérioration dans l'intégrité financière de SCGM et à une décote probable, soutient M. Morin et, par le fait même, une augmentation du coût de capital de l'entreprise.

Il est nécessaire, selon lui, que SCGM maintienne une cote de crédit A élevé pour que la compagnie puisse traverser les mauvaises et les bonnes périodes et avoir accès à du financement à des coûts raisonnables, car une cote de crédit entre A^+ et A permet à une société réglementée comme SCGM de minimiser son coût en capital.

Quant aux actions privilégiées, le témoin Normand est d'avis que le coût avant impôts des privilégiées est un bon financement pour les abonnés de SCGM et ceux-ci seraient avantagés de garder la structure actuelle.

Il souligne à cet égard que le coût de capitalisation de ces actions, qui sont un titre junior, est 9,95 % avant impôts, comparativement à 9,38 % pour la dette.

Par ailleurs, il soutient que pour racheter les actions privilégiées, qui représentent un capital permanent de 102 436 000 $, le coût d'emprunt serait de 10,45 %, ce qui représente la moyenne pondérée historique du coût de la dette qui prévalait pour la même période.

3.6 Preuve de SCGM sur la prime de risque et le taux de rendement

Le témoin expert de SCGM, le D^r^ Roger Morin, informe la Régie que, pour fins d'efficacité administrative et compte tenu de l'entente conclue entre les parties, seule la méthode prime de risque appuie sa recommandation quant au taux de rendement juste et raisonnable à accorder à SCGM.

Selon le témoin, deux composantes sont requises pour appliquer la méthode prime de risque : le taux sans risque et la prime de risque. En ce qui a trait au taux sans risque, les témoins experts des parties s'entendent pour employer le même taux. Le taux obligataire sans risque devant servir de référence est celui obtenu selon les lignes directrices émises par l'Office national de l'Énergie (ONE) énoncées dans la décision RH-2-94 rendue en mars 1995.

Cette méthode donne un taux sans risque de référence de 8,22 %, c'est-à-dire, la moyenne de 7,70 % des prévisions du rendement des obligations de 10 ans établies sur des périodes de trois mois et de 12 mois apparaissant dans le Consensus Forecast du mois d'avril 1996, auquel on ajoute l'écart moyen de 0,52 % tiré du Financial Post pour les 30 jours qui précèdent la publication du Consensus Forecast.

Pour quantifier la prime de risque de SCGM, le D^r^ Morin s'est inspiré de huit études sur les primes de risque. Après avoir expliqué les caractéristiques et les données de ces études, il les commente de la façon suivante.

Étude des entreprises réglementées canadiennes (méthodes prévisionnelles)

En utilisant la méthode d'actualisation des flux monétaires à un groupe de compagnies canadiennes de service public, le D[r] Morin obtient une prime de risque de 4,03 %. Néanmoins, il s'avère difficile, selon le témoin, d'appliquer cette méthode aux entreprises canadiennes d'énergie réglementées étant donné le manque de données fiables et la pénurie de compagnies homogènes.

Étude des distributeurs de gaz américains (méthodes prévisionnelles)

L'étude de compagnies américaines est pertinente au contexte canadien pour plusieurs raisons. D'abord, il y a une pénurie d'entreprises de services publics non diversifiées au Canada dont les actions sont cotées en bourse et donc assujetties aux opinions et actions des investisseurs.

La deuxième raison justifiant l'inclusion d'entreprises américaines dans l'échantillonnage est que les prévisions de croissance à long terme des analystes sont largement disponibles pour les compagnies de services publics américaines, contrairement à ce qu'on observe sur les marchés canadiens.

La troisième raison est que l'intégration des marchés canadiens et américains de capitaux s'est fortement intensifiée ces dernières années. Les investisseurs canadiens ont un accès beaucoup plus vaste qu'avant aux marchés américains et ont saisi l'occasion pour accroître la diversité de leurs placements et exploiter un plus grand nombre de véhicules d'investissement.

Les entreprises canadiennes de distribution du gaz oeuvrent dans le même secteur et affrontent des risques similaires à ceux des entreprises américaines. Les comparaisons entre leurs bêta et cotations d'obligations respectifs confirment d'ailleurs cette similarité. La prime de risque prévisionnelle moyenne dans l'industrie de distribution du gaz naturel américaine se chiffre à 4,35 %.

Estimation du modèle d'évaluation des actifs financiers (MEAF)

Le modèle MEAF occupe une place de choix dans la théorie financière et fournit une approche raisonnable pour quantifier la prime de risque.

Selon ce modèle, la prime de risque se calcule comme suit : le coefficient bêta de l'entreprise multiplié par l'écart entre le rendement du marché dans son ensemble et le taux sans risque.

Le D[r] Morin a attribué la valeur de 0,65 au coefficient bêta ce qui, selon lui, correspond au coefficient moyen des compagnies canadiennes de services publics et qui se rapproche au coefficient bêta moyen des distributeurs de gaz américains. Son estimé se compare également à celui des services de placement importants, comme Value Line, Merrill Lynch et Prudential, qui publient des bêta du même ordre de grandeur, et des décisions des tribunaux canadiens qui, elles, impliquent aussi un bêta de l'ordre de 0,65.

Le témoin a adopté la pratique qui veut que les coefficients bêta soient rajustés pour leur tendance à se rapprocher de la moyenne avec le temps. Conformément à cette pratique, utilisée par Value Line et Merrill Lynch, il rajuste les bêta d'une manière comparable à l'aide des poids de ⅔ et ⅓ fois l'unité.

L'évaluation de la prime de risque du marché

Quant à la composante prime de risque du marché, une fourchette de 5,9 % à 6,9 % a été utilisée. Cette fourchette repose sur quatre considérations : l'étude Hatch-White – l'étude de Boyle, Panjer et Sharp *Report on Canadian Economic Statistics 1924-1993* – l'étude Ibbotson-Sinquefielt 1926-1994 et une analyse de l'AFM appliquée au marché dans son ensemble.

En utilisant ces valeurs d'entrée de la formule MEAF pour la prime de risque, la prime se chiffre entre 3,8 % et 4,5 % avec un point milieu de 4,2 %. En ajoutant une marge conservatrice de 20 points afin de refléter les frais d'émission, la prime de risque applicable à SCGM devient 4,4 %.

Estimation de la version empirique du MEAF

Si l'on entre dans la version empirique les mêmes échelles de données que celles utilisées avec le MEAF traditionnel, les résultats produisent des estimations s'échelonnant de 4,3 % et 5,1 % avec un point milieu de 4,7 %, y compris le rajustement pour les frais d'émission.

Étude des distributeurs de gaz américains (méthode historique)

Une prime de risque historique pour l'ensemble des entreprises américaines distributrices de gaz a été évaluée au moyen d'une analyse chronologique pour la période allant de 1954 à 1994. La prime moyenne pour cette période est de 4,78 %. Cette prime est encore plus élevée si on limite l'échantillonnage aux distributeurs de gaz, soumet le D[r] Morin.

Prime de risque historique réglementaire

Un échantillon de 140 décisions sur le taux de rendement du capital-actions ordinaires autorisé par les régies canadiennes durant la période 1980-1994, ainsi que le niveau correspondant du taux d'intérêt sans risque, démontrent que la prime de risque moyenne pour toute la période se chiffre à 3,3 %, et à 4,0 % durant la dernière décennie.

Toujours à partir des décisions de taux de rendement accordées durant la période 1980-1994 et du niveau contemporain du taux d'intérêt sans risque, le D[r] Morin déclare que la relation entre la prime de risque et les taux d'intérêts est négative et se rapproche de 0,50. En insérant le taux d'intérêt sans risque de 8,22 % dans cette approche, la prime de risque se chiffre à 4,7 %. Donc la prime de risque globale qui se dégage des décisions des tribunaux canadiens se situe entre 4,0 % et 4,7 %, avec un point milieu de 4,35 %.

Prime de risque historique de l'ONE

La pièce RAM-3 montre que la prime de risque moyenne accordée par l'ONE dans la dernière décennie s'élève à 3,7 %. Historiquement, les distributeurs de gaz ont joui d'une prime de risque de 39 points plus élevés que celle accordée aux pipelines. Le risque de SCGM est encore plus élevé, si on se fie sur les rendements qu'on lui a accordés comparativement aux autres distributeurs de gaz et sur les écarts de taux de rendement plus élevés sur ses titres à revenus fixes. Par conséquent, la prime de l'ONE de 3,7 % dépasse facilement 4 % lorsqu'on la transpose correctement à SCGM.

Prime de risque historique de la Régie du gaz naturel

La pièce RAM-4 montre l'écart entre le rendement accordé par la Régie et le taux sans risque pour chaque année, ainsi que la moyenne sur les dix ans. La prime de risque moyenne s'élève à 4,1 %.

Le D[r] Morin soumet que des primes de risque de 4,3 % ne sont pas surprenantes et sont même conservatrices, si on les compare avec les primes de risque des entreprises de services publics qu'on retrouve dans les ouvrages académiques de finance. Il mentionne à cet égard cinq études sur les primes de risque des compagnies de services publics.

Le D[r] Morin arrive à la conclusion que les résultats obtenus des différentes méthodes prime de risque utilisées démontrent qu'une prime de risque de 4,3 % s'avère juste et raisonnable pour SCGM. Compte tenu de la prime de risque de 4,3 % et du taux sans risque de 8,22 %, il recommande pour 1997 l'adoption d'un taux de rendement de 12,50 % sur le capital-actions ordinaires de SCGM de 38,5 %.

3.7 Preuve de l'ACIG sur la prime de risque et le taux de rendement

Après avoir fait l'analyse de la croissance économique canadienne, des prévisions sur le taux d'inflation et de la situation du marché des capitaux canadiens, les témoins experts de l'ACIG, les D[rs] Booth et Berkowitz, confirment l'entente intervenue avec SCGM sur les prévisions des taux des obligations canadiennes à long terme qui, pour 1997, sont estimés à 8,22 %. Cette entente est aussi utilisée pour établir le taux de rendement nécessaire sur l'avoir ordinaire de SCGM.

Conformément à cette entente, les témoins experts de l'ACIG utilisent uniquement des méthodes primes de risque pour déterminer le coût du capital-actions de SCGM.

Les méthodes utilisées sont les suivantes : la méthode d'actualisation des flux monétaires (AFM), le modèle d'évaluation des actifs financiers (MEAF) et la prime de risque estimée sur les actions privilégiées.

Après avoir expliqué les caractéristiques et les données de ces méthodes, les D[rs] Booth et Berkowitz les commentent de la façon suivante :

La méthode AFM

Les témoins experts ont des réserves par rapport à l'utilisation de cette méthode parce qu'elle ne tient pas compte des changements survenus dans l'encadrement réglementaire comme les années-témoin projetées et l'introduction des comptes différés, lesquels ont réduit le risque des distributeurs de gaz de façon significative. Par exemple, la prime de risque était beaucoup plus élevée durant les années 1970 qu'actuellement.

Néanmoins, en calculant le taux de rendement selon cette méthode et en déduisant de ce taux celui des obligations canadiennes, ils estiment une prime de risque qui se situe dans une fourchette de 2,39 % à 2,66 %. En utilisant le taux des obligations long terme du Canada de 8,22 %, le rendement selon cette méthode devrait s'élever à environ 10,75 %.

La méthode MEAF

Selon les témoins, la méthode traditionnelle pour calculer la prime de risque de l'entreprise est de calculer le coefficient bêta de l'entreprise et ensuite l'appliquer à la prime de risque du marché estimée d'après l'écart entre le taux de rendement du marché et le taux obligataire long terme canadien. Ce résultat est ensuite ajouté au taux sans risque des obligations long terme canadiennes afin d'obtenir le taux de rendement applicable à l'entreprise.

L'évaluation des bêta

Les témoins présentent à la cédule 10 les coefficients bêta de certaines compagnies de services publics réglementées. Historiquement, les bêta des utilités publiques canadiennes se sont situés autour de 0,45. Le coefficient bêta moyen pour le marché boursier dans son ensemble est de 1,00; conséquemment ces données indiquent que les entreprises réglementées sont en moyenne de 45 % à 55 % aussi risquées que le marché en général.

D'autres études sur des périodes plus longues et sur des univers de référence plus larges amènent les témoins experts à attribuer une valeur de 0,50 à 0,60 au coefficient bêta, soit une médiane de 0,55. Ce coefficient de bêta correspond à la moyenne du secteur réglementé, qui est supérieur à la moyenne historique, mais que les experts prennent comme scénario de base.

Les divergences entre les experts de l'ACIG et le D^{r} Morin résident essentiellement dans les ajustements proposés par le D^{r} Morin pour refléter la tendance des coefficients bêta à se rapprocher de la moyenne de 1,00 avec le temps. Les experts de l'ACIG sont d'avis qu'il faudrait, pour être acceptable, que les statistiques économiques démontrent que les coefficients bêta ont tendance à se rapprocher de la moyenne de 1,00 avec le temps.

Or, selon les statistiques compilées, les bêta ont tendance à régresser vers la moyenne historique des utilités canadiennes qui est d'environ 0,50, plutôt que vers 1,00. Les résultats de ces données, lorsqu'appliqués aux compagnies de gaz et d'électricité, produisent un bêta de l'ordre de 0,485.

Au soutien de leurs affirmations, ils mentionnent les auteurs R. Gombola et D. Kahl qui, dans l'édition Financial Management de l'automne 1990, confirment ces résultats pour les compagnies américaines réglementées.

De plus, cette évaluation de 0,485 est presque identique au bêta avant les ajustements utilisés par le D^{r} Morin, soutiennent les D^{rs} Booth et Berkowitz. D'après ces mêmes témoins, l'estimé du bêta pour une société réglementée se situe dans la moyenne de 0,50 à 0,60.

L'évaluation de la prime de risque du marché

La prime de risque du marché est établie en examinant les taux de rendement réalisés sur différents types d'actions sur de longues périodes. Toutefois, une telle étude se heurte à des difficultés d'ordre méthodologique importantes, soulignent les experts :

– **Les problèmes d'estimation**

  Les moyennes arithmétique et géométrique sont habituellement utilisées dans le calcul des taux de rendement des investissements. Le meilleur estimé du taux de rendement de la période prochaine est obtenue en utilisant la moyenne arithmétique. Cependant, si l'on veut le meilleur estimé du rendement obtenu sur plusieurs périodes, le rendement arithmétique devient moins utile et plus d'emphase doit être placée sur le rendement géométrique.

– **La période choisie**

  En estimant la prime de risque sur une courte période, la phase du cycle économique biaise les résultats par le choix arbitraire de la période finale. Par exemple, si la période concernée englobe la fin d'un marché haussier, les rendements récents seront élevés augmentant ainsi la prime de risque réalisée. Il est important d'inclure un cycle complet du taux d'intérêts, sinon les rendements obtenus ne seront pas représentatifs de la prime de risque du marché.

Le désaccord entre les experts de l'ACIG et SCGM sur la détermination de la prime de marché se situe, entre autres, sur les périodes choisies pour l'étude historique du comportement du marché canadien et sur l'usage de données américaines.

Selon ces témoins, en omettant d'ajuster les résultats de l'étude Hatch-White pour les données de 1988 à 1995, le D^{r} Morin biaise à la hausse son estimé de la prime de risque de marché.

Les experts de l'ACIG mentionnent, entre autres, que les séries de données pour la période d'avant 1956 sont incomplètes ou différentes de celles d'aujourd'hui, que la structure des marchés financiers a évolué et que l'introduction du crédit fiscal sur les dividendes en 1948 fait en sorte que les données du marché des actions d'avant cette date reflètent un environnement fiscal fondamentalement différent. Pour ces diverses raisons, les experts de l'ACIG concluent que la période d'après 1956 est beaucoup plus utile pour évaluer la prime de risque.

Ils soulignent que si le D^{r} Morin avait ajusté ses résultats pour refléter les années les plus récentes en utilisant les données pour la période postérieure à 1956, soit au début du TSE Index, il en serait arrivé à un résultat équivalent au leur, soit environ 4,0 %.

De plus, les experts mentionnent qu'en raison de l'endettement des gouvernements, les taux des obligations à long terme Canada reflètent aujourd'hui une prime de risque importante qui n'existait pas au cours des périodes précédentes.

Par ailleurs, les témoins experts de l'ACIG critiquent l'utilisation de données américaines par le D[r] Morin qui a pour effet de hausser la prime de risque du marché jusqu'à 6,9 % en utilisant l'étude D'Ibbotson-Sinquefield sur les rendements passés des actions et obligations aux États-Unis entre 1926 et 1994.

Selon eux, bien que présentement les économies américaine et canadienne soient partiellement intégrées, il y a de sérieux obstacles à la pleine intégration de leurs marchés financiers. Ils donnent à titre d'exemple les politiques monétaires différentes, le financement de la dette et le comportement des taux d'intérêts.

Les méthodes d'estimation alternatives

La méthode traditionnelle d'établir la prime de marché est de soustraire du rendement estimé sur l'équité le rendement estimé sur les obligations Canada long terme. Une alternative est d'estimer la différence annuelle directement.

Or, selon les témoins, cette estimation montre que la prime de risque du marché réalisée a été en décroissance continuelle depuis le milieu des années 1960. La raison principale est que plus les données actuelles deviennent disponibles, moins les données d'avant la Seconde Guerre mondiale prennent de l'ampleur, soulignent-ils. La prime de risque du marché, selon les experts de l'ACIG, se situe dans la fourchette de 3,5 % à 4,0 %.

En utilisant des bêta variant de 0,50 à 0,60 et une prime de risque du marché de l'ordre de 3,5 % à 4 %, le rendement pour SCGM, selon cette méthode, serait de 10,30 %, soumettent les experts de l'ACIG.

Méthode prime de risque sur les actions privilégiées

La méthode de prime de risque sur les actions privilégiées permet de refléter l'importance des préférences fiscales, si elles existent dans le marché. Par contre, la méthode de prime de risque sur les obligations ne saisit pas les effets des changements fiscaux, soutiennent les témoins.

Utilisant six compagnies de téléphone comme référence, les témoins soulignent que les résultats de leur analyse démontrent qu'un investisseur requiert un rendement additionnel sur les actions privilégiées de l'ordre de 1,43 % à 2,68 %. Selon cette méthode, le rendement requis pour SCGM serait de 9,98 %.

En ajoutant les résultats de l'ensemble de ces diverses méthodes au taux obligataire de 8,22 %, les experts obtiennent des taux de rendements suggérés de 10,30 %, 9,98 % et 10,75 % pour une moyenne de 10,35 % auxquels ils ajoutent 15 points de base pour tenir compte des frais d'émission, donnant ainsi un taux de rendement de 10,50 % sur un scénario proposé de 36 % d'avoir ordinaire.

Sous une structure de capital avec 46 % d'équité, dont 7,5 % d'actions privilégiées, leur recommandation est à l'effet que pour chaque point de pourcentage en moins dans l'avoir, le taux demandé devrait être diminué de sept points de base, soit jusqu'à 9,70 % pour 46 % d'équité.

En ce qui concerne la prime de risque accordée sur base historique par les agences réglementaires, les experts sont d'avis que cette méthode, présentée par le D[r] Morin, ne devrait pas être utilisée en raison du phénomène de circularité. De plus, ces décisions peuvent ne pas refléter l'environnement ou les conditions présentes des marchés.

3.8 Contre-preuve de SCGM sur la prime de risque et le taux de rendement

L'approche prime de risque – actions privilégiées

Selon le D[r] Morin, la méthode retenue par l'ACIG n'est pas utilisée en réglementation parce que le marché canadien des actions privilégiées est relativement inactif et très spécialisé. De plus, c'est un marché qui manque de liquidité.

Quant aux trois nouveaux tests qu'il a soumis sur l'historique des primes de risque accordées par les agences réglementaires, le D[r] Morin est d'avis qu'ils sont utiles pour fins de comparaisons pour les investisseurs puisque les taux accordés par les régies ont une influence sur leurs choix de placement.

En ce qui concerne la période qu'il a retenue pour évaluer la prime de risque du marché, le D[r] Morin soutient qu'il faut reculer le plus longtemps possible dans le temps afin de faire une moyenne basée sur une très longue période. Selon lui, la doctrine financière préconise l'utilisation de longues périodes parce que les anticipations des investisseurs ont un horizon à long terme. À cet égard, il cite un extrait du livre du professeur Ibbotson qui soutient cette thèse.

Pour ce qui est de son évaluation des bêta ajustés qui résulte en une prime de risque de 60 points de base supérieure à celle que produit les bêta bruts retenus par l'ACIG, le D[r] Morin soumet cinq raisons pour lesquelles il a retenu la méthode des bêta ajustés :

– les services d'évaluation de fonds mutuels comme Value Line, Mutual Funds Survey, Morning Star utilisent des bêta ajustés. Les bêta bruts employés par les D[rs] Booth et Berkowitz, sont des bêta maison. Ce ne sont pas des bêta qui sont employés par des investisseurs raffinés. De plus, il existe une littérature scientifique qui supporte l'idée des bêta ajustés car ils ont un meilleur degré de précision.

– Il est très important d'ajuster le bêta pour tenir compte du fait que les bêta sont biaisés vers le bas parce qu'il n'y a pas assez de volumes pour traquer le marché. Les volumes de transactions sont minces.

– Les données mêmes qui apparaissent dans le témoignage de Booth et Berkowitz confirment la tendance des bêta d'augmenter ou de se diriger vers 1,00.

– Les décisions antérieures par les régies sur le taux de rendement et implicitement les primes de risque qui ont été octroyées contiennent des bêta qui sont du même ordre de grandeur que le bêta qu'il utilise, soit 0,65.

– Les témoins de l'ACIG essaient d'estimer un bêta en évaluant la relation entre les bêta du marché et des variables d'ordre comptable dont la croissance des actifs, la variabilité des bénéfices par action, le levier financier et la taille de l'entreprise. Selon le D[r] Morin, ce modèle n'explique rien car la variable des bénéfices par action et la croissance des actifs n'est pas significative puisqu'en bas de 1,00.

3.9 Revenus requis

Compte tenu des projections de vente, des rabais à la consommation, du coût du gaz, des autres revenus d'exploitation et des dépenses d'exploitation, ainsi que du rendement sur la base de tarification demandé, les revenus requis provenant des ventes dans la franchise pour l'exercice financier 1997 s'élèvent à 1 090 736 000 $.

Les tarifs actuellement en vigueur, en tenant compte de l'impact des décisions d'autorités compétentes et de la baisse des prix consentis aux clients qui se sont engagés notamment à consommer du gaz à long terme produiraient, pour l'exercice financier 1997, des revenus de 1 083 612 000 $.

L'application des tarifs actuellement en vigueur aux prévisions des ventes pour l'exercice financier 1997 se traduit par un manque à gagner de 7 124 000 $ devant être comblé par un ajustement des taux des tarifs à compter du 1[er] octobre 1996, tel qu'il appert à la pièce GMi-102, document 2.2.

3.10 Grille tarifaire

Les témoins de la requérante, M[mes] Sylvie Desroches, Sylvie Durand et M. Jean-Pierre Noël mentionnent que l'élaboration de la grille tarifaire proposée à compter du 1[er] octobre 1996 a été guidée par les critères suivants :

Au Tarif 1 résidentiel :

un interfinancement toujours présent qui incite à relever les premiers paliers du Tarif 1 où sont concentrés les plus petits clients, une inflation projetée à 1,8 % et une augmentation des tarifs d'électricité de 2,5 % dans le marché résidentiel;

Aux tarifs 1 multilocatif et commercial et au Tarif 3 :

une contribution importante à l'interfinancement et une situation concurrentielle parfois difficile avec le mazout;

Au Tarif 4 :

une contribution à l'interfinancement de moins en moins grande et une situation concurrentielle généralement favorable;

Au Tarif 5 (interruptible) :

une situation concurrentielle relativement favorable par rapport à la situation vécue l'année dernière, une demande qui excède l'offre (niveau relativement élevé d'interruptions), une augmentation des volumes vendus au Tarif 5 au détriment de ceux vendus au Tarif 4, une rentabilité moindre qu'au Tarif 4 quelles que soient les méthodes d'allocation retenues et un amortissement, à partir de 1996-1997, du compte de flexibilité tarifaire dont ont bénéficié les clients interruptibles.

Les témoins de SCGM mentionnent également la nécessité de maintenir les liens logiques et mathématiques (points de croisement) entre les différents tarifs.

Rapprochement des zones nord et sud

SCGM confirme la poursuite du rapprochement des taux de la zone nord avec ceux de la zone sud, tel qu'approuvé par la Régie dans sa décision D-94-65. Conformément à cette décision, le tiers de l'écart entre les deux zones sera absorbé cette année de façon à obtenir des taux uniformes au 1er octobre 1998.

Rabais transitoires

Pour le dossier tarifaire 1997, SCGM propose une réduction de ses rabais transitoires de 2 % basée sur la correction de l'interfinancement à l'intérieur du Tarif 1. Il s'agit de la quatrième année des rabais transitoires prévus au départ pour cinq ans. La cause tarifaire 1998 devait être la dernière année de ces rabais.

Cependant, d'autres rabais se sont ajoutés et les rabais transitoires ne pourront se terminer lors de la cause tarifaire de 1998.

Tarifs proposés

Pour donner suite à sa stratégie tarifaire, SCGM propose, dans le dossier de base, d'appliquer les augmentations ou diminutions moyennes suivantes sur les tarifs de transport et de distribution :

Tarif 1 :	augmentation de	0,5 %
Tarif 3 :	augmentation de	2,5 %
Tarif 4 :	augmentation de	1,6 %
Tarif 5 :	augmentation de	5,5 %
Tarif M (modulaire) :	diminution de	8,0 %

Les témoins expliquent que la clientèle résidentielle de moins de 1 095 m³ par année (Tarif 1) aurait une augmentation de 1,8 %, ce qui correspond à l'inflation projetée. Pour les clients consommant entre 1 095 m³ et 36 500 m³ par année (Tarif 1), qui sont aussi majoritairement résidentiels, l'augmentation serait moindre que l'inflation soit 0,9 %.

En contrepartie de ces augmentations, SCGM propose de réduire les taux des grands clients du Tarif 1 (multilocatif, commercial et résidentiel de plus de 36 500 m³/an) de 0,1 %.

Quant aux tarifs 4 et 5, bien que les tarifs proposés comportent des augmentations des taux unitaires, SCGM est d'avis que ces clients connaîtront malgré tout un gel de leur facture compte tenu de la révision des volumes souscrits et de la prolongation des durées de contrat. Ainsi, en termes réels (net d'inflation), cela correspond à une réduction appréciable de leur facture, soutient SCGM.

Obligation minimale aux tarifs 1 et M

SCGM explique que la rentabilité de la desserte de nouveaux clients au Tarif 1 repose sur la réalisation des volumes de vente projetés, alors qu'actuellement le Tarif 1 ne prévoit aucune obligation minimale autre que l'obligation minimale quotidienne. Cette dernière est cependant relativement minime et ne garantit pas à elle seule la rentabilité d'un projet d'investissement.

Quant au Tarif M, elle prévoit la possibilité d'une obligation minimale mais ne peut solutionner le problème, d'une part, parce qu'elle ne s'applique qu'aux clients de plus de 75 000 m³ et d'autre part, parce que son obligation minimale présente une certaine flexibilité, laquelle est certainement souhaitable dans le cas d'un client existant, mais trop grande dans le cas d'un nouveau client.

SCGM demande donc la possibilité d'exiger d'un nouveau client aux tarifs 1 et M une obligation minimale propice à mieux assurer la rentabilité du projet d'investissement de SCGM.

Suivi du Tarif modulaire (Tarif M)

À la suite des décisions D-95-46 et D-95-64 qui approuvaient le Tarif M comme projet pilote, SCGM présente le bilan des résultats volumétriques et financiers.

Ce bilan démontre que d'une part, les réductions consenties en moyenne aux clients du projet pilote (10,2 %) ont été supérieures aux réductions prévues (7,2 %) causant une variation négative de revenus mais que, d'autre part, la consommation des 102 clients du projet pilote montre une augmentation de 3,4 % après cinq mois vécus au Tarif M causant une variation positive de revenus. Bien qu'il soit un peu tôt pour conclure à une augmentation des volumes de vente due à l'introduction du tarif modulaire, ces résultats sont néanmoins très réjouissants, selon le distributeur.

De plus, SCGM informe la Régie que les résultats d'un sondage qu'elle a effectué auprès de cette clientèle démontrent que celle-ci se dit satisfaite des économies que ce tarif leur permet de réaliser et des conditions qui y sont rattachées.

À la lumière des résultats obtenus pour l'année 1995-1996, SCGM propose de maintenir le Tarif M au 1er octobre 1996 et d'élargir le projet pilote chez la clientèle existante pour en arriver à un total de 300 clients. Elle propose également diverses modifications au texte du tarif à la pièce GMi-117, document 1, section 2.4.

Nombre de paliers dans les tarifs

À la suite de la décision D-95-54 dans laquelle la Régie demandait de revoir les différents niveaux des tarifs, particulièrement ceux du Tarif 1 service général, afin de s'assurer qu'ils répondent à l'objectif visé de refléter le coût du service rendu tout en limitant le nombre, SCGM explique les objectifs visés par les différents paliers dans les tarifs.

De façon générale, les tarifs sont conçus de telle sorte qu'ils reflètent le coût de desservir les clients. Un des facteurs qui influence le coût de desservir les clients est l'importance du volume retiré. Cette procédure permet de refléter dans les tarifs les économies d'échelle réalisées à desservir des clients de plus grande taille. L'élément de la structure tarifaire permettant de refléter sur la facture du client ces économies d'échelle est le nombre de paliers.

Présentement, SCGM possède 12 paliers de facturation et trois structures tarifaires permettant de couvrir l'ensemble de sa clientèle.

Bien que SCGM n'exclut pas la possibilité de fusionner éventuellement certains paliers au Tarif 1 ou d'en modifier l'étendue, la Société préfère que toutes les modifications tarifaires se fassent progressivement, comme cela s'est passé lors de la fusion des paliers 4,9 et 4,10.

Selon la requérante, la fusion de certains paliers, en particulier des derniers paliers des tarifs 4 et 5, se fait naturellement lorsque la situation des coûts et la correction de l'interfinancement le justifient. Elle veut donc poursuivre son analyse des coûts selon la taille des clients et par coefficient d'utilisation avant d'apporter des modifications à ses structures tarifaires. Si les études de coûts justifient le rapprochement de certains paliers, et que les tarifs se rapprochent des coûts, cette tendance naturelle à fusionner certains paliers se concrétisera dans leurs tarifs, déclare SCGM.

Harmonisation des tarifs

En 1995-1996, SCGM a introduit l'article 4.6 intitulé « prolongation de contrat » dans le but d'inciter les clients du Tarif 5 à renouveler leur contrat avant terme pour un an. Cette disposition permet au client de continuer de bénéficier de la réduction pour la durée de son contrat tout en maintenant une durée résiduelle plus petite (trois ans dans le cas d'un contrat de cinq ans), réduisant ainsi son risque à long terme sans sacrifier le prix et permettant à SCGM de compter sur un renouvellement hâtif du contrat.

Cette année, SCGM propose d'ajouter cette possibilité aux autres tarifs qui comportent une réduction pour la durée du contrat, c'est-à-dire les tarifs 3, 4 et M.

Modifications à l'article 3.4 des dispositions générales

SCGM propose deux modifications à l'article 3.4 des dispositions générales, soit :

– introduire la possibilité de facturer la contribution autrement qu'en ¢ / m^3 ou au début des travaux, en l'occurrence aussi en pourcentage ou en un montant périodique fixe sur la durée du contrat;

– reconnaître qu'une contribution peut être exigée du client non seulement pour récupérer le coût des immobilisations au taux approuvé par la Régie, mais bien pour viser un effet neutre sur les tarifs dès la première année.

La première modification a été autorisée par la Régie dans sa décision D-96-24.

Pour ce qui est de la seconde modification, SCGM explique que l'article 3.4 actuellement en vigueur, qui permet au distributeur de récupérer le coût de ses immobilisations au taux approuvé par la Régie, peut causer des hausses tarifaires lors des premières années, même si ces augmentations sont par la suite compensées par des baisses tarifaires au cours des années subséquentes. L'objectif de la Société est de générer des baisses tarifaires dès les premières années, ce que la Régie souhaitait également dans ses décisions antérieures.

Bref, l'objectif serait que le raccordement d'un nouveau client ait un effet neutre sur les tarifs, dès la première année, à défaut de quoi la Société pourrait demander au client une contribution.

De plus, le distributeur propose de remplacer les mots « immobilisations » par « investissements » et « taux approuvé par la Régie » par « conditions approuvées par la Régie ».

4. PLAIDOIRIES

4.1 Me François G. Hébert – SCGM

Faisant une brève révision de la preuve soumise par sa cliente en regard des revenus requis de la projection des ventes du plan de développement et du coût du gaz, le procureur de SCGM souligne que l'approche globale retenue par sa clientèle pour l'établissement du dossier tarifaire 1997 est sensiblement la même que par les années passées.

Rappelant le contexte économique et concurrentiel dans lequel la présente demande est soumise, il croit que SCGM devra déployer tous les efforts afin d'atteindre ses objectifs et demeurer très vigilante face à la concurrence, et particulièrement celles des tarifs bi-énergie d'Hydro-Québec.

En ce qui concerne les dépenses d'exploitation, Me Hébert rappelle que le président de SCGM a démontré clairement que le contrôle des coûts était devenu une préoccupation constante de l'ensemble du personnel de l'entreprise, ce qui avait permis une décroissance des dépenses depuis 1992.

Cette volonté de maintenir le coût de service le plus bas possible va se poursuivre en 1997, puisque l'entreprise devra comprimer ses dépenses d'un montant de 1,7 million $ pour absorber les augmentations de salaires et autres dépenses évaluées selon un taux d'inflation de 1,8 %, soumet Me Hébert.

Quant à la base de tarification, le procureur de SCGM rappelle que les ajouts à cette base sont liés à la réalisation de nouvelles ventes et à l'amélioration du réseau. Ils sont donc nécessaires pour réaliser le plan de développement de l'entreprise et résultent en effet à la baisse sur les tarifs en plus d'assurer la sécurité et l'entretien du réseau.

Sur la structure de capital

Me Hébert soumet que le ratio d'équité de 39 % de l'avoir ordinaire prévu au dossier 1997 n'est qu'une surpondération temporaire qui permettra d'atteindre sur deux ans le ratio de 38,5 % autorisé par la Régie.

Il rappelle à cet effet le témoignage de M. Robert Normand sur la difficulté de s'en tenir de façon annuelle, exactement au ratio convenu. De plus, cette pondération est presque identique à celle contenue aux dossiers tarifaires 1993-1994 et 1994-1995.

Selon le procureur de SCGM, la preuve a démontré que la structure de capital actuelle de la Société a permis de minimiser le coût du capital et maintenir une bonne couverture d'intérêts et est la structure optimale pour obtenir de bonnes cotes de crédit, ce qui, rappelle-t-il, a été reconnu par la Régie dans les décisions D-93-51 et D-94-65.

M[e] Hébert soutient qu'il est toujours valable de maintenir des cotes de crédit A et A élevé et que pour les conserver, il faut que l'entreprise ait un profil financier qui rencontre les critères des maisons de notation.

Selon le procureur de SCGM, les changements demandés par l'ACIG constituent un enjeu extrêmement important pour sa cliente puisqu'ils impliquent des changements structuraux importants dans la composition de la structure de capital de la Société lesquels, si approuvés par la Régie, auraient un caractère permanent et influenceraient l'évaluation que font les maisons de notation de crédit de SCGM.

Il souligne, à cet égard, que la recommandation de l'ACIG ne repose que sur un seul tableau comparatif des ratios d'équité des autres distributeurs de gaz, qui l'amène à conclure qu'un ratio d'équité de 36 % pour SCGM est adéquat parce que son risque est essentiellement le même que les autres distributeurs.

C'est là, soumet M[e] Hébert, essentiellement la même preuve mise à jour que l'ACIG présentait dans les précédents dossiers tarifaires car cette preuve n'est soutenue par aucune étude démontrant que cette recommandation permet à SCGM d'avoir une structure de capital optimale, ni les impacts qu'elle pourrait avoir sur le coût de la dette, l'équité, la couverture d'intérêts, les cotations d'obligations et sur la facture des abonnés.

Rappelant que le propre témoin expert de l'ACIG, le D[r] Booth, admettait la possibilité d'une décote si leur recommandation était acceptée, M[e] Hébert soumet que pour accueillir les demandes formulées par l'ACIG, la Régie devrait arriver à la conclusion que sont survenus, depuis le prononcé des dernières décisions traitant de la structure de capital, des faits au sein de SCGM d'une importance telle que l'on devrait revoir la pondération de sa structure de capital.

Par ailleurs, M[e] Hébert soumet qu'il a été clairement indiqué, par le D[r] Morin, que la recommandation de l'ACIG d'augmenter le ratio de la dette à 64 % va à l'encontre de la tendance actuelle au renforcement de la santé financière des utilités publiques et positionnerait SCGM dans les critères de cotation de triple B.

Quant à la recommandation de l'ACIG sur les actions privilégiées, M[e] Hébert soumet que la preuve de SCGM démontre qu'il n'est pas opportun de modifier la décision D-90-75, qui fixait de façon permanente le ratio de 7,5 % d'avoir privilégié dans la structure de capital de SCGM et que le coût en capital de cette portion de l'avoir de l'entreprise était très avantageux pour ses clients.

Selon M[e] Hébert, les recommandations de l'ACIG sur la structure de capital va à l'encontre de ses propres intérêts et des intérêts de l'ensemble de la clientèle de SCGM. La Régie devrait donc opter pour la prudence et la stabilité financière de l'entreprise en rejetant leur proposition.

Sur la prime de risque et le taux de rendement

Comparant le risque d'affaires de SCGM avec celui des autres distributeurs canadiens, M[e] Hébert soumet que le risque d'affaires de sa cliente se démarque négativement pour les raisons suivantes :

– tous reconnaissent, y inclut les maisons de notation CBRS et DBRS, que la forte concentration des ventes dans le secteur industriel rend l'entreprise plus risquée que les autres distributeurs de gaz naturel;

– plus de la moitié des ventes industrielles, soit 70 Bcf, est faite dans deux segments d'activités de l'entreprise, soit la métallurgie et les pâtes et papiers;

– les coûts de transport du gaz jusqu'à la franchise et les coûts de distribution sont plus élevés, laissant la marge concurrentielle du gaz face aux autres sources d'énergie inférieure à celle des autres distributeurs de gaz canadiens;

– le taux de pénétration du gaz dans les secteurs résidentiel et commercial québécois est beaucoup plus faible qu'en Ontario, ce qui fait que le marché nécessite des programmes commerciaux coûteux, coûts auxquels n'ont pas à faire face les distributeurs ontariens.

La prime de risque

Selon M[e] Hébert, la preuve démontre que le D[r] Morin a utilisé plus de méthodes que les experts de l'ACIG pour évaluer la prime de risque de SCGM.

Mais plus important selon lui, ce sont les résultats obtenus par les différents experts pour les mêmes tests et les raisons qui expliquent la différence de ces résultats cruciaux dans l'évaluation que la Régie doit faire de la preuve soumise par ces experts.

Par ailleurs, M[e] Hébert soumet que le D[r] Morin avait démontré que si les experts Booth et Berkowitz avaient utilisé les mêmes méthodes qu'il avait lui-même utilisées, le taux de rendement atteindrait 12 %, ce qui se rapproche des taux de rendement de 11,88 % accordé à Consumer's Gas en 1995, de 11,50 % recommandé pour 1996, incluant les primes de risque respectives de 3,38 % et 3,5 %.

Quant aux revenus requis et la répartition de ces revenus dans les tarifs, M[e] Hébert rappelle que la stratégie tarifaire de sa cliente est appliquée de façon à assurer une meilleure équité entre les différentes classes de clients en maintenant ou en améliorant la position concurrentielle du gaz naturel, et en corrigeant de façon progressive l'interfinancement.

4.2 M[e] Pierre Tourigny – CIGMA et Multi-Énergies Inc.

M[e] Tourigny déclare que ses clients sont inquiets des augmentations proposées par SCGM au tarif interruptible.

Il souligne à cet égard que le tarif interruptible, qui était en 1990 à 85,4 % de la médiane du Tarif continu 4, passera à plus de 100 % de ce même tarif, avec une augmentation moyenne de 5,5 % pour 1997 sur les tarifs actuels.

Cette augmentation, soumet M[e] Tourigny, est exigée des clients dont les volumes sont considérés vulnérables par SCGM puisqu'ils peuvent utiliser d'autres formes d'énergie, particulièrement le mazout numéro 6, et que ce sont pour ces mêmes clients que SCGM a accordé des rabais de plus de 7 millions $ pour les maintenir au gaz naturel et faire face à la concurrence du mazout.

Or, selon M[e] Tourigny, cette augmentation frappe surtout les clients qui ont déjà négocié leur tarif interruptible à plus long terme ou pour un volume minimal plus élevé afin de bénéficier de réductions que leur confèrent ces deux conditions du tarif.

De plus, SCGM augmente le tarif interruptible à une époque où le nombre de jours d'interruption s'accroît, pouvant atteindre jusqu'à 142 jours, alors même que la situation concurrentielle du gaz au Québec est évaluée par le président de SCGM comme étant plus sévère, soutient M[e] Tourigny.

Cette façon de faire de SCGM arrive alors qu'elle réduit ses coûts de desservir cette clientèle en diminuant la capacité de transport sur le service STS et qu'elle effectue des ventes hors-franchise avec des excédents de capacité de pointe alors que les clients interruptibles sont interrompus.

Bien que ses clients soient d'accord que le tarif interruptible est là pour permettre la consommation de gaz naturel seulement lorsque la capacité du réseau de transport le permet, M[e] Tourigny soumet que la structure tarifaire doit donner à ce service un prix qui est conséquent avec la qualité du service.

En ce qui concerne le motif énoncé par SCGM pour proposer une telle augmentation qui se veut dissuasive et empêcher une migration des volumes continus du Tarif 4 vers le tarif interruptible, M[e] Tourigny est d'avis que ce genre de raisonnement est typique d'un monopole et peut amener des clients à délaisser le gaz naturel pour le mazout. Il souligne également que cette migration n'est pas nécessairement due à un tarif interruptible trop bas mais peut être due à un tarif continu trop élevé.

Il est d'avis que cette situation ne peut continuer car tous y perdraient, tant SCGM que les membres de l'association qu'il représente.

4.3 M[e] Guy Sarault – ACIG

Le procureur de l'ACIG analyse le présent dossier en fonction des trois grands moyens dont, selon lui, peut disposer SCGM pour contrôler son coût de service soit, la progression de ses revenus de ventes (en fonction du coût du gaz), le contrôle de ses dépenses (exploitation, immobilisation et coût en capital), la grille tarifaire et l'interfinancement.

Progression des revenus de ventes et coût du gaz

Faisant l'analyse du bilan préliminaire de l'exercice 1995-1996, M[e] Sarault constate que la marge bénéficiaire brute projetée pour 1997, bien que supérieure aux résultats réels de 1996, sera d'environ 5 millions $ inférieure à celle budgétée en 1996.

Il s'ensuit donc que, pour 1997, il est illusoire de compter sur une augmentation des revenus de ventes pour réduire le coût unitaire de service. Il faut donc nécessairement envisager des mesures de resserrement des dépenses si l'on veut, cette année encore, maintenir le cap au niveau du contrôle du coût de service, soumet M[e] Sarault.

Quant aux coûts d'approvisionnement gazier, M[e] Sarault estime que les économies réalisées sur les frais de transport et d'entreposage sont faites au prix d'un plus grand nombre d'interruptions qui demeurent à expliciter, et que le distributeur utilise librement les interruptions aux fins d'effectuer des transactions hors franchise jugées plus payantes.

À cet égard, M[e] Sarault est d'opinion que ces transactions hors franchise au détriment de la clientèle du tarif interruptible semblent illégales et demande à la Régie de convoquer une audience spécifique ou permettre à sa cliente de déposer une requête pour traiter en profondeur de ce sujet.

Le contrôle des dépenses

Dépenses d'exploitation

L'ACIG se dit préoccupée par les nouvelles mesures de rationalisation décidées l'automne dernier par SCGM qui ont amené l'abolition de plus de 200 postes et le licenciement de quelque 150 employés.

L'ACIG est d'avis que ce n'est pas au niveau des dépenses d'exploitation que l'on trouvera la solution au coût de service élevé de SCGM. Il rappelle à cet égard la preuve présentée par M. Peter Milne dans le cadre de la Phase I du dossier tarifaire de l'année dernière qui démontre que les dépenses d'exploitation de SCGM sont comparables à celles des autres distributeurs du Canada.

C'est au niveau des dépenses d'immobilisation ainsi que du coût en capital que le distributeur pourrait réaliser des économies substantielles capables de se répercuter sur un horizon à long terme, soutient M^{e} Sarault.

Il considère donc que, bien que louables, ces efforts de contrôle des dépenses d'exploitation ne constituent qu'un coup d'épée dans l'eau lorsque l'on considère l'ampleur des dépenses d'immobilisation et celles occasionnées par le coût en capital.

Dépenses d'immobilisation

Rappelant l'exigence formulée par la Régie à l'effet que les dépenses totales des immobilisations projetées ne devraient pas excéder le montant de l'amortissement, sous réserve de toute proposition particulière, M^{e} Sarault se dit étonné que la preuve en chef produite au sujet de la base de tarification ne mentionne aucunement l'existence de l'ordonnance de l'année dernière et n'avance aucune explication quant aux raisons pour lesquelles on ne sera pas en mesure de la respecter.

Dans ces circonstances, l'ACIG s'interroge quant au degré de sérieux que semble accorder le distributeur aux préoccupations formulées dans deux décisions successives de la Régie quant à l'évolution du niveau de sa base de tarification.

Par ailleurs, devant l'échec du programme des infrastructures, M^{e} Sarault soumet que la Régie devrait peut-être reconsidérer l'opinion émise dans sa décision D-94-65 à l'effet qu'il était alors prématuré d'entreprendre une étude en profondeur des actifs inclus à la base de tarification aux fins, possiblement, d'ordonner la radiation comptable, en tout ou en partie, des actifs jugés inutiles ou inutilisables.

Il rappelle à cet effet que la Régie avait alors jugé préférable de privilégier d'autres solutions comme l'augmentation des ventes sur le réseau existant, le contrôle serré des dépenses d'exploitation et la limitation de la croissance de la base de tarification.

Or, à l'exception peut-être des mesures exceptionnelles décrétées l'automne dernier au niveau des dépenses d'exploitation, on peut constater aujourd'hui qu'il n'y a eu aucune évolution digne de mention au niveau de l'augmentation des revenus de ventes ou de la croissance de la base de tarification.

M[e] Sarault soutient qu'il n'y a aucune contrainte juridique empêchant la Régie de décréter la radiation comptable, totale ou partielle, de certains actifs qu'elle considère inutiles ou inutilisables.

À défaut de retenir cette demande, il soumet que la Régie devrait réitérer avec vigueur l'ordonnance contenue dans sa décision de l'année dernière en précisant, cette fois, qu'aucune dérogation ne sera acceptée à moins que le distributeur ne présente d'avance, pour fins d'autorisation, une preuve convaincante démontrant qu'il est absolument nécessaire de dépasser le seuil de la dépense d'amortissement pour assurer la sécurité et l'intégrité de son réseau.

Selon M[e] Sarault, une ordonnance aussi précise sera nécessaire puisque le distributeur a déjà annoncé son intention de contribuer une somme de plus de 20 millions $ au tracé proposé dans TQM dans le cadre du « Projet Portland Gas Transmission System (PGTS) » (dossier R-3361-96).

Structure de capital

Rappelant le contexte qui a amené SCGM et sa cliente à présenter cette année une preuve complète sur le coût du capital et le taux de rendement, M[e] Sarault soumet que sa cliente a présenté dans le présent dossier une preuve savante et élaborée qui, espérait-il, saura convaincre la Régie qu'elle dispose d'une marge de manoeuvre lui permettant de réduire le taux d'équité de SCGM à un niveau comparable à celui des autres distributeurs canadiens, sans par ailleurs compromettre l'intégrité financière de l'entreprise.

À cet égard, M[e] Sarault énumère les principes applicables qui devraient être retenus dans le processus de détermination du coût en capital et du taux de rendement. Il souligne à cet effet que lors du contre-interrogatoire du D[r] Morin le 19 juin 1996, celui-ci s'est montré d'accord avec cette approche au plan des principes.

Par ailleurs, M[e] Sarault soumet que ses experts Booth et Berkowitz ont bien expliqué que l'évaluation du risque d'affaires de l'entreprise constitue le point de départ de toute analyse à laquelle on doit se livrer aux fins de la détermination de la structure de capital et du taux de rendement.

C'est à partir de son appréciation du risque d'affaires de l'entreprise que l'investisseur commandera un rendement plus ou moins élevé ou s'attendra à ce que les propriétaires injectent de leurs propres fonds pour participer au risque de l'entreprise.

Selon M[e] Sarault, ses experts ont démontré que la Régie dispose de trois outils lui permettant de gérer le risque d'affaires de SCGM : les mécanismes de protection réglementaire, la composante dette et le taux de rendement. Il est d'avis que les régies utilisent plutôt une combinaison des trois dans leur traitement des entreprises réglementées.

Reprenant les principaux éléments soumis par les experts de l'ACIG, M[e] Sarault est d'avis que la preuve a démonté que le risque d'affaires de SCGM n'est que marginalement supérieur à celui d'entreprises comparables au Canada mais que, par ailleurs, ce risque est totalement compensé par son traitement réglementaire nettement plus favorable, de telle sorte que, d'une manière globale, il n'est pas nécessaire de lui procurer un ratio de capitalisation plus élevé ou encore un taux de rendement supérieur à celui des autres.

À cet égard, M[e] Sarault soutient que la description contenue dans le document de présentation de SCGM aux agences CBRS et DBRS était beaucoup plus objective et équilibrée que le portrait fort pessimiste de l'entreprise que l'on peut lire dans le témoignage écrit de M. Normand.

Quant à l'affirmation de M. Normand à l'effet que les comptes de stabilisation de la température n'ont pas pour effet de réduire le risque d'affaires de l'entreprise, l'ACIG est d'avis que cette affirmation est non seulement contredite par les rapports des agences de notation de crédit mais également par la preuve présentée par SCGM elle-même en cours d'audience, à commencer par celle de son propre expert, Roger Morin.

Selon M[e] Sarault, il est indéniable que la structure financière de SCGM est nettement plus élevée que celle des autres entreprises de distribution canadiennes.

Cependant, il est d'avis qu'il ne faut pas confondre la structure de capital présumée d'une entreprise réglementée avec la perception que peuvent en avoir les agences de notation de crédit qui constituent le son de cloche du monde des investisseurs.

L'élément important à retenir de cette preuve, soumet M[e] Sarault, est que les agences de notation de crédit évaluent la structure en capital des entreprises réglementées selon leurs propres standards et critères et qu'ils peuvent ainsi en arriver à des chiffres qui sont passablement différents de ceux qui sont présumés pour des fins réglementaires. À cet égard, il réfère la Régie au témoignage oral du D[r] Laurence Booth lors de l'audience du 19 juin 1996 et aux témoignages écrits de ses experts.

Ces considérations sont fort importantes, soutient M^e^ Sarault, car elles démontrent que non seulement la structure de capital présumée de SCGM est plus élevée que celle des autres distributeurs mais que, aux yeux des agences de notation de crédit, il faut ajouter à cela la composante présumée pour les actions privilégiées qui, selon lui, est une pure fiction économique et juridique qui a été décrétée à des fins de continuité au lendemain de la réorganisation de Gaz Métropolitain.

C'est donc dans la perspective de ces moyennes réelles, telles que perçues par le monde des investisseurs, qu'il faut apprécier la recommandation de nos experts d'abaisser la composante équité (action ordinaire) à 36 % et d'éliminer les actions privilégiées, car même au terme d'une telle restructuration, SCGM se retrouverait dans la moyenne élevée des distributeurs gaziers au Canada.

Au soutien de cette affirmation, M^e^ Sarault donne en exemple que la cote de crédit A^+, qui est accordée à SCGM par CBRS, est supérieure d'au moins d'un cran à celle qui devrait lui être accordée sur la seule base de ses paramètres financiers.

Dans la mesure où la Régie serait satisfaite que SCGM rencontre tous les critères financiers pour obtenir une cote de crédit A et que, par ailleurs, son risque d'affaires et son environnement réglementaire sont suffisamment positifs pour même justifier une cote de crédit A^+ chez CBRS, on voit mal comment le simple fait d'abaisser sa structure de capital à la moyenne de celle des autres distributeurs du Canada pourrait entraîner une chute brutale de sa cote de crédit ou encore un préjudice grave à son intégrité financière, soumet M^e^ Sarault.

Bien au contraire, et dépendant des motifs à être formulés par la Régie dans sa décision, les milieux financiers pourraient très bien voir dans ce geste que la Régie est d'opinion que le risque d'affaires de SCGM, lorsqu'apprécié en fonction de sa protection réglementaire, n'est pas plus élevé que celui de la moyenne des distributeurs au Canada, et qu'il ne peut en conséquence commander une structure de capital plus élevée.

Par ailleurs, M^e^ Sarault s'oppose à la demande de SCGM d'augmenter le ratio d'avoir ordinaire de 38,5 % à 39 % pour l'année témoin. Il rappelle à cet égard que la Régie avait déjà rejeté une demande semblable dans sa décision D-93-51, et que M. Normand avait reconnu qu'il n'avait aucun argument nouveau à faire valoir dans le présent dossier.

En conclusion sur la structure de capital, M^e^ Sarault est d'avis que si la structure de capital de SCGM était ramenée au niveau de la moyenne canadienne, le débat annuel se limiterait à la seule question du taux de rendement, ce qui serait beaucoup plus simple.

Les experts de part et d'autre ont d'ailleurs semblé d'accord à l'effet que des aspects comme la protection réglementaire et la structure financière sont normalement relativement statiques et que les ajustements annuels apportés à la rémunération de l'actionnaire se situent avant tout au niveau du taux de rendement.

Sur la prime de risque et le taux de rendement

M[e] Sarault estime que c'est en ayant à l'esprit toutes les considérations invoquées par l'ACIG sur la structure de capital que la Régie doit apprécier les calculs savants présentés de part et d'autre pour déterminer le taux de rendement.

Sur les calculs de la prime de risque, le procureur de l'ACIG soumet que les différences fondamentales sur l'évaluation de cette prime entre ses experts et le D[r] Morin, résident sur le calcul du bêta et de l'évaluation de la prime de risque du marché en général.

Sur le bêta, la divergence entre ses experts et le D[r] Morin réside essentiellement dans les ajustements proposés par celui-ci pour refléter une prétendue tendance des coefficients bêta à se rapprocher de la moyenne (1,00) avec le temps, soutient M[e] Sarault, alors que de l'avis de ses experts, il faudrait, pour que l'usage de tels ajustements soit acceptable, que les statistiques économiques démontrent que, effectivement, les coefficients bêta ont tendance à se rapprocher de la moyenne (1,00) avec le temps.

Or, selon les statistiques compilées par eux, il semblerait que c'est exactement le contraire qui se produit et que les bêta ont tendance à régresser vers la moyenne historique des utilités canadiennes qui est d'environ 0,50.

Pour cette raison, M[e] Sarault est d'avis que le calcul du bêta selon une plage de 0,50 à 0,60, comme suggéré par ses experts, est plus réaliste que celui du D[r] Morin puisque dans les faits, la différence essentielle entre les calculs de ses experts et ceux du D[r] Morin réside dans ces ajustements qui lui permettent de faire grimper le bêta à 0,65.

Quant à la détermination de la prime du marché de l'équité en général au-delà du marché obligataire, les divergences entre ses experts et le D[r] Morin se situent essentiellement à deux niveaux, soit d'une part, les périodes choisies pour l'étude historique du comportement du marché canadien et, d'autre part, l'usage de données américaines, déclare M[e] Sarault.

Or, les experts de l'ACIG ont démontré que si le D[r] Morin avait utilisé la période de 1956 à 1995 pour l'étude historique du comportement du marché canadien, il serait arrivé à une prime de risque d'environ 4 %, soutient M[e] Sarault.

En ce qui concerne l'usage des données américaines utilisées par le D[r] Morin, M[e] Sarault soumet que cette étude fait monter la prime de risque du marché général à 6,9 %.

Il estime que ses experts ont expliqué clairement que l'utilisation de ces données pour estimer un taux de rendement raisonnable dans le contexte de la réglementation canadienne était inacceptable. Ces divergences sont majeures, souligne M[e] Sarault, et se répercutent considérablement sur les résultats obtenus.

En ce qui concerne les trois nouveaux tests sur la prime de risque rapportant les résultats de décisions réglementaires rendues dans diverses juridictions, M[e] Sarault est d'avis qu'ils ne doivent pas être retenus puisque l'usage systématique de décisions d'autres organismes de réglementation peut produire un effet de circularité dénuant le résultat de tout fondement logique, ce que le D[r] Morin avait déjà avancé devant la Régie au cours des années antérieures.

D'autre part, M[e] Sarault estime que compte tenu de l'évolution à la baisse des taux d'intérêts, l'ordonnance de cette année devrait comporter une baisse significative par rapport à celle de l'an dernier.

Une telle réduction serait d'autant plus justifiée lorsque l'on considère un autre critère important, soit celui de la capacité de payer des usagers, souligne M[e] Sarault, en rappelant qu'un seul point de pourcentage sur le rendement de l'avoir ordinaire représente environ 10 millions $ sur les tarifs de SCGM.

Le procureur de l'ACIG soumet que la Régie dispose cette année de tous les outils nécessaires pour rendre une décision éclairée et motivée lui permettant de ramener la structure de capital de SCGM et maintenir sa prime de risque implicite à des niveaux comparables à ceux des autres distributeurs canadiens.

Interfinancement et grille tarifaire

M[e] Sarault estime que le fait saillant à retenir de la proposition tarifaire de cette année est celui de récupérer prioritairement des clients industriels les réductions de l'ordre de 7,6 millions $ qu'ils ont obtenues en raison des éléments négociables de leurs contrats tels les volumes souscrits et la durée.

Pour M[e] Sarault, la récupération de ce prétendu manque à gagner constitue non seulement la principale raison de l'augmentation des revenus requis mais également le fondement de la répartition tarifaire proposée. Il estime que cette récupération est non seulement inacceptable, mais frôle l'illégalité.

Il ne faut pas perdre de vue que les clients qui s'engagent pour de plus gros volumes ou encore pour une plus longue période augmentent d'autant le risque financier associé à leurs approvisionnements gaziers, ce qui profite directement à SCGM en sécurisant une partie importante de ses revenus de ventes. Pour les gros clients industriels, il va sans dire que les escomptes ou prix moindres qu'ils obtiennent relativement à ces éléments négociables ne constituent que la juste contrepartie du risque supplémentaire qu'ils assument, soutient M[e] Sarault.

SCGM invoque non seulement ce prétexte comme justification au soutien du revenu additionnel requis mais propose également d'en récupérer le montant de ceux-là mêmes qui ont négocié ces contrats avec elle. Comme la nette majorité des clients industriels se sont prévalus de ces escomptes, la proposition de SCGM de les récupérer de l'ensemble d'entre eux équivaut nettement à reprendre de la main gauche ce que l'on a donné de la main droite, soutient M[e] Sarault.

À son avis, lorsque le distributeur propose et se voit autoriser une grille tarifaire comportant la possibilité pour ses clients de négocier certains aspects du contrat, l'ensemble de la grille tarifaire, telle que proposée à l'origine, devrait être établie en tenant compte de la possibilité que certains clients se prévaudront des escomptes qui y sont prévus. Ce processus prévisionnel quant à l'usage des escomptes disponibles dans son propre tarif devrait faire partie du risque assumé par le distributeur.

Il est injuste et immoral de permettre au distributeur de revenir chercher, après le fait, des escomptes qu'il a consentis à ceux-là mêmes qui ont négocié de bonne foi avec lui. Pour ces raisons, M[e] Sarault soumet que la Régie devrait refuser d'inclure la récupération de ce prétendu manque à gagner de 7,6 millions $ parmi les revenus additionnels requis auxquels le distributeur pourrait avoir droit cette année.

En ce qui concerne l'interfinancement, M[e] Sarault est d'opinion que quelles que soient les méthodes d'allocation du coût de service que l'on voudra bien utiliser, il n'en demeure pas moins que les clients du Tarif 4 ont contribué et contribuent toujours à l'interfinancement bénéficiant aux clients résidentiels, et que dans le cas des clients interruptibles, les prétendues méthodes d'allocation du coût de service qui les désignent comme bénéficiaires de l'interfinancement sont âprement contestées et qu'elles n'ont pas encore été approuvées par la Régie.

La Régie devrait donc ordonner à SCGM de réduire graduellement les tarifs industriels pour les ramener à des niveaux comparables à ceux qui prévalent en Ontario via, entre autres, une réduction de l'interfinancement dont bénéficient les clients résidentiels, conclut M[e] Sarault.

4.4 Réplique de M^e François G. Hébert – SCGM

M^e Hébert souligne les contradictions dans les conclusions des experts de l'ACIG sur le risque d'affaires de sa cliente, il cite en exemple les affirmations des D^rs Booth et Berkowitz qui estiment que SCGM est plus risquée que Consumer's Gas et Union Gas à cause de l'importance de sa clientèle industrielle, alors que M. Milne suggère que le risque d'affaires de Consumer's Gas et Union Gas est équivalent ou même inférieur à celui de SCGM.

Par ailleurs, rejetant les allégations de l'ACIG à l'effet que sa cliente présentait aux maisons de notation un portrait plus objectif de son risque d'affaires que celui présenté à la Régie, M^e Hébert soumet qu'il est intéressant de noter que dans sa dernière analyse de crédit, CBRS juge que SCGM fait face à un risque d'affaires plus élevé que les autres distributeurs canadiens en raison, entre autres, de la forte concentration de ses ventes dans le secteur industriel et ce, malgré le contexte réglementaire qui leur est présenté et la capitalisation de l'entreprise, et qu'après avoir évalué le risque global de l'entreprise, les détenteurs d'obligations continuent à demander une prime d'un huitième de point à SCGM.

Ceci démontre clairement que SCGM est plus risquée que les autres distributeurs et que le marché exige d'elle une prime additionnelle, ce qui a été confirmé par les témoins de l'ACIG, les D^rs Booth et Berkowitz. Il importe également de souligner que cette prime était historiquement plus près du quart de point que du huitième de point, et que cette réduction de la prime est due au phénomène généralisé dans le marché où l'ensemble des écarts des divers émetteurs par rapport aux obligations canadiennes s'est résorbé, soutient M^e Hébert.

Quant à la position concurrentielle du gaz naturel face au mazout et à l'électricité présentée par SCGM aux maisons de notation, M^e Hébert est d'avis que l'interprétation que fait l'ACIG du document de présentation de SCGM aux agences CBRS et DBRS démontre une incompréhension fondamentale.

SCGM ne fait que souligner à ces agences qu'elle ne perdra pas de clients du jour au lendemain. Il s'agit d'une évaluation de la concurrence d'une année par rapport à une autre. Cela n'élimine évidemment pas le fait que la concurrence sévère des autres formes d'énergie au Québec entrave la réalisation de nouvelles ventes.

D'autre part, pour ce qui est de la prétention de l'ACIG à l'effet que SCGM, malgré la volatilité de la clientèle industrielle, a connu au cours des dernières années une croissance constante de ses ventes dans ce secteur, M^e Hébert rappelle que cela s'explique par les investissements que SCGM a effectués dans le développement de son réseau pour pénétrer davantage ce secteur d'activité.

En ce qui concerne l'argument de l'ACIG à l'effet que la plus récente proposition de Consumer's Gas sur le taux de rendement serait de 11,50 %, soit une réduction de ⅜ % par rapport au rendement obtenu l'année précédente, M[e] Hébert soumet qu'au moment où la proposition de Consumers a été faite, le taux sans risque était de 8 %, ce qui leur donnait une prime de risque implicite de 350 points de base.

5. CONCLUSIONS DE LA RÉGIE

Les principes qui ont guidé la Régie dans l'analyse des demandes du distributeur reflètent bien ses préoccupations majeures, à savoir :

– éviter toute augmentation du coût de service et le réduire si possible;

– réduire l'interfinancement dont bénéficient certains consommateurs;

– maintenir l'équilibre financier du distributeur;

– autoriser un taux de rendement juste et raisonnable sur l'avoir des sociétaires;

– donner au distributeur les moyens appropriés en vue d'atteindre ses objectifs de ventes et de revenus nécessaires au développement de son entreprise.

La Régie doit donc s'assurer que tous les efforts ont été faits pour éviter toute augmentation du coût de service et, par le fait même, respecter la capacité de payer des usagers et améliorer ainsi la position concurrentielle du gaz naturel face aux autres formes d'énergie.

La Régie doit également analyser toutes les alternatives lui permettant de répondre de façon juste et équitable aux intérêts de toutes les parties.

Le distributeur, les consommateurs et tous les intéressés doivent retenir l'existence de ces préoccupations dans les conclusions de la Régie sur le présent dossier.

5.1 Projection des ventes et plan de développement

La Régie constate que la situation concurrentielle du gaz face aux autres formes d'énergie sera encore difficile durant la période témoin, particulièrement au niveau de petit et moyen débits, secteurs qui rapportent la marge brute la plus élevée.

La Régie est d'avis que les modifications aux programmes commerciaux PRC et PRRC, le nouveau programme de rabais pour faire face à la concurrence du mazout et la reconduction du programme bi-énergie qu'elle a autorisés dans la décision partielle D-96-24 du présent dossier pourront permettre à la requérante d'avoir un taux de pénétration plus élevé dans ces segments de clientèle.

À cet égard, la Régie est satisfaite des actions entreprises par le distributeur durant la dernière année pour pénétrer davantage le marché résidentiel et l'encourage fortement à poursuivre ses efforts.

Néanmoins, lorsque le distributeur est forcé de multiplier les programmes de rabais pour signer de nouveaux clients ou pour convaincre les clients existants de demeurer au gaz naturel, cela démontre que les coûts de distribution sont trop élevés et qu'ils affectent la compétitivité du gaz naturel face aux autres formes d'énergie.

Bien que la compétitivité du gaz naturel sera toujours tributaire en partie du coût de la marchandise, il n'en demeure pas moins que cette composante, pour les usagers, ne représente que le tiers de leur facture totale. Le distributeur ayant déjà pris des mesures pour réduire les coûts de transport et ses dépenses d'exploitation, devra poursuivre ses efforts s'il veut améliorer la compétitivité du gaz dans sa franchise et connaître une véritable croissance de ses ventes et revenus.

D'autre part, le fait que le réseau gazier du distributeur ait atteint ou soit près d'atteindre son extension géographique optimale, devrait lui permettre de réduire considérablement ses immobilisations pour le développement et maximiser l'utilisation de ses infrastructures.

5.2 Coût du gaz et plan d'approvisionnement gazier

La Régie constate que le resserrement de la capacité de transport jumelé à la demande accrue des clients en service interruptible maintiendra un niveau d'interruption élevé qui, si le distributeur ne dispose pas de capacité additionnelle pour offrir son service saisonnier, pourrait augmenter de façon importante.

Par ailleurs, les prétentions de l'ACIG et de CIGMA à l'effet que le distributeur effectue des ventes hors franchise aux dépens de sa clientèle interruptible, préoccupent fortement la Régie qui est disposée à faire toute la lumière sur les ventes et livraisons hors franchise et leur impact sur la clientèle de la franchise du distributeur.

5.3 Mesures d'efficacité énergétique

La Régie est d'avis que les mesures d'efficacité énergétique mises en place par le distributeur ou qui le seront, sont un pas dans la bonne direction pour sensibiliser sa clientèle à utiliser l'énergie de façon rationnelle et économique.

À cet égard, toute modification pour ramener les tarifs à un niveau plus près des coûts réels de service permettra aux consommateurs d'être mieux sensibilisés aux coûts d'énergie et ainsi être en mesure d'effectuer le meilleur choix énergétique.

La Régie invite donc le distributeur à continuer de bien informer les consommateurs sur tous les outils mis à leur disposition pour réduire leur facture énergétique, puisque cela permettra non seulement à ceux-ci d'épargner sur leurs coûts d'énergie, mais également d'améliorer la position concurrentielle du gaz naturel comme source d'énergie.

5.4 Revenus requis

La Régie constate que, malgré des projections de ventes record et un contrôle serré des dépenses, le distributeur est dans la position de devoir demander une hausse tarifaire de 7 124 000 $.

Devant ce constat, la Régie est d'avis qu'elle doit, tout comme par les années passées, prendre les mesures nécessaires pour limiter au strict minimum les hausses tarifaire afin de respecter la capacité de payer des usagers et améliorer la position concurrentielle du gaz naturel. C'est donc dans ce contexte que la Régie prend position sur les diverses sections du dossier tarifaire.

5.5 Dépenses d'exploitation

La Régie est d'avis que le distributeur a démontré que le contrôle des coûts d'exploitation était une préoccupation constante et que, grâce à la collaboration de l'ensemble de son personnel, il a mis en place un plan de rationalisation important qui a réduit de façon substantielle ses dépenses d'exploitation.

La Régie déplore que cette rationalisation implique des licenciements de personnel mais estime que la requérante se devait de réagir puisque non seulement cela vient réduire le manque à gagner de l'entreprise pour la période témoin, mais a également comme effet de réduire le coût de service facturé aux usagers.

Bien que le secteur des dépenses d'exploitation n'est pas le seul qui nécessite un contrôle rigoureux, il faut reconnaître que les actions prises par la requérante ont une portée récurrente, et ont pu être appliquées sans réduire de façon importante le service à la clientèle, tout en maintenant la sécurité du réseau.

La Régie encourage donc le distributeur à continuer d'appliquer un contrôle rigoureux des divers postes budgétaires puisque cela a un effet positif sur le coût de service des usagers.

5.6 Impôts sur le revenu

En ce qui concerne le projet de cotisation relié aux dollars australiens au montant de 11 539 000 $ pour une transaction effectuée en 1990, la Régie est d'avis que malgré la possibilité que le distributeur soit éventuellement cotisé pour une telle somme, il n'est pas justifié de l'inclure dans la base de tarification du présent dossier puisqu'il n'a pas reçu d'avis de cotisation. Le distributeur pourra soumettre cette réclamation, s'il y a lieu, dans un prochain dossier tarifaire ou un dossier spécifique « pass on » selon les règles applicables.

En conséquence, le distributeur devra déduire de la base de tarification soumise le montant approprié.

5.7 Base de tarification

5.7.1 Immobilisations

La Régie ne partage pas la position de l'ACIG à l'effet que les additions à la base de tarification ne respectent pas les directives de la Régie exprimées ainsi dans les décisions D-94-65 et D-95-54 pour les raisons inscrites dans ces mêmes décisions :

Décision D-94-65

> *« De plus, le distributeur devra également viser à limiter les additions à la base de tarification au montant de l'amortissement annuel, à moins que des ventes supplémentaires puissent générer des revenus suffisants, ou que des mesures spécifiques ne soient prises pour éviter, même au cours des premières années, toute hausse de tarif à la clientèle. »*

Décision D-95-54

> *« Or, compte tenu que malgré des ventes records et une gestion serrée des dépenses d'exploitation l'on doive procéder à une augmentation des tarifs, la Régie avise le distributeur que lors de la présentation de son budget dans la cause tarifaire 1996-1997, les dépenses totales des immobilisations projetées ne devront pas excéder le montant de l'amortissement, sous réserve de toute proposition particulière à cette époque. »*

L'analyse de la preuve soumise dans le présent dossier démontre que les dépenses projetées des immobilisations seront de 46 233 000 $ alors que le montant d'amortissement prévu sera de 49 970 000 $.

De plus, les additions aux fins d'immobilisation incluent un montant de 18 644 000 $ pour l'obtention de ventes additionnelles qui généreront des revenus suffisants pour éviter toute hausse de tarif reliée à ces additions.

Les demandes de SCGM aux fins des dépenses d'immobilisation respectent donc l'esprit et la lettre des deux décisions mentionnées ci-haut.

5.7.2 Frais reportés

Les additions projetées par SCGM dans le présent dossier sont de l'ordre de 13 744 000 $. Il faut ajouter à ces coûts non amortis un montant de 7 655 000 $ représentant les coûts du programme de flexibilité tarifaire autorisé par la Régie, un montant de 10 385 000 $ pour un projet de cotisation d'impôt et un montant de 10 665 000 $ pour la modification du traitement des comptes de stabilisation approuvée par la Régie dans la Phase I du présent dossier.

Or, en toute équité pour le distributeur, il faut prendre en considération les faits suivants : le montant de 10 385 000 $ de cotisation d'impôt pour une transaction effectuée en 1990 est un élément que le distributeur ne contrôle pas et par ailleurs, si ce montant devait être éventuellement payé par les usagers, ils en ont évité les coûts depuis 1990. La Régie est donc d'avis que les cotisations d'impôt pour des transactions antérieures au présent dossier doivent être considérées comme un élément incontrôlable pour le distributeur.

Quant au solde non amorti du compte de stabilisation au montant de 10 665 000 $, en plus des avantages que comporte la modification du traitement de ce compte, il faut tenir compte de l'aspect fiscal découlant des modifications apportées au traitement de ce compte qui résulte en une économie d'impôt de 4 372 650 $ pour la période d'amortissement projetée de cinq ans.

On doit donc reconnaître que ces deux éléments représentant un montant de 21 050 000 $ ne découlent pas d'investissements faits par le distributeur et que, si l'on exclut ce montant des additions à la base de tarification, le véritable montant des investissements faits par le distributeur est de 21 399 000 $ pour un amortissement de 23 254 000 $.

Néanmoins, le distributeur doit comprendre que n'ayant plus beaucoup de marge de manoeuvre sur la réduction des dépenses d'exploitation, il doit s'attaquer immédiatement à mettre fin à la croissance de la base de tarification ce qui, selon l'avis de la Régie, ne devrait pas être un défi trop élevé compte tenu que l'extension de son réseau ne devrait pas nécessiter d'investissements majeurs pour les prochaines années.

En conséquence, le distributeur devra, à moins de justifications particulières qu'il devra soumettre préalablement à la Régie ou pour assurer la sécurité et l'intégrité de son réseau, présenter dans son prochain dossier tarifaire un budget d'investissement qui ne dépassera pas le montant d'amortissement.

Pour les motifs énumérés ci-haut, la Régie ne retient pas la suggestion de l'ACIG d'entreprendre une étude en profondeur sur les possibilités d'ordonner la radiation comptable en tout ou en partie des actifs jugés inutiles ou inutilisables.

5.8 Indices de performance

Compte tenu du plan de rationalisation mis en place par le distributeur et ses impacts possibles sur les différents services, la Régie accepte de maintenir pour la période témoin les mêmes indices de performance pour la période témoin.

5.9 Risque global de l'entreprise

De façon générale, la Régie se prononce surtout sur l'évolution du risque global de l'entreprise comparé à celui de la période précédente, sans se prononcer de façon détaillée sur toutes les composantes utilisées pour les évaluations sur le risque global de l'entreprise, la structure de capital et la prime de risque qui déterminent le taux de rendement à accorder.

Néanmoins, compte tenu de l'ampleur de la preuve contradictoire soumise par les parties qui, à elle seule, a nécessité quatre jours d'audience sur la structure de capital, la prime de risque et le taux de rendement, la Régie estime nécessaire de statuer sur chacun des éléments contradictoires majeurs invoqués, et d'énoncer les grands principes qui l'ont guidée dans sa décision sur ces éléments.

En conséquence, le risque de l'entreprise, la structure de capital et la prime de risque étant intimement liés pour déterminer le taux de rendement juste et raisonnable à accorder à SCGM, la Régie les traitera dans cet ordre.

5.9.1 Comparaison du risque d'entreprise de SCGM avec celui d'autres distributeurs

La Régie est d'avis qu'il est très difficile de comparer le risque global de SCGM avec celui des autres distributeurs canadiens et encore plus des distributeurs américains dont plusieurs sont également distributeurs d'électricité. Il aurait fallu, pour que la comparaison soit la plus pure possible, que l'on compare SCGM avec un ou plusieurs distributeurs qui ont le même profil d'affaires.

Or, l'ACIG, dans sa preuve comparant SCGM avec d'autres distributeurs canadiens, a utilisé différents distributeurs selon les éléments qu'elle comparait. Par exemple au niveau des ventes industrielles, elle a utilisé Centra Gas Ontario et North West. Au niveau du risque relié au secteur résidentiel, elle a utilisé Consumers pour démontrer que celui-ci était plus risqué. Pour ce qui est de la situation de monopole du distributeur, l'ACIG compare SCGM avec les distributeurs américains et albertains.

Pour les risques reliés à la demande, elle compare SCGM avec Union, Consumers et Centra Gas Ontario. Pour les risques reliés à l'offre, elle compare SCGM à TCPL, Consumers, Union et Centra Gas Ontario. En ce qui concerne les risques reliés à la position géographique du distributeur, l'ACIG les compare à Centra Gas Ontario. Quant aux comparaisons de la taille des distributeurs, elle compare SCGM à BC Gas.

Il est évident que l'utilisation de différents distributeurs selon les éléments que l'on compare démontre qu'il n'existe pas de distributeurs canadiens qui ont un profil d'affaires homogène, même si leurs activités sont similaires.

Bien que la comparaison avec les autres distributeurs canadiens soit intéressante pour démontrer qu'ils évoluent dans un environnement similaire, la Régie est d'avis qu'il faut être prudent dans le poids à accorder à l'ensemble de ces comparaisons.

En conséquence, afin d'utiliser les comparaisons les plus pures possibles, la Régie, dans son évaluation du risque de SCGM, va s'en tenir pour fins de comparaison aux éléments analogues soumis dans la preuve des parties pour des entreprises de gaz réglementées ontariennes seulement, puisque ce sont les distributeurs qui par leur situation géographique et leurs activités contiennent le plus d'éléments comparables à SCGM. D'ailleurs, pour la plupart des éléments majeurs comparables, ce sont ces distributeurs que l'ACIG utilise.

5.9.2 Risque d'affaires à court terme

La preuve a démontré clairement que les taux de distribution de SCGM sont de beaucoup supérieurs à ceux des autres distributeurs ontariens, et ce seul fait rend la position concurrentielle de SCGM face aux autres formes d'énergie beaucoup plus difficile que celle des distributeurs ontariens et nécessite de multiples programmes de rabais.

De plus, les coûts de transport de la marchandise gaz pour l'amener à sa franchise sont supérieurs de 10 % à ceux des distributeurs ontariens en raison des coûts plus élevés reliés au transport du gaz entreposé en Ontario.

Par ailleurs, la preuve a démontré également que la concurrence de l'électricité est de loin supérieure dans la franchise de SCGM alors que les tarifs élevés de l'électricité sont très favorables au gaz en Ontario. Le fait qu'au secteur résidentiel le taux de pénétration du gaz naturel dans la nouvelle construction est d'environ 95 % chez les distributeurs ontariens, alors que dans la franchise de SCGM l'électricité s'accapare 80 % de ce marché, démontre qu'il faut en tenir compte lorsque l'on compare la situation concurrentielle des entreprises.

Quant au pourcentage élevé des ventes industrielles de SCGM, il est indéniable que la clientèle industrielle est beaucoup plus risquée que celle du secteur résidentiel qui, pour la majorité, ne détient pas d'alternative pour ses besoins de chauffage, ce qui n'est pas le cas de la clientèle industrielle.

À cet égard, la Régie constate que n'eut été des investissements de SCGM pour étendre son réseau afin d'acquérir des nouveaux clients et des programmes commerciaux pour faire face à son principal concurrent dans ce secteur, soit le mazout, SCGM aurait connu une décroissance de ses ventes industrielles.

Néanmoins, la croissance du prix du mazout et la stabilité du prix du gaz naturel que l'on constate actuellement devraient améliorer la position concurrentielle du gaz naturel pour la prochaine année, ce qui vient réduire le risque dans ce segment de marché.

Quant à l'engagement des clients industriels pour des contrats de cinq ans, la Régie est d'avis que c'est là un avantage à court terme pour SCGM qui s'assure des volumes et revenus stables, mais cet avantage est quelque peu diminué par le fait qu'il a eu comme conséquence une baisse des volumes souscrits au tarif continu.

D'autre part, la situation concurrentielle du gaz face au mazout chez SCGM est également défavorable dans les secteurs résidentiel et commercial, ce qui a nécessité l'approbation de programmes de rabais pour maintenir ou augmenter sa part de marché dans ces secteurs. Or, on ne peut ignorer que ces investissements et programmes commerciaux contribuent à augmenter le coût de distribution, ce que n'ont pas à subir les distributeurs ontariens.

Par ailleurs, bien que ces programmes soient un élément favorable qui réduit le risque de SCGM, ils ne réussissent pas toujours à éviter des pertes de volumes, comme l'a démontré le programme bi-énergie de SCGM. Ces programmes ne sont donc qu'une solution à court terme au véritable problème qui est un coût de distribution trop élevé.

Force est donc de conclure que les consommateurs ontariens se dirigent tout naturellement vers le gaz naturel pour leurs besoins énergétiques, ce qui n'est pas le cas dans la franchise de SCGM qui doit compter beaucoup plus sur la conversion des équipements pour accroître sa part de marché.

En ce qui concerne le compte de stabilisation de la température, il n'y a aucun doute que c'est là un avantage marqué pour le distributeur québécois comparativement aux distributeurs ontariens, mais cet avantage est neutralisé en partie par le fait que les distributeurs ontariens conservent tous les trop-perçus alors que SCGM doit prouver, en fermeture des livres, que sa performance lui donne droit à une partie de ces trop-perçus, la balance allant aux usagers.

En conclusion, la Régie est d'avis que SCGM dispose de tous les outils nécessaires pour faire face à court terme aux situations concurrentielles difficiles et réaliser ses objectifs financiers de la période témoin.

Compte tenu des projections de ventes plus réalistes aux petit et moyen débits, des programmes commerciaux additionnels et de la réduction de l'écart entre les prix du mazout et ceux du gaz naturel, la Régie est d'opinion que le risque à court terme du distributeur a légèrement diminué par rapport à l'an passé, mais demeure supérieur à celui de certains distributeurs ontariens.

5.9.3 Risque d'affaires à long terme

Bien qu'il soit vrai que la proportion élevée des ventes industrielles comporte le plus haut risque à long terme pour le distributeur, la Régie est d'avis que ce risque est réduit lorsque l'on tient compte que les investissements majeurs pour l'extension de son réseau sont à toutes fins pratiques terminés, ce qui devrait avoir un effet à la baisse de plus en plus important sur les tarifs de distribution et permettre d'améliorer sensiblement sa position concurrentielle dans ce segment de la clientèle.

Par ailleurs, en ce qui concerne les coûts de transport supérieurs à ceux des distributeurs ontariens, la Régie est d'avis que l'objectif que s'est donné le distributeur de faire de sa franchise à moyen terme la « plaque tournante » du transport du gaz naturel dans le nord-est du continent lui permettra plus de flexibilité dans ses approvisionnements gaziers, ce qui devrait lui permettre, si le tout se concrétise, de réduire ses coûts de transport et d'entreposage.

D'autre part, la Régie ne peut retenir la prétention du témoin de l'ACIG, M. Milne, à l'effet que SCGM peut compter sur un potentiel de volumes additionnels de 200 Bcf puisqu'elle ne s'appuie sur aucune étude de marché.

Néanmoins, l'estimé de 80 Bcf fait par les témoins de SCGM qui connaissent bien leur marché, est tout de même important et pourrait être plus élevé si le distributeur réussissait à réduire son coût de service.

Quant aux prétentions du témoin de SCGM, M. Forget à l'effet que la baisse de réserves canadiennes constitue un risque plus élevé pour les approvisionnements à long terme, la Régie estime que c'est là un risque que partagent les autres distributeurs et que les nouveaux outils que le distributeur se donnera pour l'acheminement du gaz lui permettront d'avoir accès à des réserves américaines aussi facilement que certains distributeurs ontariens.

Le risque d'affaires à long terme du distributeur est donc similaire à celui de l'an passé mais devrait décroître de façon continue, compte tenu de la fin de ses investissements majeurs dans son réseau et de l'utilisation des nouveaux outils dont il disposera pour ses approvisionnements gaziers.

5.9.4 Risque financier

Bien que la preuve ait démontré que le distributeur n'ait pu réaliser son taux de rendement autorisé pour la période 1994-1995 et ne semble pas en mesure de l'atteindre pour la période 1995-1996, le manque à gagner sera minime, ce qui prouve la capacité de la direction à prendre les mesures nécessaires pour rencontrer les attentes de ses sociétaires et n'aura pas d'impact négatif chez les investisseurs.

Grâce à une santé financière saine qui lui permet d'obtenir de nouveaux financements à des conditions avantageuses et sa capacité à rencontrer de façon constante les attentes de ses sociétaires actuels, la Régie est d'avis que le distributeur jouit d'un risque financier favorable qui est le même que l'an dernier.

5.9.5 Risque réglementaire

Il n'y a aucun doute que le distributeur jouit d'un encadrement réglementaire adapté aux besoins de ses clients et de l'entreprise, ce qui est reconnu par les maisons de notation. Néanmoins, rien ne démontre que l'encadrement réglementaire de SCGM est supérieur à celui des distributeurs ontariens.

En effet, que ce soit les programmes de rabais à la consommation, de flexibilité tarifaire ou de compte de stabilisation, rien ne prouve que les autres régies agiraient autrement si la situation des distributeurs qu'elles régissent l'exigeait.

La Régie est donc d'avis que le distributeur jouit d'un cadre réglementaire favorable qui est le même que l'an dernier.

5.9.6 Risque global de l'entreprise

En ce qui concerne le risque global de SCGM, la Régie considère que ce dernier est légèrement supérieur à ceux de Consumer's Gas et Union Gas, évaluation que partagent les experts Booth et Berkowitz.

5.10 Structure de capital

La Régie observe la même problématique qu'elle énonçait dans ses conclusions concernant le risque de l'entreprise quant à la valeur à accorder aux comparaisons faites avec d'autres distributeurs canadiens sur la structure de capital de SCGM.

En effet, lorsqu'on analyse les comparaisons soumises par SCGM à la pièce GMi-114, document 1, page 21, on constate les disparités suivantes entre les sept distributeurs cités :

– le ratio d'avoir ordinaire varie de 25,71 % à 40 %;

– le portefeuille des actions privilégiées varie de 1,40 % à 26,70 %;

– Union Gas considère 11,35 % de son équité en impôts reportés;

– la base de tarification des mêmes sept distributeurs varie entre 272,5 millions $ à 2 602,2 millions $;

– Centra Gas Ontario et Union Gas, avec des ratios d'endettement respectifs de 62,60 % et 54,50 %, ont des notations de crédit inférieures ou égales à celles de SCGM qui sont respectivement A et A élevé.

Ces disparités qui existent dans le financement du capital entre les différents distributeurs canadiens exigent que la Régie use de la plus grande prudence dans l'évaluation de ces comparaisons.

La recommandation de l'ACIG à l'effet d'augmenter à 64 % le ratio d'endettement de SCGM ferait de la requérante l'entreprise ayant le plus haut ratio d'endettement parmi les sept distributeurs canadiens utilisés pour fins de comparaison. Il est donc fort probable que SCGM subirait une décote si la Régie acceptait cette recommandation.

Or, la preuve de l'ACIG et sa recommandation ne sont basées que sur un tableau comparatif de l'avoir des distributeurs, sans être soutenue par une étude d'impact détaillée, alors qu'elle propose des changements importants dans la structure de capital de SCGM pour faire passer le niveau d'endettement du distributeur de 54 à 64 %, tout en recommandant un taux de rendement 2 % inférieur à celui demandé par la requérante.

La Régie estime qu'un changement de cette importance exige la connaissance d'impacts potentiels ou probables qui pourraient survenir sur l'entreprise et les abonnés.

De plus, la recommandation de l'ACIG de porter la dette de SCGM à 64 % combiné au taux de rendement de 10,50 % situerait l'entreprise aux limites extrêmes des critères retenus par CBRS sur le ratio d'endettement et la couverture d'intérêts pour maintenir la cote de SCGM.

Bien que ces critères ne sont qu'une partie des éléments pris en considération par les agences dans l'établissement d'une cote de crédit, une détérioration du risque financier de l'entreprise pourrait conduire SCGM à une décote, puisque même un endettement de 60 % et une couverture de 2,25 fois peuvent appeler une cote triple B selon CBRS, ce qui rendrait plus difficile l'accès au marché financier et exigerait un coût supérieur pour les emprunts de SCGM. Le témoin expert de l'ACIG, le D^{r} Booth, a d'ailleurs reconnu la possibilité d'une décote avec les changements proposés par sa cliente.

À cet égard, il est utile de constater que, malgré un ratio d'équité plus élevé que celui de Consumer's Gas, le marché financier exige de SCGM une prime additionnelle d'environ 15 points de base.

Même si la Régie reconnaît qu'à court terme une telle baisse de l'avoir présumé des sociétaires pourrait résulter en une économie pour les abonnés de SCGM, les risques d'une réaction négative des maisons de notation de crédit pourraient conduire à moyen et long terme, à des coûts financiers supérieurs que ces mêmes abonnés devraient supporter.

La Régie est donc d'avis que le changement proposé par l'ACIG est dans les circonstances inopportun.

Quant à la recommandation de l'ACIG de convertir des actions privilégiées en dette, il faudrait, pour donner suite à cette recommandation, qu'il y ait un avantage marqué pour les usagers sans que cela cause préjudice aux sociétaires qui, depuis la structure adoptée par la décision D-90-75, évaluent leur avoir privilégié comme une forme d'avoir permanent.

Or, la preuve soumise par SCGM sur les coûts d'une telle conversion démontre qu'il en coûterait 2,5 millions $ supplémentaires aux abonnés puisqu'elle estime le coût de financement du rachat de ces actions à 10,45 % alors que le coût de financement des actions privilégiées dans la structure actuelle n'est que de 9,95 %. De plus, même en utilisant le taux de 9 % suggéré par l'ACIG, la Régie considère qu'il n'y aurait pas un avantage marqué pour la clientèle.

Par ailleurs, la décision D-90-75 reconnaissait comme avoir permanent présumé les actions privilégiées. Or, le rachat de cet avoir soulèverait une question d'équité à l'égard des sociétaires qui, comme lors de l'analyse de 1990 ayant donné lieu à la décision D-90-75, devraient être consultés puisque les actions privilégiées sont des titres considérés comme junior à la dette.

De plus, pour accepter la recommandation de l'ACIG d'augmenter le ratio d'endettement à 64 %, il aurait fallu que celle-ci démontre que le coût global du capital de SCGM est supérieur à celui des distributeurs auxquels on la compare.

Or, la preuve de SCGM démontre que, basé sur un taux de rendement de 12 % de l'avoir ordinaire des sociétaires, le coût global de son capital serait de 10,17 %, ce qui se compare favorablement à ceux de Centra Gas Ontario, Union Gas et Consumer's Gas qui, selon les données mises en preuve, sont respectivement de 10,76 %, 10,45 % et 10,25 %.

D'autre part, la Régie est d'avis que la décroissance du coût en capital de SCGM depuis les 15 dernières années est due non seulement à la baisse des taux d'intérêts mais également à la stratégie financière adoptée par la requérante, et qu'il faut donc lui permettre de poursuivre dans cette voie.

Par ailleurs, il est démontré aux pièces GMi-114, document 1, page 21 et GMi-115, document 21, page 8, que le ratio d'endettement de 54 % de SCGM est comparable à la moyenne des sept autres distributeurs canadiens, qui est également de 54 %, alors que les pièces présentées par l'ACIG montrent plutôt une structure moyenne d'équité de 36 % et 64 % de dette.

La différence dans les résultats présentés par l'ACIG et SCGM s'explique principalement par le fait que l'ACIG n'inclut pas à titre d'équité les impôts reportés de Union Gas qui fait grimper son ratio d'équité à 45,50 % et n'utilise pas dans sa compilation les mêmes entreprises que SCGM.

La Régie estime que le ratio moyen d'endettement des distributeurs est de 54 % et qu'il doit être retenu à titre de comparaison avec SCGM puisque, d'une part, les disparités dans l'avoir des distributeurs rendent difficile toute comparaison et que, d'autre part, le critère retenu par les maisons de notation pour attribuer les cotes de crédit n'est pas le niveau ou le genre d'équité des entreprises, mais le niveau de la dette.

À cet égard, la Régie est d'opinion que l'augmentation de la dette, lorsque non nécessaire, est contraire aux principes de saine gestion et va à l'encontre des tendances au renforcement de la santé financière des entreprises de services publics.

La Régie est d'avis également qu'on ne peut modifier fréquemment ou subitement la structure de capital d'une entreprise car cela pourrait créer une instabilité financière qui pourrait inquiéter les investisseurs.

D'autre part, on sait pertinemment qu'une crédibilité financière auprès des investisseurs se bâtit à long terme. SCGM en a fait la preuve manifeste puisqu'elle a pris plusieurs années pour passer de la cote triple B à celles de A et A élevé.

Il faut donc maintenir une cote de crédit se situant entre A et A élevé car cette évaluation des maisons de notation a permis à SCGM de réduire ses coûts financiers de façon importante et d'avoir accès à un plus grand marché financier.

De plus, la Régie estime qu'il existe d'autres moyens pour atteindre l'objectif que sous entend la recommandation de l'ACIG, à savoir la réduction du coût de service de SCGM.

À cet égard, la Régie rappelle que, tout en maintenant la structure de capital de SCGM autorisée dans sa décision D-90-75, ses décisions tarifaires de 1990 à 1996 inclusivement ont réduit de plus de 50 millions $ les hausses tarifaires demandées par la requérante.

En conséquence, même si le ratio d'équité de la structure de capital de SCGM est légèrement supérieur à la moyenne des distributeurs canadiens, la Régie le maintient et espère, qu'à moins de circonstances exceptionnelles qui le justifieraient, on ne remettra pas en cause à chaque année cette structure que la Régie juge optimale, et qui respecte les principes qui l'ont guidée dans sa décision, à savoir : assurer à long terme un coût de capital le plus bas possible, et maintenir la santé financière du distributeur.

Demande de pondération de l'avoir ordinaire de 38,5 % à 39 % pour 1997

Bien que la Régie reconnaisse que le ratio de l'avoir ordinaire des sociétaires peut fluctuer légèrement d'une année à l'autre et que la gestion de cet avoir pour atteindre exactement le ratio maximal permis est difficile, il faut comprendre que l'esprit et la lettre de la décision D-93-51, qui fixait un ratio maximal de 38,5 %, sont à l'effet que c'est là un plafond et que toute variation de ce ratio, devrait être en deçà de ce plafond.

La Régie réalise que cette situation peut sembler inéquitable pour les sociétaires lorsque le ratio réel observé est inférieur à celui permis, mais l'objectif recherché par la Régie dans l'établissement de ce plafond était de limiter le ratio d'avoir ordinaire des sociétaires parce qu'il exige un rendement supérieur à la dette, tout en permettant au distributeur de jouir d'année en année d'une structure de capital qui répond aux attentes des investisseurs.

La Régie refuse donc la pondération de 39 % pour 1997 du ratio d'avoir ordinaire demandée et ordonne à SCGM de se gouverner en conséquence.

5.11 La prime de risque et le taux de rendement

Compte tenu des commentaires formulés par l'expert de la requérante, le D^{r} Morin, et le témoin du secteur financier, M. Robert Normand, sur la prime de risque implicite de 3,1 % mentionnée dans le dossier tarifaire de l'an dernier, la Régie estime nécessaire de préciser que les taux obligataires retenus par la Régie comme taux sans risque ont été ceux projetés et mis en preuve lors de l'audition de la cause et non ceux du marché à la date des décisions de la Régie.

Par exemple, dans le dossier tarifaire de l'an dernier, le taux obligataire projeté mis en preuve était de 8,9 % alors que, selon la preuve soumise à la pièce GMi-114, document 37, celui du marché, au moment de la décision, était de 8,635 %. La Régie, en approuvant la recommandation formulée dans l'entente intervenue entre SCGM et l'ACIG sur un taux de rendement de 12 %, autorisait donc une prime de risque implicite de 3,1 % selon le taux obligataire mis en preuve.

La même situation se répète dans le présent dossier concernant l'entente intervenue au mois de mai entre l'ACIG et SCGM sur un taux obligataire projeté de 8,22 %, alors que la publication du 12 août dernier du Consensus Forecast démontrait un taux obligataire projeté inférieur à 8 %.

Il est évident que les taux obligataires, n'étant pas nécessairement les mêmes à la date de la décision que ceux mis en preuve et retenus par la Régie, font évoluer à la baisse ou à la hausse la prime de risque implicite ainsi obtenue. À cet égard, le tableau mis en preuve par la requérante à la pièce GMi-114, document 37 le démontre clairement.

Sur la preuve

Les différentes méthodes ou périodes utilisées par les experts de l'ACIG et celui de la requérante pour établir leur prime de risque sur un avoir ordinaire de 38,5 %, donnent à penser que ces experts ont utilisé des méthodes ou périodes qui leur permettaient, d'une part, de recommander une prime de risque minimale (ACIG) et, d'autre part, une

prime de risque maximale (SCGM). L'écart de 200 points dans le présent dossier semble le démontrer.

La Régie rappelle que, dans l'analyse des recommandations qui lui sont soumises, elle est à la recherche de données qui lui permettent d'établir un taux de rendement juste et raisonnable qui respecte la capacité de payer des usagers et non pas un taux de rendement minimal ou maximal comme semblent le suggérer les preuves de l'ACIG ou de SCGM.

C'est donc dans ce contexte que la Régie statue sur les différentes données qui lui ont été soumises.

D'entrée de jeu, la Régie doit rejeter la recommandation de l'ACIG d'un taux de rendement de 9,70 % applicable à un ratio d'avoir ordinaire de 38,5 % pour les raisons suivantes :

– les méthodes de base utilisées par les experts de l'ACIG pour établir un taux de rendement donnent un résultat de 10,35 %, auquel ils ajoutent 15 points de base pour les coûts d'émission;

– ce taux de 9,70 % est de loin inférieur à ce que les autres distributeurs canadiens obtiennent avec un ratio d'endettement similaire et, comparé avec Consumer's Gas, que les experts de l'ACIG considèrent légèrement moins risqué que SCGM, ce taux est de 180 points plus bas que le taux autorisé à Consumers par l'OEB dans sa décision EBRO 492 pour la même période témoin;

– ce taux donnerait une prime de risque implicite de 1,48 %, ce qui n'est aucunement justifié, pas même par les calculs des experts de l'ACIG sur le bêta et de la prime de risque de marché qui donne environ 2,30 %.

La Régie ne retiendra donc dans son analyse que les méthodes utilisées par l'expert de SCGM qui l'ont amené à recommander une prime de risque de 4,3 % et celles utilisées par les experts de l'ACIG qui établissent la prime de risque à 2,3 %. Les commentaires de la Régie ne porteront que sur les principaux éléments qui suscitent la controverse.

Critères d'application

Bien que pour fixer le taux de rendement à accorder aux actionnaires d'une société réglementée, il est utile de s'appuyer sur les résultats d'un large éventail de tests ou de méthodes, étant donné qu'aucune méthode n'offre une formule infaillible pour déterminer le rendement recherché, le poids à accorder à chacune d'entre elles doit varier en fonction de leurs caractéristiques propres et leur pertinence face à l'objectif recherché.

À cet égard, la méthode présentée par le D[r] Morin sur une compilation des primes de risque accordées par les agences réglementaires doit être considérée avec prudence puisqu'elle comporte un problème de circularité.

De plus, ces primes de risque sont obtenues en soustrayant des taux de rendement accordés par les régies, les taux des obligations long terme observés a posteriori. Ces taux ne sont donc pas nécessairement ceux qu'ont pris en compte ces organismes au moment de leur décision.

Ces tests peuvent donc être utilisés mais seulement à titre d'information complémentaire en ayant à l'esprit les réserves nécessaires quant au phénomène de circularité et au mode de calcul des primes de risque.

Par ailleurs, le nombre et le type de méthodes mis en preuve devant ces régies peuvent varier. Par exemple dans la cause tarifaire de Consumers, qui a amené la décision EBRO 492, les méthodes utilisées par les différents experts se résument à l'utilisation de trois méthodes traditionnelles soit : la méthode de bénéfices comparables, la méthode de la prime de risque (MEAF) et la méthode de l'actualisation des flux monétaires (AFM).

En ce qui concerne la méthode utilisée par les D[rs] Booth et Berkowitz de l'ACIG qui consiste à calculer la prime de risque par rapport au rendement des actions privilégiées, les mêmes réserves s'imposent.

Cette méthode, qui vise à compenser pour les distorsions reliées aux changements fiscaux qui ont affecté le traitement des titres de dette et d'actions ordinaires, apporte un éclairage nouveau mais soulève certains problèmes d'application et de données. Elle peut cependant être utilisée à titre d'information complémentaire en ayant à l'esprit qu'il ne s'agit pas d'une approche traditionnelle longuement validée sur le plan réglementaire.

Par ailleurs, la Régie constate que les différences fondamentales sur l'évaluation de la prime de risque entre les experts des deux parties résident dans le calcul du bêta et de l'évaluation de la prime de risque du marché en général.

Sur le bêta

Lorsqu'on analyse la preuve contradictoire des experts de l'ACIG et celui de SCGM, on constate que l'écart réside principalement dans les ajustements des bêta bruts faits par le D[r] Morin.

La Régie, avec respect pour les experts de l'ACIG et les auteurs qu'ils ont cités, estime approprié de retenir la méthode utilisée par le D[r] Morin qui fait valoir que cette méthode, utilisée par les grandes maisons de placement et soutenue par une littérature scientifique, démontre que les bêta ajustés, lorsqu'utilisés, ont un meilleur degré de précision.

Par ailleurs, bien que les experts de l'ACIG recommandent de ne pas utiliser la méthode du bêta ajusté pour les utilités canadiennes, ils reconnaissent, dans la réponse fournie à la question n° 13 de la Régie, que les bêta ajustés avaient certaines bases théoriques.

De plus, les données soumises par les experts de l'ACIG à la page 35 de leur preuve écrite semblent démontrer que pour les distributeurs de gaz, le bêta est en croissance constante depuis 1990 passant de 0,418 à 0,563 pour 1994.

Ces mêmes experts ont également conclu que des études sur des périodes plus longues et sur des univers de référence plus larges les menaient à attribuer une valeur de 0,50 à 0,60 au coefficient bêta, démontrant par le fait même une tendance à la hausse des bêta par rapport à leur niveau historique.

Sur la prime de risque du marché

Les données américaines

La Régie reconnaît qu'il y a au Canada moins d'entreprises de services publics non diversifiées qu'il en existe aux États-Unis dont les actions sont cotées en bourse. Néanmoins, la Régie ne peut accorder un poids aussi important à ces données qu'aux données canadiennes pour les raisons suivantes :

– bien que l'intégration des marchés canadien et américain de capitaux s'est fortement intensifiée au cours des dernières années, il demeure qu'il existe encore des éléments différents importants dont tiennent compte les investisseurs dans leur choix, notamment les politiques monétaires des pays concernés, le traitement fiscal de la dette et le comportement des taux d'intérêts;

– d'autre part, la Régie est d'avis qu'il faut tenir compte du profil des investisseurs actuels et des détenteurs des parts sociales de SCGM cotées en bourse ainsi que la part, relativement faible, de ces titres dans le portefeuille de l'ensemble des titres détenus;

– en effet, les parts sociales cotées en bourse ne représentent que 20 % de l'ensemble des titres puisque 71,690 % de la propriété de SCGM est détenue par deux sociétés d'état du Québec et la firme Gaz de France, une entreprise spécialisée dans le transport et la distribution du gaz, elle-même société d'état, et 8,4 % par la firme Lévesque, Beaubien, Geoffrion;

– bien que la Régie reconnaisse que les investisseurs canadiens ont maintenant un accès plus grand au marché américain, ou inversement, il est intéressant de noter que la dette à long terme de SCGM est libellée en majeure partie en dollars canadiens, à l'exception, entre autres, des billets en dollars australiens qui représentent 15,5 % de la dette à long terme;

– d'autre part, la mise en marché de parts de SCGM s'est conclue rapidement et, bien que ces titres ne représentent que 20 % de l'avoir des sociétaires, il est important de souligner que ces titres sont pour une très grande part détenues par des investisseurs québécois ou canadiens.

Par ailleurs, l'affirmation du D[r] Morin, à l'effet que les entreprises canadiennes de distribution de gaz oeuvrent dans le même secteur et affrontent des risques similaires à ceux des entreprises américaines, est constatée dans une certaine mesure seulement.

En effet, il existe entre les entreprises canadiennes et américaines de distribution de gaz des différences fort importantes dans plusieurs de leurs caractéristiques, tant au niveau de la diversité de leurs opérations, des structures de capital, de la concurrence des autres formes d'énergie, de la situation de monopole de SCGM que de l'encadrement réglementaire. La difficulté de comparaison, qu'a démontrée la Régie dans ses analyses des distributeurs canadiens, est encore plus grande en considérant des distributeurs américains.

Les périodes de référence utilisées

La Régie partage l'opinion du D[r] Morin à l'effet que l'utilisation de longues périodes permet de minimiser l'élément subjectivité et de prendre en considération le nombre le plus élevé possible de cycles économiques et de taux d'intérêts. Néanmoins, il faut se questionner quant à la nécessité de reculer aussi loin que 1924 lorsque l'on considère les changements structurels importants qui se sont produits dans l'économie canadienne depuis cette période, tant au niveau fiscal que du taux d'endettement des gouvernements.

Par ailleurs, parmi les périodes retenues par les experts de l'ACIG pour établir une prime de risque du marché, on ne peut qualifier la période de 1956 à 1995 de courte période. La Régie est d'avis que des sous-périodes de 40 ans sont suffisamment longues pour être prises en considération dans l'appréciation des attentes des investisseurs.

Compte tenu du poids accordé aux données américaines et des taux obtenus pour les différentes périodes de référence retenues, et considérant le risque de l'entreprise légèrement moins élevé que l'an dernier, la structure de capital autorisée, la baisse des taux d'intérêts et la prime de risque retenue, la Régie établit à 11,50 % le taux de rendement sur l'avoir ordinaire des sociétaires. Ce taux de rendement donne une prime de risque implicite de 3,28 % par rapport au taux des obligations à long terme mis en preuve.

La Régie croit que dans les circonstances, un taux de rendement de 11,50 % représente un taux juste et raisonnable qui demeure intéressant pour les investisseurs actuels et futurs, permet à l'entreprise de continuer à se développer et respecte la capacité de payer des usagers.

5.12 Grille tarifaire et répartition

Sur le Tarif M

Bien qu'en général la Régie trouve acceptables les modifications proposées par SCGM sur le Tarif M, la Régie se prononce de façon spécifique sur les éléments suivants :

Révision de l'obligation minimale annuelle en cours de contrat

En ce qui concerne la proposition du distributeur de permettre la révision de l'obligation minimale annuelle en cours de contrat par un client du Tarif M, la Régie, compte tenu des avantages déjà consentis aux clients de ce tarif, accepte la proposition du distributeur mais limite le droit d'effectuer une première révision avant la fin de la première année contractuelle aux seuls clients qui en sont à leur premier contrat au Tarif M.

Harmonisation des tarifs

La Régie autorise SCGM à appliquer aux tarifs 3 et 4 les mêmes dispositions de l'article 4.6 intitulé « Prolongation de contrat ». Cette disposition sera un incitatif de plus pour les clients à renouveler leur contrat avant terme et sécurisera ainsi une partie des volumes du distributeur. Néanmoins, la Régie ne peut autoriser l'application de la disposition au Tarif M, tant et aussi longtemps que ce tarif sera au stade de projet pilote.

Rabais transitoires et obligations minimales au Tarif 1

La Régie accepte les modifications proposées par la requérante.

Tarif 5

Les clients qui choisissent le Tarif 5 le font parce que ce tarif est le moins dispendieux et qu'ils ont une source alternative pour leur besoin d'énergie. Ils y adhèrent donc si le tarif est intéressant et leur permet d'équilibrer leur portefeuille d'approvisionnement.

Ces clients savent également que ce service peut être interrompu lorsque la capacité du réseau de transport ne permet pas de les desservir.

Par ailleurs, la Régie est d'avis que ce tarif, malgré les interruptions prévues, ne doit pas par ses options et ses coûts être plus favorable que le Tarif 4 en service continu car cela pourrait amener une migration importante des clients de ce tarif vers le tarif interruptible, réduisant ainsi les revenus du distributeur. Néanmoins, la hausse proposée par la requérante pour les clients de ce tarif semble injustifiée.

La hausse tarifaire demandée à ces clients est de 4 715 000 $. Ce montant inclut un montant de 3 206 000 $ ou une hausse de 3,7 % visant à compenser, en partie, le manque à gagner de SCGM, suite aux réductions tarifaires accordées aux clients de ce tarif qui ont souscrit des volumes à long terme et un montant de 1 509 000 $ attribué à l'amortissement du compte de la flexibilité tarifaire dont ont bénéficié les clients du tarif interruptible.

Or, bien que les augmentations prévues pour la récupération des coûts du programme de flexibilité tarifaire, dont ont bénéficié ces clients, soient tout à fait justifiées et équitables, il en est tout autrement quant aux augmentations découlant du manque à gagner du distributeur.

De l'avis de la Régie, cette récupération est inacceptable car ces clients ont négocié de bonne foi des ententes à long terme pour bénéficier des escomptes de tarif et se retrouveraient en contre-partie avec des engagements supplémentaires auxquels ils n'auraient peut-être pas souscrit sans ces escomptes. Il est donc injuste de permettre au distributeur de revenir chercher spécifiquement, après le fait, des escomptes consentis à ceux-là mêmes qui ont négocié de bonne foi avec lui.

De plus, cette pratique tarifaire peut devenir dangereuse car les clients en interruptible génèrent des revenus d'au-delà de 85 millions $ et représentent 50 % des volumes de la clientèle grande entreprise. Les appréhensions de CIGMA et de l'ACIG, à l'effet qu'une telle mesure pourrait amener l'abandon du gaz naturel par certains clients, sont fort plausibles compte tenu de leur capacité d'utiliser d'autres sources d'énergie en tout temps.

D'ailleurs, est-il besoin de rappeler que le distributeur considère cette clientèle très vulnérable dans l'évaluation de son risque d'affaires et qu'il a dû, par les années passées, offrir de généreux rabais à certains clients pour les maintenir au gaz naturel, craignant de perdre des volumes importants et plusieurs dizaines de millions de dollars de revenus sans l'offre de ces rabais.

Par ailleurs, la Régie partage l'avis de l'ACIG à l'effet que, lorsque le distributeur propose une grille tarifaire comportant la possibilité pour ses clients de négocier certains aspects du contrat, l'ensemble de la grille tarifaire, telle que proposée à l'origine, devrait être établie en tenant compte de la possibilité que certains clients se prévaudront des escomptes qui y sont prévus.

En conséquence, le distributeur devra limiter les augmentations du Tarif 5 au montant représentant les coûts du programme de flexibilité dont les clients ont bénéficié.

Répartition tarifaire

Les principes ayant guidé la Régie dans la répartition des revenus dans les tarifs sont les mêmes que ceux énoncés par la requérante, à savoir : assurer une meilleure équité entre les différentes classes de clients en maintenant ou en améliorant la position concurrentielle du gaz naturel tout en corrigeant de façon progressive l'interfinancement.

Sur ce point, la Régie est toujours favorable à l'élimination de l'interfinancement entre les tarifs. Elle croit que des tarifs représentant les coûts réels sont une bonne façon d'inviter les consommateurs à mieux planifier leurs besoins en énergie et ainsi réaliser des économies importantes sur leurs factures énergétiques.

De plus, la réduction de l'interfinancement permettra à SCGM d'avoir des tarifs plus compétitifs pour le secteur industriel, permettant ainsi à ces industries d'avoir un coût d'énergie plus près de celui des industries ontariennes.

Les conclusions énumérées dans la présente décision permettent non seulement d'éliminer les revenus additionnels requis, mais également de réduire le coût de service. Le distributeur devra donc soumettre en même temps que la grille tarifaire les calculs révisés des revenus requis et de la base de tarification.

À cet égard, dans l'ajustement des revenus requis, le distributeur devra s'assurer de tenir également compte des impacts des décisions D-96-16, D-96-21 et D-96-24.

En conséquence, la Régie ordonne au distributeur d'ajuster ses tarifs le 1er octobre 1996 de la façon suivante :

– maintien de l'augmentation tarifaire moyenne proposée au Tarif 1;

– réduction de 3 % du Tarif 3;

– augmentation maximale de 1 509 000 $ du Tarif 5;

– baisse moyenne de 8 % du Tarif M;

– réduction du Tarif 4 pour la balance des économies réalisées conformément aux conclusions de la Régie.

La requérante devra donc ajuster les tarifs de façon à maintenir les liens logiques et mathématiques entre les différents tarifs et les sous-tarifs (points de croisement).

Elle devra également modifier le texte du tarif pour le rendre conforme aux conclusions de la présente décision.

5.13 Frais des intervenantes

La preuve présentée par l'ACIG sur la structure de capital et le taux de rendement a suscité des débats qui ont nécessité quatre jours d'audience, soit la plus longue période consacrée à ces deux éléments depuis plusieurs années et possiblement la plus dispendieuse pour les usagers, et ce, malgré le fait que l'ACIG et SCGM s'étaient entendues sur le taux sans risque qui sert de base pour établir le taux de rendement.

La Régie considère néanmoins que la preuve soumise par les experts financiers de l'ACIG et ceux de SCGM lui a permis d'avoir à sa disposition les informations nécessaires pour traiter en profondeur les éléments contradictoires des parties.

Compte tenu des conclusions sur la structure de capital, la Régie considère qu'à moins de faits nouveaux, les parties se concentreront sur l'évolution du risque global de SCGM et sur la prime de risque à accorder pour établir un taux de rendement juste et raisonnable. Cette façon de procéder devrait permettre de réduire le temps consacré aux débats et ainsi en réduire les coûts pour les usagers.

En conséquence, la Régie accepte le remboursement des frais de l'ACIG. Elle accepte également le remboursement des frais de CIGMA considérant que ces interventions ont été utiles à ses délibérations. Le *quantum* devrait être déterminé ultérieurement selon les règles de procédure et de pratique en vigueur.

6. DÉCISION

Les conclusions précédemment exprimées font partie intégrante de la présente décision.

POUR CES MOTIFS, la Régie du gaz naturel :

AUTORISE les projets d'extension et de modification du réseau compris dans le budget d'immobilisation de 1996-1997;

AUTORISE la reconduction du tarif modulaire aux conditions énoncées dans ses conclusions;

RECONDUIT les indices de performance approuvés dans sa décision D-93-51;

AUTORISE un taux de rendement de 11,50 % sur l'avoir ordinaire des sociétaires;

ORDONNE au distributeur de modifier ses tarifs à compter du 1er octobre 1996 pour les rendre conformes aux conclusions de la Régie;

ORDONNE au distributeur de modifier le texte du tarif proposé à la section GMi-119 du présent dossier pour le rendre conforme aux conclusions de la Régie;

ORDONNE au distributeur de soumettre pour approbation de la Régie, dans les 10 jours, la grille tarifaire contenant les ajustements décrétés par la Régie;

ORDONNE au distributeur d'indiquer à la Régie la période de conservation à titre confidentiel, des documents déposés (GMi-103, document 3.23) et dont il est fait mention en preuve sur le programme bi-énergie (D-96-24, page 6).

Montréal, le 9 octobre 1996

Jean-Paul Théorêt

René Brisebois

Bernard Langevin

Régisseurs

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QUEBEC

GAZ METROPOLITAIN inc.

Requérante

ASSOCIATION DES CONSOMMATEURS
INDUSTRIELS DE GAZ (ACIG)

Intervenante

Décision D-90-75
en date du 19 décembre 1990

OBJET: Détermination de certains principes généraux devant s'appliquer à la fixation des tarifs.

M. Jean-Paul Théorêt

M. Marc E. LeClerc

M. Bernard Langevin

Régisseurs

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1.- Introduction

La requête de la requérante en date du 23 octobre 1990 amendée le 4 décembre 1990 a fait l'objet d'audiences publiques et d'un avis favorable émis par la Régie au gouvernement en vertu de l'article 62 de la Loi.

La Régie réfère le lecteur à ce rapport pour toute information ayant trait à l'aliénation, la cession et le transfert des droits exclusifs de distribution de GMi à la Société en commandite Gaz Plus, dont la dénomination sociale éventuelle sera Société en commandite Gaz Métropolitain inc.

La Régie a également introduit dans ce rapport (section 4) pour information du gouvernement, le chapitre suivant ayant trait aux principes réglementaires relevant de la présente décision.

2.- Principes

2.1) Structure du capital

2.1.1) Position des parties

Le témoin Normand a brossé un tableau global des aspects de la réorganisation, identifiant les activités de l'entreprise qui seraient touchées et indiquant à la Régie comment l'entreprise entendait traiter les impacts de ces modifications dans les futures demandes tarifaires.

Les éléments de l'entreprise qui seraient touchés par la réorganisation sont les suivants:

- la structure financière,
- le paiement des impôts sur ses bénéfices,
- le paiement des taxes sur son capital,

- le paiement des frais découlant de la réorganisation proposée.

Selon le témoin, une fois neutralisé l'effet de la réorganisation sur ces quatre éléments, aucun autre aspect des opérations du distributeur ne serait modifié.

Le témoin propose donc des mesures réglementaires afin de neutraliser les effets de la réorganisation et d'assurer l'intégrité financière de l'entreprise relativement à la structure financière.

Le témoin Hotte explique comment sera établie la structure de capital de la société:

1) Les activités et la structure du distributeur seront fusionnées avec les activités et la structure de Gaz Plus.

2) L'avoir des actionnaires ordinaires deviendra l'avoir des sociétaires.

3) Les actions privilégiées seront rachetées et remplacées par un montant additionnel de l'avoir des sociétaires (T.S., pages 157-158).

Le témoin Hotte explique comment est établie une structure du capital présumée et conclut que dans le cas de la société en commandite une structure de capital régularisée serait plus adéquate et assurerait une plus grande transparence avec la structure de la société. (T.S., pages 156-157)

Il commente sur l'adoption d'une structure régularisée, plutôt que présumée pour la requérante:

"Nous ne croyons pas que ces différences nécessitent d'adopter intégralement le

principe d'une structure de capital présumée. En effet le poids des activités non réglementées de Gaz Plus ne justifient pas, selon nous, d'établir le montant global de la structure de capital en fonction de la base de tarification. D'autre part, le remplacement de l'avoir des actionnaires par de l'avoir des sociétaires ainsi que le rachat des actions privilégiées par de l'avoir additionnel des sociétaires nécessitent tout au plus de procéder à des écritures de régularisations, afin de maintenir une neutralité du coût en capital moyen, et ainsi éviter aux usagers toute augmentation, si tel était le cas" (T.S., page 158)

Au sujet de la structure financière, M. Normand précise qu'afin de garder une cote de crédit de "A", à "A moyen" la structure du capital actuelle devrait être maintenue aux mêmes critères que présentement, c'est-à-dire environ 38,5% d'équité ordinaire, 7,5% de capital privilégié et 54% de dettes.

Le témoin Hotte a ensuite expliqué comment serait établie la rémunération des composantes de cette structure du capital:

1) l'avoir des sociétaires sera rémunéré à un taux de rendement juste et raisonnable, à être fixé par la Régie selon les mêmes critères qu'actuellement. (T.S., page 159-160)

2) La dette sera rémunérée aux taux effectifs de la société. (T.S., pages 160-161)

3) La portion de l'avoir des sociétaires qui remplace les actions privilégiées sera rémunérée au taux actuel des actions privilégiées jusqu'au moment de leur rachat fictif et par la suite elle sera rémunérée au taux du marché. (T.S., pages 255 à 258)

Concernant les frais découlant de la réorganisation (consultations fiscale, légale, comptable, financière, et autres, coût de la requête, coût de courtiers, prime, droits de mutation, etc.) M. Normand émet le principe qu'aucun de ces coûts n'apparaîtra dans le coût de service aux clients et que leur paiement n'affectera pas la structure financière de l'entreprise. Ils seront tous à la charge des actionnaires.

Le témoin Gervais (Wood-Gundy) présente dans son témoignage écrit les trois principales préoccupations des prêteurs comme étant le service de la dette (capital et intérêts), la cote de crédit des titres et le maintien de la liquidité des titres. Le témoin fait état de huit éléments qui généralement influencent le coût d'une émission de dette, notamment l'environnement réglementaire, le niveau d'endettement, la rentabilité et les engagements financiers (T. écrit R-5). Il mentionne qu'il a eu des conversations avec des agences de notation de crédit qui prévoient maintenir les cotes de crédit actuelles sans modification. (T. écrit R-6, p. 2).

Le témoin a participé à l'élaboration de la réorganisation, dans le but d'assurer une neutralité vis-à-vis les prêteurs. A une question du procureur de la Régie, quant aux éléments d'évaluation pour fins de crédit, le témoin a décrit GMi II comme émettrice de titres uniquement pour les rendre admissibles aux fins d'investissements par les institutions financières (T.S., page 376). GMi II prête ensuite à la société GMi et transporte le prêt en collatéral aux institutions financières. GMi II devient une compagnie à activités restreintes, "single purpose", un véhicule financier. (T.S., page 379).

Le procureur de l'ACIG, Me Audet n'a émis aucune objection relativement à la structure de capital proposée.

2.1.2) Conclusion de la Régie

La Régie est d'avis que la structure de capital proposée pour la société GMi représente des changements mineurs par rapport à la structure actuelle de GMi. Elle constate qu'au niveau des actions privilégiées, la requérante propose de fixer de façon permanente le ratio de 7,5% de la structure de capital (GMi 4, doc. 2) et que la rémunération soit au taux actuel jusqu'à leur remplacement simulé selon l'échéancier actuel et au taux courant pour la suite.
La Régie constate aussi que les actionnaires se sont engagés à assumer tous les frais résultant de la mise en place de cette structure de capital.

Elle constate également l'assurance donnée par les agences de crédit que le coût de la dette ne sera pas modifié par rapport au coût actuel, selon le témoin Gervais. Toutefois, advenant une hausse du coût du capital, cette hausse sera imputée aux sociétaires.

Pour ces raisons, la Régie approuve la proposition de la requérante quant à la structure de capital de la Société GMi.

2.2) Impôt présumé et taxe sur le capital présumée

2.2.1) Position des parties

Le témoin Chevalier (R.C.M.P.),mentionne dans son témoignage écrit que le but principal de la restructuration corporative est la consolidation des bénéfices et des pertes aux fins fiscales du groupe corporatif. (T. écrit, R-5, page 3).

Après l'étude de plusieurs alternatives, le témoin Chevalier mentionne que la requérante a opté pour le scénario qui prévoit la fusion de corporations

existantes, le remplacement du capital-actions par des dettes subordonnées, et le transfert des actifs et des opérations du distributeur actuel à une société en commandite.

Les revenus d'entreprise sont générés par la société en commandite, et sont attribués aux actionnaires ultimes sans déductions d'impôts et de paiement de taxes sur le capital, les sociétés au Canada n'y étant pas assujetties (T. écrit, R-9, page 10). Dans le montage financier de la réorganisation, les actionnaires reçoivent ainsi des revenus d'intérêts avant impôts au lieu de recevoir des dividendes qui constituent des revenus "impôts acquittés".

Pour expliquer l'utilisation d'un impôt présumé d'une société en commandite par rapport à un impôt payé par une corporation, le témoin présente la pièce GMi 6, doc. 5, et conclut à la conformité de la proposition au principe qui distingue entre les opérations réglementées du distributeur et les autres activités non-réglementées, conservant ainsi une pleine neutralité face aux usagers du distributeur.

Selon M. Chevalier, dans le contexte d'une société en commandite et d'un impôt présumé, il ne faut pas tenir compte des impôts que les actionnaires ultimes doivent payer; pour illustrer sa conclusion, il présente diverses hypothèses d'actionnariat ultime: corporation oeuvrant au Québec, mixte oeuvrant au Québec et en Ontario et corporation de placements. (T.S., pages 316 à 321).

Le procureur de l'ACIG, Me Audet, pose la question d'un partenariat direct de la Caisse et de Soquip dans la Société en commandite Gaz Plus pour diminuer le montant d'impôt présumé, Caisse et Soquip n'étant pas imposables. Le témoin Chevalier répond qu'il n'est pas possible d'en arriver directement à la suggestion de Me Audet puisque Caisse et Soquip sont actionnaires de Noverco, non pas de la requérante, et que des transferts de biens avant une transaction papillon *,

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* Note: représente une série de transactions impliquant le transfert d'actifs aux actionnaires, sans incidence fiscale (art. 55.3 L.I.R.)

nécessaires pour concrétiser l'hypothèse émise dans la question de Me Audet, entraineraient des dividendes présumés imposables qui coûteraient plusieurs millions de dollars. (T.S., page 352).

Le témoin Hotte explique que la requérante introduit le principe d'impôts et taxes présumés pour permettre aux associés de recevoir un rendement suffisant pour qu'ils puissent payer lesdits impôts et taxes. (T.S. p. 163) Il dit avoir fait des recherches auprès des autres distributeurs au Canada, et constate que certains utilisent le calcul d'un impôt présumé, tout comme le demande la requérante. (T.S. p. 164)

Pour le calcul de l'impôt présumé de la Société GMi, le témoin Marcoux explique que seront exclus les activités non-règlementées, certains frais financiers reliés aux activités non-règlementées, et éventuellement toutes compensations payées aux détenteurs actuels de créances dans le cadre de la réorganisation.

La taxe sur le capital sera calculée selon les montants détaillés au chapitre de la structure de capital. Les taux et crédits applicables au distributeur actuel avant la réorganisation seront utilisés. (T.S. pp. 216 - 217)

Le témoin Marcoux assure la Régie que les consommateurs ne seront pas affectés par la fiscalité présumée au niveau de la Société GMi:

> *"Cette assurance se manifeste par une continuité dans la préparation des données utilisées dans le calcul de l'impôt présumé."*

Questionné sur la préparation des rapports d'impôts, le témoin Marcoux confirme que la requérante fournira à la Régie les rapports d'impôts et leurs annexes qu'elle aura préparés incluant les détails relatif au calcul de l'allocation du coût en capital. (T.S. p. 270)

Dans sa plaidoirie, Me. Lassonde précise que la requérante préfère la méthode de l'impôt présumé décrite plus haut et il ajoute:

"..., c'est la méthode, selon nous, qui permet le mieux d'isoler le coût de service de l'entreprise réglementée de tout facteur externe, y compris les facteurs qui seraient reliés aux caractéristiques ou au statut fiscal des compagnies associées." (T.S. p. 475)

En plaidoirie, le procureur de l'ACIG, Me. Audet, s'est questionné quant à la neutralité préservée dans la réorganisation lorsqu'un associé ultime reçoit un montant supplémentaire de revenu qu'il n'a pas à remettre au fisc. (T.S. p. 508) Il s'est posé la question sur la possibilité qu'un impôt présumé ne soit pris qu'à cinquante pour-cent (50%) pour satisfaire le paiement d'impôts du partenaire imposable, avec accord entre les associés, afin d'exercer une pression à la baisse sur le coût de service.

2.2.2) Conclusion de la Régie.

2.2.2.1) Les articles 32 et 35 de la Loi

La Régie exerce ses fonctions dans le cadre de la Loi sur la Régie du gaz naturel.

Cette loi sanctionnée le 17 juin 1988 définit le distributeur comme étant une "personne ou société" (art.2) tout comme l'ancienne loi sur la Régie de l'électricité et du gaz (L.R.Q. 1977 c. R-6) le définissait en y ajoutant le mot "corporation" (art. lc).

La société englobe la société commerciale, ou compagnie.

Cependant la loi actuelle est plus détaillée au chapitre des aliénations de titres de contrôle d'une société (parts) ou compagnie (actions) (art. 62), que ne l'était l'ancien article (art. 44) en ne visant que l'attribution d'actions.

Il ne faut pas oublier que l'intérêt pour la flexibilité des sociétés en commandite est plus répandu depuis la modification du Code civil en 1980.

Or, le législateur n'ayant pas voulu parler pour ne rien dire, la loi actuelle sur la Régie permet aux détenteurs des titres de contrôle des deux corporations distributrices au Québec (GMi et Gazifère) de demander une autorisation de leur modification d'entité pour l'instauration de société dont la société en commandite.

L'impact fiscal premier de la société est perçu comme le transfert de la charge d'impôts aux sociétaires, cette charge n'étant plus imposée aux revenus dans l'entreprise opérée par la société en commandite.

Quant à la tarification, l'article 32 de la loi actuelle prévoit la méthode traditionnellement reconnue d'imputation dans les tarifs des éléments tels les investissements dans la base de tarification, les dépenses d'exploitation, la rémunération des propriétaires de capitaux.

L'article prévoit, en son dernier paragraphe, l'utilisation de toute autre méthode dans l'intérêt des parties, propriétaires et consommateurs.

Cet article permet donc la transition d'une compagnie à une société en commandite, et la radiation de toute charge d'impôt déjà incluse dans les tarifs du distributeur corporatif actuel serait le résultat, selon la Régie, d'une application irrégulière et abusive de la Loi.

L'article 35 actuel prévoit qu'un tarif ne peut contenir que les taux ou conditions nécessaires pour rencontrer les coûts de

capital et d'exploitation, pour maintenir la stabilité et le développement normal de l'entreprise. Cet article reprend les éléments déjà connus dans les articles 25 et 27 de l'ancienne loi (dépenses, stabilité, développement normal).

Rien dans la loi actuelle n'interdit de reconnaître au propriétaire d'une entreprise de gaz, le pouvoir de transporter l'entité détentrice des droits exclusifs de compagnie à une société en commandite.

Dans le présent dossier, il faut le rappeler, l'effet de la transition en société en commandite s'opère avec totale neutralité. Les consommateurs n'assumeront pas plus de charge d'impôt dans les tarifs qu'ils n'en ont actuellement. La préoccupation est à l'effet que l'entité est présumée compagnie aux mêmes titres et effets fiscaux qu'actuellement.

2.2.2.2) Approbation du principe

La Régie accepte que la requérante utilise le principe d'impôts et de taxes présumés qui seront comptabilisés dans les budgets et les résultats au chapitre du coût de service. Pour confirmer leur pertinence et leur envergure nécessaire, les vérificateurs externes émettront une opinion directement à la Régie lors de leur vérification annuelle.

La Régie devra être informée de toute cotisation subséquente émise par Revenu Québec et Revenu Canada aux associés dont les revenus attribués de la société en commandite auraient fait l'objet d'une révision à la hausse ou à la baisse.

2.3) Pouvoirs de surveillance de la Régie

2.3.1) Fonctions du commandité-gérant de la Société en commandite

Au sens civil, le commandité est gérant de la Société en commandite.

Selon le dossier, la requérante a indiqué que par la fusion de Noverco II et la Compagnie GMi au plus tard le 1er octobre 1991, une compagnie dénommée GMi II pour les fins du dossier, agira comme commanditaire, commandité-gérant de la Société en commandite.

Ce commandité ne sera qu'une compagnie "émettrice", qu'un véhicule de financement à but unique, à activités restreintes, ("single purpose").

Une fusion prématurée selon le témoin Chevalier (témoignage écrit page 9), signifierait une fin d'exercice financier dans GMi et le paiement des taxes sur le capital et impôt sur le revenu pour une période où ces charges sont les plus élevées. Dans son témoignage écrit (page 2) le témoin Gervais a relaté les principaux éléments susceptibles d'avoir une influence sur le coût d'une émission de dette par l'émetteur, le commandité, qui sont en général:

1- la nature des activités de l'émetteur,

2- la taille de l'émetteur,

3- l'environnement réglementaire, s'il y a lieu,

4- le niveau d'endettement,

5- la rentabilité de l'entreprise et sa stabilité,

6- le rang de la dette,

7- les engagements financiers,

8- l'admissibilité aux fins de placement des titres.

Au procureur de la Régie, le témoin Gervais a affirmé que l'émetteur devait être la compagnie GMi et non la Société en commandite à cause de la nécessité de titres émis par une corporation comme titres éligibles pour fins d'investissements par les institutions financières. De plus, le témoin Gervais a ajouté:

> "*Par contre, cette créance-là sera cautionnée ou garantie par la société, de telle sorte que les prêteurs ont une vue directe sur les actifs de la société qui est vraiment l'entité opérante." (T.S. 5 décembre 1990, page 376-377)*
>
> *"Donc eux auront un titre de GMi inc. garanti par la société et, en plus, ils auront le prêt de GMi inc. comme collatéral pour sécuriser le prêt. Donc c'est... même si GMi est l'émetteur, c'est vraiment la société qui est garante de la dette."*
>
> *"C'est la société qui, au point de vue économique, est vraiment le créancier. Au point de vue légal, il y a un artifice, si on peut dire, pour contourner le probème d'admissibilité aux fins de placement."* (T.S., 5 décembre 1990, page 378)

La Régie comprend que l'évaluation financière des institutions prêteuses tiendra compte des deux entités indissociables, le commandité et la Société en commandite, comme le témoin Gervais les désigne respectivement, "l'entité garante et l'entité opérante" (T.S., 5 décembre 1990, page 382).

La Régie est également d'avis qu'elle-même aura droit de regard sur ces deux entités dans l'exercice de son pouvoir de surveillance.

2.3.2) Activités réglementées de la Société en

commandite

Dans sa requête, la requérante déclare vouloir prendre des mesures afin de facilement identifier les activités réglementées et afin de continuer de les dissocier des activités non réglementées (allégué 24).

La Société en commandite qui sera détentrice des droits exclusifs de distribution conservera les activités non réglementées actuelles du distributeur GMi et de la Société en commandite Gaz Plus.

Pour éviter un aspect fiscal défavorable que causerait un transfert actuel des activités non réglementées à une autre entité, compagnie ou société du groupe, il a été attesté qu'un tel transfert pourrait être effectué dans un délai d'environ deux ans. (T.S. témoin Chevalier le 5 décembre 1990, page 449)

La Régie doit ici souligner que l'objectif de séparation des activités est envisagé depuis plusieurs années dans le groupe corporatif du distributeur GMi, et qu'il a été même spécifiquement placé en priorité lors de la prise de contrôle par Noverco. (décision G-447 le 6 juin 1986 pages 5,6,8 et 9)

La Régie exprime le souci d'une transparence dans les livres de la Société en commandite et de son commandité et incite toutes les parties du groupe corporatif à collaborer aux mesures qui seront prises, entre temps, pour facilement identifier et dissocier les deux types d'activités. Les rapports mensuels et annuels réglementaires, les dossiers d'une cause tarifaire et d'une fermeture des livres, entre autres, seront les guides de surveillance de cette situation intérimaire.

2.3.3) Conclusion de la Régie

La Régie est satisfaite, de la preuve reçue et entendue, que son pouvoir de surveillance des opérations du distributeur pourra être exercé de la même façon à l'égard d'une Société en commandite que d'une compagnie.

Tenant compte des interrelations civiles et commerciales particulières dans le premier cas, soit entre une Société en commandite et ses commanditaires et son commandité, soit entre cette société et indirectement les actionnaires véritables des compagnies intermédiaires du groupe corporatif du distributeur, aucune objection n'a été formulée ni appréhendée quant à la surveillance de la Régie.

La Régie a pu constater la volonté des gestionnaires de continuer de lui produire toutes les informations susceptibles de dissocier clairement les activités réglementées des activités non réglementées, depuis leur accomplissement jusqu'à leurs ultimes impacts, s'il y en a, dans les livres financiers de l'entreprise de gaz et les livres corporatifs. (T.S. témoin Normand, 5 décembre 1990 pages 397-398)

2.4) Suivis juridique, administratif et comptable

A la demande de la Régie, la requérante produira les documents et informations utiles au suivi des transactions dans l'échéancier devant mener à une transformation complète du groupe corporatif le 1er octobre 1991.

Cette date limite est établie pour la fusion de la compagnie GMi et de Noverco II et l'approbation des créanciers. (GMi 6 d.3, page 2 et T.S. témoin Beaulieu, 4 décembre 1990 page 137)

La requérante produira donc tous documents et toutes

informations permettant un suivi aux niveaux juridique, administratif et comptable d'ici cette date alors qu'un dossier complet devra être soumis à la Régie, distinctement des dossiers de fermeture des livres au 30 septembre 1991 et de tarification du 1er octobre 1991.

Plus précisément, entre temps, la requérante produira:

1- projet de lettre d'amendement aux autorités fiscales (témoin Chevalier);

2- bilans d'ouverture pro forma de Société GMi et Gaz Métropolitain inc.;

3- copie des actes, documents, engagements et statuts, mise à jour juridique (suivi légal et contractuel) (témoin Beaulieu);

4- suivi comptable - états financiers, rapports d'étapes (témoins Marcoux et Normand);

5- documents à l'appui de la demande de décision anticipée, (GMi 2- 19 documents); et toutes modifications ou mises à jour;

6- états financiers les plus récents de Société en commandite Gaz Plus.

(T.S. Me Lassonde, 11 décembre 1990, page 465).

3.- Frais

3.1 Pour l'étude et l'analyse de cette requête et de la preuve reçue et entendue en audiences publiques, la Régie a retenu les services de la firme de comptables agréés Maheu, Noiseux pour assister son personnel des services écono-financier.

Les honoraires et frais de ce mandat seront assumés par la requérante mais imputés aux frais de la

réorganisation et non à l'entreprise de gaz.

Les états de comptes de la firme seront payés dans les 30 jours de leur réception par la requérante.

3.2 L'intervenante ACIG a demandé que ses frais de participation soient remboursés. (T.S. Me Audet, 11 décembre 1990, page 519). En conformité de l'article 30 de la Loi et des règles de procédure et de pratique de la Régie, la Régie accepte la demande de l'ACIG dont la participation a été appréciée en cette cause.

La requérante assumera ces frais qui seront aussi imputés aux frais de la réorganisation et non à l'entreprise de gaz.

L'état de compte de l'ACIG devra être transmis à la Régie selon les règles pour décision du quantum.

4.- Décision

Les conclusions exprimées ci-devant font partie intégrante de la présente décision.

Plus particulièrement quant aux principes soumis, la Régie :

ACCUEILLE la requête de la requérante;

DETERMINE que les principes suivants s'appliqueront à l'année témoin en cours et à toute autre année tarifaire subséquente, savoir:

- la Régie utilisera aux fins réglementaires et pour la détermination du taux de rendement sur la base de tarification de la Requérante et de Société GMi, successeur en titre de la Requérante, la structure de capital régularisée et les coûts financiers compatibles avec une telle structure incluant un taux de rendement sur l'avoir des associés;

- la Régie tiendra compte des conséquences fiscales découlant du fait que les revenus de Société GMi sont imposables au niveau des associés et considérera pour la détermination des dépenses d'opérations de Société GMi un impôt présumé (impôt sur le revenu et impôt sur les grandes corporations) et une taxe sur le capital présumée, soit les impôts calculés comme si la présente réorganisation n'avait pas lieu et en présumant que la société en commandite est une corporation canadienne imposable.

Montréal, le 19 décembre 1990

Jean-Paul Théorêt

Marc E. LeClerc

Bernard Langegin

Régisseurs

QUEBEC
R-3186-90

GAZ METROPOLITAIN, inc.

Requérante

ASSOCIATION DES CONSOMMATEURS
INDUSTRIELS DE GAZ (ACIG)

Intervenante

Avis de la Régie au gouvernement
en date du 17 décembre 1990

OBJET: Autorisation du gouvernement pour aliéner, céder ou transférer à la Société en commandite Gaz Plus et éventuellement Société en commandite Gaz Métropolitain inc., le droit exclusif de distribution du gaz naturel de Gaz Métropolitain, inc.

M. Jean-Paul Théorêt

M. Marc E. LeClerc

M. Bernard Langevin

Régisseurs

AU GOUVERNEMENT DU QUEBEC

Conformément à l'article 62 de la Loi sur la Régie du gaz naturel (L.R.Q. c. R-8.02),

Nous avons l'honneur de vous soumettre le rapport et les recommandations de la Régie du gaz naturel suite aux audiences publiques tenues sur la demande de Gaz Métropolitain inc. d'aliéner, céder ou transférer son droit exclusif de distribution du gaz naturel à la Société en commandite Gaz Plus éventuellement appelée Société en commandite Gaz Métropolitain inc..

Montréal, le 17 décembre 1990

Jean-Paul Théorêt

Marc E. LeClerc

Bernard Langevin

Régisseurs

COPIE CONFORME
Me Laurette Laurin
Secrétaire

GMi, 3186-90, AVIS/1.
1990-12-17

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AVIS DE LA REGIE

1.- INTRODUCTION

Ce rapport de la Régie à la Ministre responsable de l'application de la Loi sur la Régie du gaz naturel résulte de l'analyse de la preuve reçue et entendue sur des matières devant faire l'objet d'une décision du gouvernement et d'une décision réglementaire de la Régie.

1.1) Juridiction de la Régie

1.1.1) Demande de la Ministre.

Par lettre du 16 novembre 1990 et en conformité avec l'article 62 de la Loi, la Ministre a demandé avis de la Régie en ces termes:

> *"Afin qu'il soit décidé ultérieurement de cette demande par le Conseil des ministres, j'apprécierais revecoir l'avis de votre organisme et ce, notamment sur les sujets suivants:*
>
> *- La structure corporative du nouveau distributeur aura-t-elle un effet sur son intégrité financière à court, moyen et long terme? Les coûts de finàncement et de rémunération du capital investi dans le réseau de distribution québécois de gaz naturel risquent-ils d'augmenter et, dans l'affirmative, quelles seraient les mesures susceptibles de protéger adéquatement les consommateurs?*

- La structure corporative du nouveau distributeur assurera-t-elle l'intégrité des opérations de distribution? Permettra-t-elle au distributeur de poursuivre le développement de ses infrastructures et d'assurer la croissance de ses marchés?

- Tout autre sujet que la Régie voudra bien porter à l'attention du gouvernement et qui serait susceptible d'assurer une protection adéquate de l'intérêt public."

1.1.2) Décision sur matières relevant de la Régie

Dans sa requête du 23 octobre 1990, amendée le 4 décembre 1990, GMi a requis de la Régie une approbation particulière aux fins réglementaires, en ces termes:

"*DETERMINER que les principes suivants s'appliqueront à l'année témoin en cours et à toute autre année tarifaire subséquente, à savoir:*

- la Régie utilisera aux fins réglementaires et pour la détermination du taux de rendement sur la base de tarification de la Requérante et de Société GMi, successeur en titre de la Requérante, la structure de capital régularisée et les coûts financiers compatibles avec une telle structure incluant un taux de rendement sur l'avoir des associés;

- la Régie tiendra compte des conséquences fiscales découlant du fait que les revenus de Société GMi sont imposables au niveau des associés et considérera pour la détermination des dépenses d'opérations de Société GMi un impôt présumé (impôt sur le revenu et impôt sur les grandes corporations) et

une taxe sur le capital présumée, soit les impôts calculés comme si la présente réorganisation n'avait pas lieu et en présumant que la société en commandite est une corporation canadienne imposable."

Dans sa requête, GMi a également demandé à la Régie de recommander au gouvernement l'autorisation de procéder aux aliénations, cessions et/ou transferts à la Société en commandite Gaz Plus de ses biens, droits et obligations, incluant les droits exclusifs de distribution visés par l'arrêté en conseil 3271-79, les décrets 824-81 et 825-81, ainsi que tous autres droits, s'il en est, découlant de tous décrets gouvernementaux.

1.2) Audiences publiques

Des avis ont été publiés par la Régie le 23 novembre 1990 dans les journaux suivants: North Bay Nugget, La Tribune, Le Devoir, La Presse, The Gazette, Le Soleil, Le Nouvelliste, The Sherbrooke Record et le 27 novembre 1990 dans les journaux suivants: The Quebec Chronicle Journal, Journal Témiscamien Inc., La Frontière.

L'intervention écrite de l'Association des consommateurs industriels de gaz (ACIG) a été reçue par la Régie le 8 novembre 1990.

Des audiences publiques ont été tenues les 4, 5 et 11 décembre 1990.

2.- PROPOSITION DE LA REQUERANTE GMi - STRUCTURE ORGANISATIONNELLE.

La requérante GMi désire obtenir l'autorisation de céder, aliéner ou transférer ses biens, droits et obligations à la

Société en commandite Gaz Plus, laquelle deviendra par changement de dénomination sociale, Société en commandite Gaz Métropolitain, inc. (Société GMi).(Allégués 7 et 23)

L'un des commanditaires, le commandité ou gérant de la Société en commandite sera Gaz Métropolitain, inc. (GMi II résultant de la fusion de GMi actuel et de Noverco II). L'autre commanditaire sera Commanditaire Inc. Ces deux dernières entités commanditaires seront possédées à parts égales par CASO (à parts égales de Soquip et Caisse de dépôt et placement du Québec) et NOUCO (à part entière de Canam).(Allégué 23 et pièce GMi 1 d.1)

La requérante, en plus de cette demande au gouvernement, désire obtenir de la Régie la détermination de certains principes réglementaires dans le contexte de la réorganisation du groupe corporatif dont elle fait partie.(Allégué 7)

En somme, la requérante agit en quelque sorte comme un mandataire des trois actionnaires véritables du groupe corporatif soit Canam, Soquip et Caisse, lorsqu'elle présente en audiences publiques toute cette preuve et documentation de la réorganisation dans laquelle des travaux et des frais sont réellement engagés par la requérante depuis un mois et demi.(T.S. témoin Normand page 399, 5 décembre 1990)

L'administration des entités commanditaires sera effectuée par le personnel actuel de GMi devenant le personnel de la société en commandite, et l'administration de NOUCO et CASO sera prise en charge par leurs actionnaires. (T.S. témoin Normand page 396, 5 décembre 1990)

3.- MATIERES VISEES PAR LA DEMANDE DE LA MINISTRE

3.1) Intégrité financière, court, moyen et long terme

3.1.1) Financement et capital investi

Les témoins de la requérante ont expliqué la structure financière de la société à être formée. Des rencontres avec les créanciers actuels et les agences de crédits ont eu lieu pour s'assurer du maintien après la réorganisation, de la liquidité des titres à son niveau actuel, de la perception favorable dont jouit présentement la corporation auprès des institutions financières.

Les témoins ont confirmé que la requérante a pris toutes les mesures nécessaires pour que la situation financière demeure stable, entre autres:

- les actionnaires maintiendront sous forme d'avoir des sociétaires le même montant que celui présentement investi sous forme de capital-actions ordinaires;

- les actions privilégiées qui seront rachetées seront remplacées par de l'avoir des sociétaires additionnel afin de ne pas diluer la qualité du crédit;

- pour le futur, les sociétaires s'engagent à maintenir une proportion d'avoir des sociétaires comparable à celle requise par les marchés financiers, et assurer le maintien de la cote de crédit actuel.

De l'avis des témoins, les mesures prises permettent d'éviter toute augmentation de risque financier pour la société GMi, de conserver la crédibilité auprès des institutions financières et de maintenir l'accès aux marchés financiers après la réorganisation.

3.1.2) Protection du consommateur - neutralité

Le dossier soumis établit que la réorganisation projetée est neutre vis-à-vis le consommateur, en raison:

- du maintien de la cote de crédit, toute variation résultant de la réorganisation étant à la charge des actionnaires,
- du désir exprimé par les actionnaires de maintenir une saine structure financière,
- de la prise en charge par les actionnaires de tous les frais associés à la réorganisation,
- de l'inclusion au coût de service des impôts et taxes présumés identiques à ceux qui auraient prévalu si le statut corporatif avait été maintenu,
- de la séparation étanche des activités non réglementées de celles réglementées.

3.1.3) Avis de la Régie

La Régie est satisfaite que la requérante et les actionnaires font tout ce qui est nécessaire pour que la situation financière actuelle demeure inchangée vis-à-vis les marchés financiers.

Elle constate que les agences de crédit confirment leur acceptation de la réorganisation de GMi. (voir Annexe II)

La Régie est d'opinion que la santé financière restera essentiellement la même par la mise en place de la réorganisation proposée.

Pour les mêmes raisons que ci-haut, elle est également d'avis que les usagers du gaz naturel ne seront pas défavorisés par cette opération.

3.2) Intégrité des opérations du distributeur

3.2.1) Développement des infrastructures et croissance des marchés

Les témoins Rheault et Dutil, représentant les actionnaires, ont confirmé leur intérêt dans la distribution du gaz au Québec. Par le maintien d'une bonne situation financière de l'entreprise et une politique de réinvestissement des profits, ils entendent favoriser l'expansion et le développement de la distribution.

Les actionnaires projettent de favoriser trois axes de développement:

- la diversification des sources d'approvisionnement gazier;
- une bonne gestion de la demande;
- l'accroissement des volumes de gaz vendu et transporté sur le réseau.

La requérante soutient que la réorganisation n'aura aucun effet sur les opérations de distribution pour les raisons suivantes:

- la gestion des opérations demeure inchangée,
- le personnel en place continue à donner le même service aux usagers,
- la croissance et le développement de l'entreprise sont de l'intérêt et de l'intention des actionnaires.

3.2.2) Activités complémentaires

Pour permettre le développement optimal du réseau de distribution, les actionnaires ont exprimé leur intention d'investir par un véhicule distinct dans des activités non réglementées, soit: la cogénération, l'entreposage souterrain, le port méthanier, et autres activités connexes.

3.2.3) Avis de la Régie

Les actionnaires ont la ferme intention de participer activement au développement du gaz naturel au Québec. La Régie constate également que l'entretien et le développement du réseau de distribution est assuré par le maintien du personnel existant et par le maintien des méthodes de gestion de la requérante.
La Régie en conclut que la réorganisation dans cette optique ne peut nuire au développement et à la croissance du marché du gaz naturel au Québec. Au contraire, d'après les témoins Rheault (T.S., p. 429) et Caillé (T.S., p. 434), la participation dans les investissements complémentaires aura un effet très favorable:

Les infrastructures additionnelles favorisent l'intensification de l'utilisation du réseau, ce qui diminuera le coût de service.

3.3) Autres sujets soulignés par la Régie

3.3.1) Suivi de l'échéancier

Les principales étapes du processus de réorganisation du groupe corporatif dont fait partie le distributeur comprennent l'octroi des décisions anticipées demandées aux Ministères du Revenu, l'approbation par les créanciers du distributeur d'amendements requis aux actes de fiducie et autres conventions de prêts, la fusion

de la compagnie GMi et de Noverco II, la nouvelle convention de société en commandite, la notation en vue de la cote de crédit.

La Régie entend suivre ce processus tout en ayant accès aux renseignements requis pour sa surveillance réglementaire.

3.3.2) Cote de crédit

La requérante a analysé plusieurs scénarios visant à assurer la neutralité vis-à-vis les prêteurs. La cote de crédit étant une mesure du degré de sécurité qui sous-tend les titres de créances émis par une compagnie, la requérante a exposé son plan de réorganisation à deux agences canadiennes de notation de crédit qui, dans des opinions écrites, n'ont pas relevé de difficultés importantes quant à la structure financière projetée.

Toutefois leur avis est conditionnel à la revue des ententes financières et de la structure organisationnelle définitive.

La Régie observe que toute baisse dans la cote de crédit peut entraîner des hausses de taux d'intérêts, et conséquemment peut avoir un effet sur le taux de rendement effectif appliqué à la base de tarification.

Cependant, toute hausse dans les coûts d'emprunt, reliée à la réorganisation, sera à la charge des associés. Pour que la Régie puisse en effectuer le suivi, la requérante devra lui transmettre toute information pertinente dès qu'une agence de notation de crédit lui signifiera un changement, ou dès qu'un fait quelconque sera appréhendé comme difficulté réelle pour le maintien de la cote de crédit.

3.3.3) Convention de Société en commandite

La requérante a reconnu que la convention de Société en commandite du 10 février 1988 et déposée en liasse en pièce GMi 2, devra être complètement refaite. En fonction des éléments propres à la réorganisation et apparaissant dans les demandes de décisions anticipées adressées aux Ministères du Revenu, même la convention d'actionnaires en date du 18 juin 1990 devra être ajustée. (T.S. Me Lassonde, 5 décembre 1990, page 343)

Face à la préoccupation de l'ACIG quant à la portée de l'article 5.02 de la convention de 1988 relative à la distribution trimestrielle de 75% des bénéfices nets de la Société en commandite Gaz Plus actuelle, la requérante a invoqué que la politique de distribution des bénéfices dans la nouvelle convention sera adaptée pour respecter les ratios financiers comme actuellement, (T.S. témoin Beaulieu, 5 décembre 1990, page 345 et Me Audet 11 décembre 1990 page 517) et maintenir la santé financière du distributeur (T.S. témoin Normand, 5 décembre 1990, page 338).

A ce stade-ci, la Régie se satisfait des engagements de la requérante et sera en mesure de suivre, à travers le processus de réorganisation, l'exécution des ententes sur tous les principes régissant la santé financière du distributeur.

3.3.4) Bilans d'ouverture pro forma de Société GMi et Gaz métropolitain, inc.

La Régie a demandé à la requérante de produire des bilans pro forma d'ouverture de la société en commandite et de Gaz métropolitain, inc. pour donner un portrait de l'actif et du passif des nouvelles entités. Ces bilans devront refléter toute la neutralité garantie vis-à-vis les usagers et les prêteurs.

La Société en commandite Gaz Plus exploite

présentement des activités non réglementées. La requérante garantit un prêt de 15 millions $ de cette société.

3.3.5) Description des décisions gouvernementales de franchise

La requérante a modifié sa requête le 4 décembre 1990 pour désigner trois décisions du gouvernement du Québec relatives à l'octroi de droit exclusif sur des territoires, soit l'arrêté en conseil 3271-79 du 5 décembre 1979, le décret 824-81 du 11 mars 1981 et le décret 825-81 du 11 mars 1981, respectivement pour les territoires suivants:

- A.C. 3271-79, Canton Gendreau, district Pontiac-Témiscamingue,

- décret 824-81, 11 mars 1981, territoire de GICQ dit Zone Est,

- décret 825-81, 11 mars 1981, territoire de Ste-Agathe-des-Monts, frontières Québec-Ontario et Canado-américaine jusqu'à la limite Gazifère.

Par intervention du procureur de la Régie (T.S. 4 décembre 1990, pages 12 à 14, 5 décembre 1990, page 374 et 11 décembre 1990 pages 463-464) il a été soumis que d'autres décisions du gouvernement devraient être clairement désignées dans la requête et dans l'éventuelle décision du gouvernement, de préférence à une clause dite "panier", afin que le transfert des droits exclusifs de distribution octroyés à la requérante ou ses auteurs, soit bien réalisé. Ces autres décisions à considérer pour un total de huit (8) sont :

- ch 157, 2 février 1956, art. 6, Ile de Montréal et rive sud dans un rayon de 15 milles,

- ch 167, 31 janvier 1957, art. 2, district de Rouyn-Noranda,

- ch 95, 6 juillet 1962, art. 6 du ch 157, comtés de Verchères et Richelieu,

- A.C. 3706-77, 2 nov. 1977, village de Marieville et paroisse de Sainte-Marie-de-Monnoir,

- décret 734-84, 28 mars 1984, territoire comté Argenteuil.

3.3.6) Fiscalité

Les revenus d'une société en commandite sont imposables entre les mains des associés lorsque ces revenus leur sont attribués à la fin d'un exercice financier. Pour calculer un impôt présumé et une taxe sur le capital présumée d'une société en commandite, des déclarations d'impôts fédéral (T2) et provincial (C17) simulées doivent être utilisées, avec les annexes reflétant les inclusions et les déductions dans le calcul du revenu imposable, tel que déclaré dans les témoignages de la requérante.

La Régie a demandé à GMi que les vérificateurs externes émettent un certificat sur les déclarations simulées (T2 et C17) quant aux montants y apparaissant et à leur similitude par rapport à ceux que prépare le distributeur actuel.

3.3.7) Créanciers

La Régie note que les dettes de diverses catégories de la requérante seront transportées à la compagnie GMi qui agira comme commanditaire - commandité de la société en commandite. Les obligations prenant un premier rang sur les actifs de GMi I conserveront leur priorité de rang sur les mêmes actifs qui seront transférés à la société en commandite. La requérante a confirmé que l'instrument juridique reconnaissant les dettes de premier rang ne sera plus utilisé, mais

qu'un nouvel acte de fiducie rangerait toute nouvelle dette sur un même pied. Les dettes qui seront garanties par une obligation de second rang verront leur position améliorée à mesure des remboursements de la dette de premier rang. L'avoir des sociétaires sera converti en dettes subordonnées.

3.3.8) Autres juridictions

Dans son témoignage écrit le témoin Marcoux (page 6) désigne certaines entreprises d'activités non réglementées indépendantes de la requérante GMi au niveau comptable, dont les activités de Champion Pipeline.

La réorganisation du groupe affectera également cette dernière entreprise et bien qu'il n'ait pas été mentionné qu'une autorisation de l'organisme fédéral régissant les transporteurs-pipelines pourrait être requise ou non, la Régie préfère signaler qu'à tout événement cette précision sera inscrite au suivi du processus de réorganisation comme toute autre démarche.

Outre ce cas, le dossier démontre donc que l'autorité fiscale des deux niveaux de gouvernement constitue la seule autre juridiction intéressée par la réorganisation.

3.3.9) Modifications de l'article 62 de la Loi

La requête de GMi quant à la réorganisation du groupe corporatif, auquel fait partie le distributeur GMi, met en évidence un souci fondamental du législateur depuis des décennies dans la régulation économique de la distribution du gaz naturel. Il s'agit de la propriété de l'entreprise de gaz et de l'identité du détenteur des droits exclusifs octroyés par le gouvernement.

L'article 62 actuel de la Loi sur la Régie du gaz

naturel, en vertu duquel l'autorisation du gouvernement est requise par la requérante (compagnie GMi) pour transférer ses droits à une Société en commandite (Société GMi), ne conviendrait pas à une structure telle que proposée.

En effet, une aliénation des titres de contrôle d'une compagnie distributrice répondrait à des exigences légales plus sévères qu'une cession de parts d'une société dont la société en commandite.

L'article 62 de la Loi sur la Régie, sanctionnée le 17 juin 1988, est déjà reproduit avec des modifications appréciables, par exemple, dans la Loi modifiant la Loi sur la Régie des Télécommunications, sanctionnée le 21 novembre 1990 (art. 6 modifiant l'article 24).

En effet dans cette dernière loi le paragraphe relatif au contrôle d'une société est fusionné au paragraphe ayant trait aux personnes morales où l'on ne parle plus maintenant que de société exploitante visée par une opération à effet direct ou indirect de prise de contrôle.

La Régie suggère donc que des consultations soient entreprises dans le but de déterminer l'opportunité d'une modification de l'article 62 de la Loi sur la Régie du gaz naturel, ayant en hypothèse, après approbation éventuelle par le gouvernement de cette requête de réorganisation du groupe corporatif de GMi, une aliénation du contrôle d'une compagnie actionnaire du commanditaire-commandité-gérant de la Société en commandite, détentrice de droits exclusifs de distribution au Québec.

Par extension, comme nous soumettons dans ce rapport, la régulation économique permettra à la Régie de surveiller les activités du commandité puisque son existence est essentiellement reliée à celle de la Société en commandite. Ce serait alors la limite ultime actuelle de tout droit de regard général au sens de la Loi sur la Régie.

4.- COMMUNICATION A LA MINISTRE DE LA DECISION NON ENCORE PUBLIEE QUANT AU REGLEMENTAIRE

4.1) Structure du capital

4.1.1) Position des parties

Le témoin Normand a brossé un tableau global des aspects de la réorganisation, identifiant les activités de l'entreprise qui seraient touchées et indiquant à la Régie comment l'entreprise entendait traiter les impacts de ces modifications dans les futures demandes tarifaires.

Les éléments de l'entreprise qui seraient touchés par la réorganisation sont les suivants:

- la structure financière,
- le paiement des impôts sur ses bénéfices,
- le paiement des taxes sur son capital,
- le paiement des frais découlant de la réorganisation proposée.

Selon le témoin, une fois neutralisé l'effet de la réorganisation sur ces quatre éléments, aucun autre aspect des opérations du distributeur ne serait modifié.

Le témoin propose donc des mesures réglementaires afin de neutraliser les effets de la réorganisation et d'assurer l'intégrité financière de l'entreprise relativement à la structure financière.

Le témoin Hotte explique comment sera établie la structure de capital de la société:

1) Les activités et la structure du distributeur seront fusionnées avec les activités et la structure de Gaz Plus.

2) L'avoir des actionnaires ordinaires deviendra l'avoir des sociétaires.

3) Les actions privilégiées seront rachetées et remplacées par un montant additionnel de l'avoir des sociétaires (T.S., pages 157-158).

Le témoin Hotte explique comment est établie une structure du capital présumée et conclut que dans le cas de la société en commandite une structure de capital régularisée serait plus adéquate et assurerait une plus grande transparence avec la structure de la société. (T.S., pages 156-157)

Il commente sur l'adoption d'une structure régularisée, plutôt que présumée pour la requérante:

> *"Nous ne croyons pas que ces différences nécessitent d'adopter intégralement le principe d'une structure de capital présumée. En effet le poids des activités non réglementées de Gaz Plus ne justifient pas, selon nous, d'établir le montant global de la structure de capital en fonction de la base de tarification. D'autre part, le remplacement de l'avoir des actionnaires par de l'avoir des sociétaires ainsi que le rachat des actions privilégiées par de l'avoir additionnel des sociétaires nécessitent tout au plus de procéder à des écritures de régularisations, afin de maintenir une neutralité du coût en capital moyen, et ainsi éviter aux usagers toute augmentation, si tel était le cas"* (T.S., page 158)

Au sujet de la structure financière, M. Normand

précise qu'afin de garder une cote de crédit de "A", à "A moyen" la structure du capital actuelle devrait être maintenue aux mêmes critères que présentement, c'est-à-dire environ 38,5% d'équité ordinaire, 7,5% de capital privilégié et 54% de dettes.

Le témoin Hotte a ensuite expliqué comment serait établie la rémunération des composantes de cette structure du capital:

1) l'avoir des sociétaires sera rémunéré à un taux de rendement juste et raisonnable, à être fixé par la Régie selon les mêmes critères qu'actuellement. (T.S., page 159-160)

2) La dette sera rémunérée aux taux effectifs de la société. (T.S., pages 160-161)

3) La portion de l'avoir des sociétaires qui remplace les actions privilégiées sera rémunérée au taux actuel des actions privilégiées jusqu'au moment de leur rachat fictif et par la suite elle sera rémunérée au taux du marché. (T.S., pages 255 à 258)

Concernant les frais découlant de la réorganisation (consultations fiscale, légale, comptable, financière, et autres, coût de la requête, coût de courtiers, prime, droits de mutation, etc.) M. Normand émet le principe qu'aucun de ces coûts n'apparaîtra dans le coût de service aux clients et que leur paiement n'affectera pas la structure financière de l'entreprise. Ils seront tous à la charge des actionnaires.

Le témoin Gervais (Wood-Gundy) présente dans son témoignage écrit les trois principales préoccupations des prêteurs comme étant le service de la dette (capital et intérêts), la cote de crédit des titres et le maintien de la liquidité des titres. Le témoin fait état de huit éléments qui généralement influencent le coût d'une

émission de dette, notamment l'environnement réglementaire, le niveau d'endettement, la rentabilité et les engagements financiers (T. écrit R-5). Il mentionne qu'il a eu des conversations avec des agences de notation de crédit qui prévoient maintenir les cotes de crédit actuelles sans modification. (T. écrit R-6, p. 2).

Le témoin a participé à l'élaboration de la réorganisation, dans le but d'assurer une neutralité vis-à-vis les prêteurs. A une question du procureur de la Régie, quant aux éléments d'évaluation pour fins de crédit, le témoin a décrit GMi II comme émettrice de titres uniquement pour les rendre admissibles aux fins d'investissements par les institutions financières (T.S., page 376). GMi II prête ensuite à la société GMi et transporte le prêt en collatéral aux institutions financières. GMi II devient une compagnie à activités restreintes, "single purpose", un véhicule financier. (T.S., page 379).

Le procureur de l'ACIG, Me Audet n'a émis aucune objection relativement à la structure de capital proposée.

4.1.2) Conclusion de la Régie

La Régie est d'avis que la structure de capital proposée pour la société GMi représente des changements mineurs par rapport à la structure actuelle de GMi. Elle constate qu'au niveau des actions privilégiées, la requérante propose de fixer de façon permanente le ratio de 7,5% de la structure de capital (GMi 4, doc. 2) et que la rémunération soit au taux actuel jusqu'à leur remplacement simulé selon l'échéancier actuel et au taux courant pour la suite.
La Régie constate aussi que les actionnaires se sont engagés à assumer tous les frais résultant de la mise en place de cette structure de capital.

Elle constate également l'assurance donnée par les

agences de crédit que le coût de la dette ne sera pas modifié par rapport au coût actuel, selon le témoin Gervais. Toutefois, advenant une hausse du coût du capital, cette hausse sera imputée aux sociétaires.

Pour ces raisons, la Régie approuve la proposition de la requérante quant à la structure de capital de la Société GMi.

4.2) Impôt présumé et taxe sur le capital présumée

4.2.1) Position des parties

Le témoin Chevalier (R.C.M.P.),mentionne dans son témoignage écrit que le but principal de la restructuration corporative est la consolidation des bénéfices et des pertes aux fins fiscales du groupe corporatif. (T. écrit, R-5, page 3).

Après l'étude de plusieurs alternatives, le témoin Chevalier mentionne que la requérante a opté pour le scénario qui prévoit la fusion de corporations existantes, le remplacement du capital-actions par des dettes subordonnées, et le transfert des actifs et des opérations du distributeur actuel à une société en commandite.

Les revenus d'entreprise sont générés par la société en commandite, et sont attribués aux actionnaires ultimes sans déductions d'impôts et de paiement de taxes sur le capital, les sociétés au Canada n'y étant pas assujetties (T. écrit, R-9, page 10). Dans le montage financier de la réorganisation, les actionnaires reçoivent ainsi des revenus d'intérêts avant impôts au lieu de recevoir des dividendes qui constituent des revenus "impôts acquittés".

Pour expliquer l'utilisation d'un impôt présumé d'une société en commandite par rapport à un impôt payé par une corporation, le témoin présente la pièce GMi 6, doc. 5, et conclut à la conformité de la proposition au principe qui distingue entre les opérations

réglementées du distributeur et les autres activités non-réglementées, conservant ainsi une pleine neutralité face aux usagers du distributeur.

Selon M. Chevalier, dans le contexte d'une société en commandite et d'un impôt présumé, il ne faut pas tenir compte des impôts que les actionnaires ultimes doivent payer; pour illustrer sa conclusion, il présente diverses hypothèses d'actionnariat ultime: corporation oeuvrant au Québec, mixte oeuvrant au Québec et en Ontario et corporation de placements. (T.S., pages 316 à 321).

Le procureur de l'ACIG, Me Audet, pose la question d'un partenariat direct de la Caisse et de Soquip dans la Société en commandite Gaz Plus pour diminuer le montant d'impôt présumé, Caisse et Soquip n'étant pas imposables. Le témoin Chevalier répond qu'il n'est pas possible d'en arriver directement à la suggestion de Me Audet puisque Caisse et Soquip sont actionnaires de Noverco, non pas de la requérante, et que des transferts de biens avant une transaction papillon *, nécessaires pour concrétiser l'hypothèse émise dans la question de Me Audet, entraineraient des dividendes présumés imposables qui coûteraient plusieurs millions de dollars. (T.S., page 352).

Le témoin Hotte explique que la requérante introduit le principe d'impôts et taxes présumés pour permettre aux associés de recevoir un rendement suffisant pour qu'ils puissent payer lesdits impôts et taxes. (T.S. p. 163) Il dit avoir fait des recherches auprès des autres distributeurs au Canada, et constate que certains utilisent le calcul d'un impôt présumé, tout comme le demande la requérante. (T.S. p. 164)

Pour le calcul de l'impôt présumé de la Société GMi, le témoin Marcoux explique que seront exclus les activités non-règlementées, certains frais financiers reliés aux activités non-règlementées, et éventuellement toutes compensations payées aux détenteurs actuels de créances dans le cadre de la réorganisation.

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* Note: représente une série de transactions impliquant le transfert d'actifs aux actionnaires, sans incidence fiscale (art. 55.3 L.I.R.)

La taxe sur le capital sera calculée selon les montants détaillés au chapitre de la structure de capital. Les taux et crédits applicables au distributeur actuel avant la réorganisation seront utilisés. (T.S. pp. 216 - 217)

Le témoin Marcoux assure la Régie que les consommateurs ne seront pas affectés par la fiscalité présumée au niveau de la Société GMi:

> *"Cette assurance se manifeste par une continuité dans la préparation des données utilisées dans le calcul de l'impôt présumé."*

Questionné sur la préparation des rapports d'impôts, le témoin Marcoux confirme que la requérante fournira à la Régie les rapports d'impôts et leurs annexes qu'elle aura préparés incluant les détails relatifs au calcul de l'allocation du coût en capital. (T.S. p. 270)

Dans sa plaidoirie, Me. Lassonde précise que la requérante préfère la méthode de l'impôt présumé décrite plus haut et il ajoute:

> *"..., c'est la méthode, selon nous, qui permet le mieux d'isoler le coût de service de l'entreprise réglementée de tout facteur externe, y compris les facteurs qui seraient reliés aux caractéristiques ou au statut fiscal des compagnies associées."* (T.S. p. 475)

En plaidoirie, le procureur de l'ACIG, Me. Audet, s'est questionné quant à la neutralité préservée dans la réorganisation lorsqu'un associé ultime reçoit un montant supplémentaire de revenu qu'il n'a pas à remettre au fisc. (T.S. p. 508) Il s'est posé la question sur la possibilité qu'un impôt présumé ne soit pris qu'à cinquante pour-cent (50%) pour satisfaire le paiement d'impôts du partenaire imposable, avec accord entre les associés, afin d'exercer une pression à la baisse sur le coût de service.

4.2.2) Conclusion de la Régie.

4.2.2.1) Les articles 32 et 35 de la Loi

La Régie exerce ses fonctions dans le cadre de la Loi sur la Régie du gaz naturel.

Cette loi sanctionnée le 17 juin 1988 définit le distributeur comme étant une "personne ou société" (art.2) tout comme l'ancienne loi sur la Régie de l'électricité et du gaz (L.R.Q. 1977 c. R-6) le définissait en y ajoutant le mot "corporation" (art. 1c).

La société englobe la société commerciale, ou compagnie.

Cependant la loi actuelle est plus détaillée au chapitre des aliénations de titres de contrôle d'une société (parts) ou compagnie (actions) (art. 62), que ne l'était l'ancien article (art. 44) en ne visant que l'attribution d'actions.

Il ne faut pas oublier que l'intérêt pour la flexibilité des sociétés en commandite est plus répandu depuis la modification du Code civil en 1980.

Or, le législateur n'ayant pas voulu parler pour ne rien dire, la loi actuelle sur la Régie permet aux détenteurs des titres de contrôle des deux corporations distributrices au Québec (GMi et Gazifère) de demander une autorisation de leur modification d'entité pour l'instauration de société dont la société en commandite.

L'impact fiscal premier de la société est perçu comme le transfert de la charge d'impôts aux sociétaires, cette charge n'étant plus imposée aux revenus dans

l'entreprise opérée par la société en commandite.

Quant à la tarification, l'article 32 de la loi actuelle prévoit la méthode traditionnellement reconnue d'imputation dans les tarifs des éléments tels les investissements dans la base de tarification, les dépenses d'exploitation, la rémunération des propriétaires de capitaux.

L'article prévoit, en son dernier paragraphe, l'utilisation de toute autre méthode dans l'intérêt des parties, propriétaires et consommateurs.

Cet article permet donc la transition d'une compagnie à une société en commandite, et la radiation de toute charge d'impôt déjà incluse dans les tarifs du distributeur corporatif actuel serait le résultat, selon la Régie, d'une application irrégulière et abusive de la Loi.

L'article 35 actuel prévoit qu'un tarif ne peut contenir que les taux ou conditions nécessaires pour rencontrer les coûts de capital et d'exploitation, pour maintenir la stabilité et le développement normal de l'entreprise. Cet article reprend les éléments déjà connus dans les articles 25 et 27 de l'ancienne loi (dépenses, stabilité, développement normal).

Rien dans la loi actuelle n'interdit de reconnaître au propriétaire d'une entreprise de gaz, le pouvoir de transporter l'entité détentrice des droits exclusifs de compagnie à une société en commandite.

Dans le présent dossier, il faut le rappeler, l'effet de la transition en société en commandite s'opère avec totale neutralité. Les consommateurs n'assumeront pas plus de charge d'impôt dans les tarifs qu'ils n'en

ont actuellement. La préoccupation est à l'effet que l'entité est présumée compagnie aux mêmes titres et effets fiscaux qu'actuellement.

4.2.2.2) Approbation du principe

La Régie accepte que la requérante utilise le principe d'impôts et de taxes présumés qui seront comptabilisés dans les budgets et les résultats au chapitre du coût de service. Pour confirmer leur pertinence et leur envergure nécessaire, les vérificateurs externes émettront une opinion directement à la Régie lors de leur vérification annuelle.

La Régie devra être informée de toute cotisation subséquente émise par Revenu Québec et Revenu Canada aux associés dont les revenus attribués de la société en commandite auraient fait l'objet d'une révision à la hausse ou à la baisse.

4.3) Pouvoirs de surveillance de la Régie

4.3.1) Fonctions du commandité-gérant de la Société en commandite

Au sens civil, le commandité est gérant de la Société en commandite.

Selon le dossier, la requérante a indiqué que par la fusion de Noverco II et la Compagnie GMi au plus tard le 1er octobre 1991, une compagnie dénommée GMi II pour les fins du dossier, agira comme commanditaire, commandité-gérant de la Société en commandite.

Ce commandité ne sera qu'une compagnie "émettrice", qu'un véhicule de financement à but

unique, à activités restreintes, ("single purpose").

Une fusion prématurée selon le témoin Chevalier (témoignage écrit page 9), signifierait une fin d'exercice financier dans GMi et le paiement des taxes sur le capital et impôt sur le revenu pour une période où ces charges sont les plus élevées. Dans son témoignage écrit (page 2) le témoin Gervais a relaté les principaux éléments susceptibles d'avoir une influence sur le coût d'une émission de dette par l'émetteur, le commandité, qui sont en général:

1- la nature des activités de l'émetteur,

2- la taille de l'émetteur,

3- l'environnement réglementaire, s'il y a lieu,

4- le niveau d'endettement,

5- la rentabilité de l'entreprise et sa stabilité,

6- le rang de la dette,

7- les engagements financiers,

8- l'admissibilité aux fins de placement des titres.

Au procureur de la Régie, le témoin Gervais a affirmé que l'émetteur devait être la compagnie GMi et non la Société en commandite à cause de la nécessité de titres émis par une corporation comme titres éligibles pour fins d'investissements par les institutions financières. De plus, le témoin Gervais a ajouté:

> *"Par contre, cette créance-là sera cautionnée ou garantie par la société, de telle sorte que les prêteurs ont une vue directe sur les actifs de la société qui est vraiment l'entité opérante." (T.S. 5 décembre 1990, page 376-377)*

"Donc eux auront un titre de GMi inc. garanti par la société et, en plus, ils auront le prêt de GMi inc. comme collatéral pour sécuriser le prêt. Donc c'est... même si GMi est l'émetteur, c'est vraiment la société qui est garante de la dette."

"C'est la société qui, au point de vue économique, est vraiment le créancier. Au point de vue légal, il y a un artifice, si on peut dire, pour contourner le probème d'admissibilité aux fins de placement." (T.S., 5 décembre 1990, page 378)

La Régie comprend que l'évaluation financière des institutions prêteuses tiendra compte des deux entités indissociables, le commandité et la Société en commandite, comme le témoin Gervais les désigne respectivement, "l'entité garante et l'entité opérante" (T.S., 5 décembre 1990, page 382).

La Régie est également d'avis qu'elle-même aura droit de regard sur ces deux entités dans l'exercice de son pouvoir de surveillance.

4.3.2) Activités réglementées de la Société en commandite

Dans sa requête, la requérante déclare vouloir prendre des mesures afin de facilement identifier les activités réglementées et afin de continuer de les dissocier des activités non réglementées (allégué 24).

La Société en commandite qui sera détentrice des droits exclusifs de distribution conservera les activités non réglementées actuelles du distributeur GMi et de la Société en commandite Gaz Plus.

Pour éviter un aspect fiscal défavorable que causerait un transfert actuel des activités non réglementées à une autre entité, compagnie ou société du groupe, il a été attesté qu'un tel transfert pourrait être effectué dans un délai d'environ deux ans. (T.S. témoin Chevalier le 5 décembre 1990, page 449)

La Régie doit ici souligner que l'objectif de séparation des activités est envisagé depuis plusieurs années dans le groupe corporatif du distributeur GMi, et qu'il a été même spécifiquement placé en priorité lors de la prise de contrôle par Noverco. (décision G-447 le 6 juin 1986 pages 5,6,8 et 9)

La Régie exprime le souci d'une transparence dans les livres de la Société en commandite et de son commandité et incite toutes les parties du groupe corporatif à collaborer aux mesures qui seront prises, entre temps, pour facilement identifier et dissocier les deux types d'activités. Les rapports mensuels et annuels réglementaires, les dossiers d'une cause tarifaire et d'une fermeture des livres, entre autres, seront les guides de surveillance de cette situation intérimaire.

4.3.3) Conclusion de la Régie

La Régie est satisfaite, de la preuve reçue et entendue, que son pouvoir de surveillance des opérations du distributeur pourra être exercé de la même façon à l'égard d'une Société en commandite que d'une compagnie.

Tenant compte des interrelations civiles et commerciales particulières dans le premier cas, soit entre une Société en commandite et ses commanditaires et son commandité, soit entre cette société et indirectement les actionnaires véritables des compagnies intermédiaires du groupe corporatif du distributeur, aucune objection n'a été formulée ni appréhendée quant à la surveillance de la Régie.

La Régie a pu constater la volonté des gestionnaires de continuer de lui produire toutes les informations susceptibles de dissocier clairement les activités réglementées des activités non réglementées, depuis leur accomplissement jusqu'à leurs ultimes impacts, s'il y en a, dans les livres financiers de l'entreprise de gaz et les livres corporatifs. (T.S. témoin Normand, 5 décembre 1990 pages 397-398)

4.4) Suivis juridique, administratif et comptable

A la demande de la Régie, la requérante produira les documents et informations utiles au suivi des transactions dans l'échéancier devant mener à une transformation complète du groupe corporatif le 1er octobre 1991.

Cette date limite est établie pour la fusion de la compagnie GMi et de Noverco II et l'approbation des créanciers. (GMi 6 d.3, page 2 et T.S. témoin Beaulieu, 4 décembre 1990 page 137)

La requérante produira donc tous documents et toutes informations permettant un suivi aux niveaux juridique, administratif et comptable d'ici cette date alors qu'un dossier complet devra être soumis à la Régie, distinctement des dossiers de fermeture des livres au 30 septembre 1991 et de tarification du 1er octobre 1991.

Plus précisément, entre temps, la requérante produira:

1- projet de lettre d'amendement aux autorités fiscales (témoin Chevalier);

2- bilans d'ouverture pro forma de Société GMi et Gaz Métropolitain inc.;

3- copie des actes, documents, engagements et statuts, mise à jour juridique (suivi légal et contractuel) (témoin Beaulieu);

4- suivi comptable - états financiers, rapports d'étapes (témoins Marcoux et Normand);

5- documents à l'appui de la demande de décision anticipée, (GMi 2- 19 documents); et toutes modifications ou mises à jour;

6- états financiers les plus récents de Société en commandite Gaz Plus.

(T.S. Me Lassonde, 11 décembre 1990, page 465).

5.- SOMMAIRE - AVIS FAVORABLE

Cette analyse de la proposition de réorganisation du groupe corporatif dont fait partie le distributeur GMi permet à la Régie d'émettre un avis favorable au gouvernement en vue du transfert des droits exclusifs de distribution.

Ce projet de réorganisation n'affectera pas l'intégrité financière ni l'intégrité des opérations du nouveau distributeur, Société en commandite. Les engagements d'investissement pour le développement des infrastructures du réseau de distribution et dans des activités complémentaires constituent un signe de continuité d'amélioration du service au consommateur.

La neutralité de la réorganisation face au consommateur par le coût de service du distributeur signifie l'entière protection contre toute imputation de frais ou de charges dues à la nouvelle structure.

Les frais de réorganisation comme les charges additionnelles résultant d'une possible modification de cote de crédit reliée à un fait ou événement ou cause quelconque rattaché à la réorganisation, seront tous imputés aux trois actionnaires du groupe.

ANNEXE (I)

Procureurs et témoins en audiences publiques

Procureurs:

Me Richard Lassonde et Me Line Ouellet, GMi -(assistés de Me Henri-Louis Fortin, Stein, Monast avocats, et Me Pierre S. Boivin, Soquip).

Me Georges Audet, Heenan Blaikie, ACIG

Me Pierre Théroux, Régie

Témoins:

M. André Caillé, Président, chef de la direction, GMi

M. Robert Normand, Vice-président, Finances et réglementation

Me Jean-Paul Beaulieu, Directeur finances, trésorier

M. Donald Hotte, Directeur affaires réglementaires

M. Denis Marcoux, Directeur comptabilité et budgets

M. Serge Chevalier, c.a. - Raymond, Chabot, Martin, Paré (Noverco)

M. François Gervais, Vice-président et administrateur Wood Gundy Inc.

M. Marcel Dutil, Président, Canam Manac

M. Yves Rheault, Président, Soquip

ANNEXE (II B)

DOMINION BOND RATING SERVICE LIMITED

200 King Street West, Suite 1304,
Sun Life Centre, West Tower, P.O. Box 34,
Toronto, Ontario M5H 3T4

Telephone (416) 593-5577
Fax (416) 593-8432

DBRS

November 30, 1990

Gaz Metropolitain, inc.
Mr. Jean-Paul Beaulieu
P.O. Box 6111, Station 'A'
Montreal, Quebec
H3C 3H9

Dear Jean-Paul:

As requested, we are responding to give our opinion on the proposed structural changes being considered for Gaz Metropolitain.

In general, it is the opinion of DBRS that the new structure, as proposed, should have no significant impact on the level of protection provided for the holders of long term debt instruments issued by Gaz Metropolitain. This opinion is based on our understanding of the new proposed structure, and assumes that this new structure can be legally implemented as planned.

Thank you for your time in detailing your plans with us. Please feel free to call if we can be of further assistance.

Yours truly,

Kent S. Wideman
Financial Analyst

KSW:pp

GMi-7

ANNEXE (II A)

Canadian Bond Rating Service

Suite 810
1600 René-Lévesque Blvd. West
Montreal, Quebec H3H 1P9
Tel.: (514) 937-9557 • Fax: (514) 937-0676

December 10, 1990

Jean-Paul Beaulieu
Director, Corporate Finance
and Treasurer
Gaz Metropolitain,inc
1717 du Havre Street
Montreal, Quebec
H2K 2X3

RATING COMMITTEE DECISION

Dear Mr. Beaulieu,

The CBRS Rating Committee has reviewed the proposed reorganization of Gaz Metropolitain inc. ("GMi").

Our preliminary finding, based on information provided by the Company is that the proposed reorganization should have no material impact on the creditworthiness of the first mortgage bonds and debentures of GMi.

Our conclusion is subject to favourable approval from:

(i) La Regie du gaz naturel
(ii) Government of Quebec
(iii) Debtholders
(iv) Income tax ruling

In addition, we understand that the full cost of the reorganization will be borne by the shareholders and that the subordinated debt at the GMi level will be truly subordinated in all respects.

Subject to the successful completion of all the above and review of final documentation, CBRS will then issue a final report confirming its preliminary analysis.

Brian I. Neysmith, Chairman
CBRS Rating Committee

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Document 2
Page 1 de 1
Cause R-3186-90

Original: 1990.12.11

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Kent S. Wideman
Financial Analyst

KSW:pp