SUBMISSION ON BEHALF OF

THE MANITOBA INDUSTRIAL POWER USERS GROUP

IN REGARD TO AN INTERIM RATE INCREASE

FOR MANITOBA HYDRO EFFECTIVE APRIL 1, 2011

Submitted to:

The Manitoba Public Utilities Board

On behalf of:

Manitoba Industrial Power Users Group

March 9, 2011

TABLE OF CONTENTS

1.0 BACKGROUND 1
1.1 2010/11 INTERIM RATES 1
1.2 2011/12 INTERIM RATES 1
2.0 CONTEXT OF PROPOSED RATE INCREASE 2
3.0 LIMITED JURISDICTION TO GRANT INTERIM RATE INCREASES 4
4.0 DOES MANITOBA HYDRO MEET THE TEST FOR AN INTERIM RATE INCREASE? 9
4.1 QUANTUM AND NEED FACTORS 9
4.2 PUBLIC INTEREST FACTORS 10
5.0 SUMMARY AND RECOMMENDATIONS 11
ATTACHMENT 1 – BELL CANADA *v.* CANADA [1989] 1 S.C.R. 1722 ..... A-1
ATTACHMENT 2 - EUB DECISION 2005-099 AUGUST 29 2005 ..... A-2

LIST OF TABLES

Table 1: Comparison of General Consumer Electricity Rate Increases 1990 through 2012 2

1.0 BACKGROUND

1.1 2010/11 INTERIM RATES

In Order 18/10, the Board approved by majority decision an interim 2.9% rate increase effective April 1, 2010 for most general consumer rate classes (excluding area and roadway lighting). The majority decision noted the following considerations in approving the interim rates effective April 1, 2010:

- Manitoba Hydro's ("MH") forecast net income for fiscal 2010 of $121 million from electricity operations is a drop of $167 million from the previous year, due to decreases in both domestic and export sales revenues.
- MH's projected expenses were "relatively stable" between the last two Integrated Financial Forecasts and the Board majority saw MH's GRA filings in a similar light to its prior GRA filing, that is replete with issues and concerns with the numerous risk factors set out in prior Orders (including drought protection; IFRS; illiquid equity; extensive capital plans and capitalizations; and export prices).
- The timing of the GRA process will be extended from the usual duration of past experience, primarily due to the Board's review of MH's risk and risk management issues. The Board majority noted MH ought not to be penalized financially for not being able to present and defend its rate increase requests in a timely manner when the cause of the delay was not foreseen or planned by MH.

In the dissenting opinion, the Board minority noted MH has repeatedly missed filing deadlines set in past Board Orders. The Board minority also noted the interest of consumers is another factor the Board must take into consideration in assessing the public interest.

1.2 2011/12 INTERIM RATES

On January 31, 2011, the Board asked intervenors to consider the question of whether the Board should grant MH an interim rate increase effective April 1, 2011.[1] The Board Chair described a number of factors intervenors could consider, but also invited them to expand the scope of their submissions beyond those specifically identified by the Board. The Board also indicated Hydro should file certain IFF scenarios and additional information prior to the intervenor submissions on interim rates for April 1, 2011.

[1] January 31, 2011 transcript, beginning page 2477.

2.0 CONTEXT OF PROPOSED RATE INCREASE

If approved, a 2.9% interim rate increase effective April 1, 2011 would be the second consecutive interim increase and the fourth consecutive year with rate increases in excess of actual CPI and the Bank of Canada's annual inflation target of 2%.[2] This pace of rate increases for Manitoba Hydro is unprecedented in the history of rate regulation in Manitoba. Table 1 shows the cumulative percentage increases over the nine years from 2004 through 2012 would exceed the cumulative percentage rate increases for the 14-year period from 1990 through 2003. Further, rate increases from 2004 through 2012 would significantly exceed the pace of Manitoba's CPI increase over the same period.

Table 1: Comparison of General Consumer Electricity Rate Increases 1990 through 2012[3][4]

Fiscal Year Ending	Rate Increase %	Board Order	Manitoba Calendar Year CPI
2012 proposed	2.90%	18/10	-
2011 Interim	2.90%	18/10	-
2010	2.90%	32/09	0.8%
2009	5.00%	90/08	0.6%
2007	2.25%	20/07	2.0%
2005	2.25%	34/05,101/04	2.7%
2004	5.00%	101/04	2.0%
2003	-0.72%	07/03	1.8%
1997	1.30%	51/96	2.0%
1996	1.50%	51/96	2.2%
1995	1.20%	62/94	2.7%
1994	1.20%	62/94	1.4%
1992	2.65%	25/92	1.4%
1991	3.10%	29/91	5.1%
1990	4.00%	43/90	4.5%
Cumulative Rate Increase 2004-2012		24.68%	
Cumulative Rate Increase 1990-2003		15.07%	
Cumulative MB CPI 2004-2010		10.79%	
Cumulative MB CPI 1990-2003		33.60%	

[2] In November 2006, the Bank of Canada renewed its target range of 1 to 3 per cent through the end of 2011. Monetary policy is aimed at keeping inflation at the 2 per cent target midpoint.

[3] Rate increases for 2006/07 through 2010/11 are for general consumers excluding area and roadway lighting.

[4] Manitoba Consumer Price Index data from CANSIM Table 326-0021.

The April 1, 2011 interim rate increase would also come during a time when Manitoba's economy is still recovering from the recent economic downturn. Manitoba Finance forecasts inflation for the fiscal year ending in 2012 to be a modest 2.1%[5].

[5] Province of Manitoba. Mid-Year Report on Manitoba's five-year economic plan. December 2010.

3.0 LIMITED JURISDICTION TO GRANT INTERIM RATE INCREASES

The Public Utility Board is a creature of statute. It has no inherent jurisdiction to order interim relief.

The Supreme Court of Canada reviewed the purpose of interim orders in a Bell Canada case and held as follows[6]:

> By virtue of s. 60(2) of the *National Transportation Act*, the appellant also has the power to make interim orders:
> **60.**...
>
> (2) The Commission may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.
> **.....**
> Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. **The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order** (emphasis added).
>
> In Decision 84-28, the appellant granted the respondent an interim rate increase on the basis of the following criteria which, for convenience, I cite again (at p. 9):
>
> > The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that **could result in a serious deterioration in the financial**

[6] Bell Canada *v.* Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722 at pp 34-35.

> **condition** of an applicant **absent a general interim increase**.
>
> Decision 84-28 was **truly an interim decision** since it did not seek to decide in a preliminary manner an issue which would be dealt with in the final decision. Instead, the appellant granted the interim rate increase on the **basis that such an increase was necessary in order to prevent the respondent from having serious financial difficulties** (emphasis added).

The Supreme Court of Canada's decision is instructive. At first blush, the authority to grant an interim rate increase by virtue of s. 60(2) of the *National Transportation Act* seems unfettered - there are no express conditions. However, the Court notes that the purpose of interim orders is to "to provide temporary relief against the deleterious effects of the duration of the proceedings" and required proof of "serious financial consequences".

These proceedings are underway and scheduled to be completed in the third week of June- some 3 months after the April 1, 2011 date. This is not a long period of time[7]. Second, MH's financial position in 2011 is expected to continue to improve even without a further rate increase.

It is submitted that in Manitoba, the legislature has explicitly prescribed an "urgency" test with respect to interim rate increases. In the alternative, s.47(2) should be interpreted so as to include the implicit requirement that there needs to be special circumstances for the Board to exercise this discretionary power. The Public Utility Board's jurisdiction is set out in *The Public Utilities Board Act*, as follows:

> **ORDERS OF THE BOARD**
>
> **Power to order partial or other relief**
> 44(1) Upon any application to it, the board may make an order granting the whole or part only of the application or may grant such further or other relief in addition to or in substitution for that applied for, as fully and in all respects as if the application had been for such partial, further or other relief.
>
> **Interim order**
> 47(2) The board may, instead of making an order final in the first instance, make an interim order and reserve further directions, either for an adjourned hearing of the matter, or for further application.
>
> **Orders involving expense to parties to be after notice and hearing**

[7] This is roughly similar to the schedule for the 2008 GRA where closing submissions were heard May 2, 2008 and May 23, 2008 with rates implemented effective July 1, 2008 as approved in Order 90/08. Interim rates were not requested by Manitoba Hydro nor implemented by the Board in the 2008 GRA proceeding.

> 48 The board shall not make an order involving any outlay, loss, or deprivation to any owner of a public utility, or any person without **due notice and full opportunity to all parties concerned**, to produce evidence and be heard at a public hearing of the board, **except in case of urgency**; and in that case, as soon as practicable thereafter, the board shall, on the application of any party affected by the order, re-hear and reconsider the matter and make such order as to the board seems just [8] (emphasis added).

Like the legislation in the Bell case, *The Public Utilities Board Act* confers a fairly broad discretion to issue interim orders. The orders of the Board can be non-financial in nature. For example, the Board can order MH to produce documents and relevant information. However, if an interim order is with respect to an increase in rates (i.e. an order involving an outlay to ratepayers), pursuant to s. 49, which applies to final orders and to interim orders, there must be a case of urgency if it wishes to increase rates before the parties have had a full opportunity to be heard.

If the Board determines a case of urgency has been proven, the Board has the jurisdiction to order refunds under s. 28 of *The Crown Corporations Public Review and Accountability Act* C.C.S.M. c. C336:

> **When** a new rate for services or **an increased rate is allowed pursuant to an interim order** and a final order does not allow any changes or allows changes other than those permitted in the interim order, **the Public Utilities Board may make any order** to compensate for or **to refund any excess amounts collected by the corporation** that it considers necessary and appropriate in the circumstances.

While this section gives the Board flexibility to reimburse consumers for all or a portion of an excessive interim rate, some issues arise. The existence of these issues further supports MIPUG's submission that the Board's discretion to order interim rate increases was only intended in cases of urgency, or in the alternative special circumstances.

In the following paragraphs some of these issues are identified.

One issue is the administrative cost to process and to deliver a refund payment to each of the approximately 500,000 ratepayers. If its costs $2.00 per ratepayer refund for administrative costs, stationary costs and postage, the costs may be in the range of 1 million dollars. In addition, if a ratepayer moves out of Manitoba, the ratepayer would not receive the refund.

Making a decision on an interim rate after only hearing most of Manitoba Hydro's case and in the absence of any special need to do so puts the Board in a position of setting rates before being fully informed.

[8] *The Public Utilities Board Act* C.C.S.M. c. P280.

For example, the Board has not heard any evidence on the COSS ratios. MIPUG's pre-filed evidence support a case that rates need to be adjusted between classes. In particular, the residential rates are below cost. By ordering an across the classes interim increase without considering how the increase, if any, is allocated between customer classes, the Board may aggravate the issue. Unless they are adjusted in the final order, the inequity between customer classes will continue for two additional years.

Procedural rules enacted by a statutory tribunal cannot expand the jurisdiction. However, part of the Board's rules on *ex-parte* interim orders has some features which are similar to the Bell case requirements and the requirements in s. 48 of *The Public Utility Board Act.*

The Board's *Rules of Practice and Procedure* set out the following test at section 24(2) with regard to the circumstances in which a party may apply for an interim *ex-parte* order:

> 24(2) An application for an interim *ex-parte* order shall only be made:
>
> (a) if emergency circumstances exist; or
> (b) if there is urgency where, in the Board's opinion, when balancing the interest of providing notice of an application with the financial health of the Applicant, it is deemed just and reasonable to proceed *ex parte*; or
> (c) for purposes of efficiency; or
> (d) for such other special circumstances as may be determined by the Board; and
> (e) if the applicant provides full disclosure as to why the application should proceed *ex parte.*

A similar test to that used by the Board in its *Rules of Practice and Procedure* has been applied by the Alberta Utilities Commission (formerly the Alberta Energy and Utilities Board) in Decision 2005-099 with regard to interim rate applications. The decision sets out that the following two groups of factors may be employed to evaluate whether an interim rate application is justified[9]. These factors may be given different weighting depending on the specific circumstances surrounding each application.

Quantum and Need Factors

Quantum and need factors relate to the specifics of the requested rate increase and include the following:

- The identified revenue deficiency should be probable and material.
- Is the increase required to preserve the financial integrity of the applicant or to avoid financial hardship to the applicant?
- Can the applicant continue safe utility operations without the interim adjustment?
- Contentious items may be excluded from the amount collected.

[9] EUB Decision 2005-099(August 29, 2005) at page 7-8.

General Public Interest Factors

If all or a portion of the suggested rate increase appears appropriate after a consideration of the quantum and need factors, the Board must assess certain general public interest factors to determine if the interim rate increase is justified, including the following:

- Interim rates should promote rate stability and ease rate shock.
- Interim rates should maintain intergenerational equity.
- Interim rate increases may be required to provide appropriate price signals to customers.
- The use of carrying costs may be considered to avoid interim rate increases.
- It may be appropriate to apply the interim rider on an across-the-board basis.

4.0 DOES MANITOBA HYDRO MEET THE TEST FOR AN INTERIM RATE INCREASE?

MIPUG submits that Manitoba Hydro does not meet the urgency test or the alternate test of special circumstances.

First, Manitoba Hydro has not applied for an interim rate increase and has not provided information on why an interim increase would be required. In addition, it has given notice in an email from its Counsel dated March 2, 2011 that:

> … in response to the Chairman's remarks on January 31, 2010 requesting Manitoba Hydro's Manitoba Hydro's 20 Year Financial Outlook and related scenarios, I am instructed to advise that Manitoba Hydro's 20 Year Financial Outlook will be presented to the Audit Committee of the Manitoba Hydro Board on March 14, 2011. Subject to Audit Committee approval, the 20 Year Financial Outlook will be filed with the Public Utilities Board and intervenors. The 20 Year Financial Outlook contains a number of sensitivities and alternative development sequences which should, for the most part, respond to PUB/MH/Pre-Ask 4.

This information was to be filed by Manitoba Hydro by March 9, 2011. During the KPMG testimony, it was discovered that Manitoba Hydro changed the terms and conditions of the KPMG to remove the requirement of an analysis by KPMG of the identified business and operational risks. Given this apparent indifference to the Board's Order 32/09 and the failure to file any application to justify an interim rate increase, it is submitted that the Board should not, of its own initiative proceed with an interim rate increase. The Board can and should refuse to exercise discretion in these circumstances.

It is MIPUG's position that the facts currently on the record in the 2010/11 and 2011/12 GRA do not support a case for urgency or of special circumstances of the nature required to approve an interim rate increase.

4.1 QUANTUM AND NEED FACTORS

With regard to Manitoba Hydro's current application, in MIPUG's view, the facts do not support a finding of urgency of material quantum and need:

- Forecast electricity operations net income for 2010/11 and 2011/12 increased from $78 million and $87 million respectively in IFF-09 to $149 million and $125 million in IFF-10.
- Forecast electricity operations retained earnings for 2010/11 and 2011/12 increased from $2,261 million and $2,331 million in IFF-09 to $2,354 million and $2,479 million in IFF-10.

- Manitoba Hydro's quarterly report ending December 31, 2010 indicates extraprovincial revenues for the first nine months of 2010/11 were higher in both absolute dollar terms and average revenue per unit sold compared to the first nine months of 2009/10[10].
- IFF-10 also indicates new short-term and long-term debt rates are forecast to be lower through 2013/14 relative to IFF-09.
- Manitoba Hydro indicates water in storage through December 2010 is higher than 2009 and well above average.[11]

Manitoba Hydro does not have an urgent need for an interim rate increase. The fact that it may be 3 months before a final decision is pronounced does not meet the urgency test or the alternate test of special circumstances.

4.2 PUBLIC INTEREST FACTORS

The minority decision in Order 18/10 noted the interest of consumers is another factor that the Board must take into consideration in assessing the public interest. In that Order, it was noted the economic conditions of the past year resulted in trying times and challenges for consumers. Those challenges continue as the economic recovery proceeds at a slower pace than may have been expected at the time Order 18/10 was issued. Domestic consumers in Manitoba have had to make adjustments to their spending in response to economic conditions. It is reasonable to expect Manitoba Hydro to do the same while the Board and Intervenors consider and test the evidence in the current GRA.

MIPUG submits that given the current economic conditions, a consideration of public interest factors suggest ratepayers should not be burdened with an additional interim rate increase.

[10] $329 million on 8.6 billion kW.h in 2010/11 compared to $328 million on 9.1 billion kW.h sold in 2009/10.

[11] Page 52. Manitoba Hydro Presentation to the Public Utilities Board. January 5, 2011.

5.0 SUMMARY AND RECOMMENDATIONS

In summary, MIPUG notes the following with respect to the consideration of interim rates for Manitoba Hydro effective April 1, 2011:

1. There is no basis in evidence to conclude Manitoba Hydro has an urgent need for interim rate relief, or in the alternative, that there are special circumstances to make such an award.

2. Domestic consumers in Manitoba have been subjected to a series of rate increases in excess of inflation over the past several years. They are also already paying an existing interim rate increase. A consideration public interest factors indicates ratepayers should not be burdened with an additional interim rate increase.

Therefore, MIPUG submits that the Board should not award Manitoba Hydro a further interim rate increase at this time.

ATTACHMENT 1

BELL CANADA V. CANADA [1989] 1 S.C.R. 1722

Bell Canada *v.* Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722

The Canadian Radio-Television and Telecommunications Commission *Appellant*

v.

Bell Canada *Respondent*

and

The Attorney General of Canada, the Consumers' Association of Canada, the Canadian Business Telecommunications Alliance, CNCP Telecommunications and the National Anti-Poverty Organization *Interveners*

indexed as: bell canada *v.* canada (canadian radio-television and telecommunications commission)

File No.: 20525.

1989: February 21; 1989: June 22.

Present: Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

on appeal from the federal court of appeal

Administrative law -- CRTC jurisdiction -- CRTC ordering Bell Canada to grant a one-time credit to its customers -- Order to remedy imposition of interim rates approved by CRTC in 1984 and 1985 and found to be excessive in 1986 -- Whether CRTC had jurisdiction to make such an order -- Whether CRTC's interim rate order may be reviewed in a retrospective manner -- Whether CRTC's power to fix "just and reasonable" rates for Bell Canada involves the regulation of its revenues -- Railway Act, R.S.C., 1985, c. R-3, ss. 335(1), (2), (3), 340(5) -- National Transportation Act, R.S.C., 1985, c. N-20, 52, 60, 66, 68(1).

In March 1984, Bell Canada filed an application with the CRTC for a general rate increase. To prevent a serious deterioration in Bell Canada's financial situation while awaiting the hearing and the final decision on the merits, the CRTC granted Bell Canada an interim rate increase of 2 per cent effective January 1, 1985. The interim rate increase was calculated on the basis of financial information provided by Bell Canada. In its decision, however, the CRTC clearly expressed the intention to review this interim rate increase in its final decision on Bell Canada's application on the basis of complete financial information for the years 1985 and 1986. In 1985, given Bell Canada's improved financial situation, the CRTC ordered Bell Canada to file revised tariffs effective as of September 1, 1985. As a result of this decision, Bell Canada was forced to charge the rates effective before its application for a rate increase filed in March 1984. These new rates too were interim in nature. In October 1986, notwithstanding Bell Canada's request to withdraw its initial application for a general rate increase, the CRTC reviewed Bell Canada's financial situation and the appropriateness of its rates. The CRTC established appropriate levels of profitability for Bell Canada on the basis of its return on equity and found that, in 1985 and 1986, it had earned excess revenues for a total of $206 million. Although Bell Canada always charged rates approved by the CRTC, the latter decided that Bell Canada could not retain these excess revenues and ordered it to distribute the excess revenues through a one-time credit to be granted to certain classes of customers. On appeal, the Federal Court of Appeal quashed the

CRTC's order. This appeal is to determine (1) whether the CRTC had the legislative authority to review the revenues made by Bell Canada during the period when interim rates were in force; and (2) whether the CRTC had jurisdiction to make an order compelling Bell Canada to grant a one-time credit to its customers.

Held: The appeal should be allowed.

The CRTC's decisions are subject to appeal to the Federal Court of Appeal on questions of law or jurisdiction by virtue of s. 68(1) of the *National Transportation Act*. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise. Here, Bell Canada is challenging the CRTC's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the CRTC when it makes interim decisions. This question cannot be solved without an analysis of the procedural scheme created by the *Railway Act* and the *National Transportation Act*. The decision impugned by Bell Canada is therefore not a decision which falls within the CRTC's area of special expertise and is pursuant to s. 68(1) subject to review in accordance with the principles governing appeals. Indeed, the CRTC was not created for the purpose of interpreting the *Railway Act* or the *National Transportation Act* but rather to ensure, amongst other duties, that telephone rates are always "just and reasonable".

The fixing of tolls and tariffs that are "just and reasonable" necessarily involves, albeit in a seemingly indirect manner, the regulation of the revenues of the regulated entity as the administrative tribunal must balance the interests of the customers with the necessity of ensuring that the regulated entity is allowed to make sufficient revenues to finance the costs of the services

it sells to the public. In fixing fair and reasonable tolls in this case, the CRTC had to take into consideration the level of revenues needed by Bell Canada.

The CRTC had the power to revisit the period during which interim rates were in force. Such power is implied in the power to make interim orders within the statutory scheme established by the *Railway Act* and the *National Transportation Act*. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. It is the interim nature of the order which makes it subject to further retrospective directions. The circumstances under which they are granted also explains and justifies their being, unlike final orders, subject to retrospective review and remedial orders. Interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are traditionally granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. To hold in this case that the interim rates could not be reviewed would not only be contrary to the nature of interim orders, it would also frustrate and subvert the CRTC's order approving interim rates which clearly indicates its intention to review the rates charged for 1985 up to the date of the final decision.

There should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. The added flexibility provided by the power to make interim orders is meant to foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which

interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable.

Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the CRTC is empowered to make orders as of the date at which the initial application was made or as of the date the CRTC initiated the proceedings of its own motion. The power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, the rate review process does not begin at the date of the final hearing; instead, the rate review begins when the CRTC sets interim rates pending a final decision on the merits.

Finally, once it is decided that the CRTC has the power to revisit the period during which interim rates were in force for the purpose of ascertaining whether they were just and reasonable, it follows that it has the power to make a remedial order where, in fact, these rates were not just and reasonable. In any event, s. 340(5) of the *Railway Act* provides a sufficient statutory basis for the power to make remedial orders including an order to give a one-time credit to certain classes of customers. While the one-time credit order will not necessarily benefit the customers who were actually billed excessive rates, once it is found that the CRTC has the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue.

Cases Cited

Approved: *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705; **referred to**: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*,

[1979] 2 S.C.R. 227; *Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245; *Alberta Union of Provincial Employees v. Board of Governors of Olds College*, [1982] 1 S.C.R. 923; *Re Ontario Public Service Employees Union and Forer* (1985), 52 O.R. (2d) 705; *Re City of Ottawa and Ottawa Professional Firefighters' Association, Local 162* (1987), 58 O.R. (2d) 685; *Greyhound Lines of Canada Ltd. v. Canadian Human Rights Commission* (1987), 78 N.R. 192; *Canadian Pacific Ltd. v. Canadian Transport Commission* (1987), 79 N.R. 13; *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] S.C.R. 837; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *City of Calgary v. Madison Natural Gas Co.* (1959), 19 D.L.R. (2d) 655; *United States v. Fulton*, 475 U.S. 657 (1986); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978); *Regina v. Board of Commissioners of Public Utilities* (1966), 60 D.L.R. (2d) 703; *Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission* (1978), 87 D.L.R. (3d) 727; *Nova v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437.

Statutes and Regulations Cited

CRTC Telecommunications Rules of Procedure, SOR/79-554, Parts III, VII.

National Energy Board Act, R.S.C., 1985, c. N-7, s. 64.

National Transportation Act, R.S.C., 1985, c. N-20, ss. 49, 52, 60(2), 61, 66, 68(1).

Railway Act, R.S.C., 1985, c. R-3, ss. 334 to 340.

APPEAL from a judgment of the Federal Court of Appeal, [1988] 1 F.C. 296, 43 D.L.R. (4th) 30, 78 N.R. 58, quashing an order of the CRTC. Appeal allowed.

Raynold Langlois, Q.C., *Greg Van Koughnett*, and *Luc Huppé*, for the appellant.

Gérald R. Tremblay, Q.C., and *Michel Racicot*, for the respondent.

Graham Garton, for the intervener the Attorney General of Canada.

Janet Yale, for the intervener the Consumer's Association of Canada.

Kenneth G. Engelhart, for the intervener the Canadian Business Telecommunications Alliance.

Michael Ryan, for the intervener CNCP Telecommunications.

Andrew Roman and *Robert Horwood*, for the intervener the National Anti-Poverty Organization.

//*Gonthier J.*//

The judgment of the Court was delivered by

GONTHIER J. -- The present case is an appeal against a decision of the Federal Court of Appeal which quashed one of the orders made by the appellant in Telecom Decision CRTC 86-17 ("Decision 86-17"). The impugned order compelled the respondent to distribute $206 million in excess revenues earned in the years 1985 and 1986 through a one-time credit to be granted to certain classes of customers. The respondent does not contest the factual findings on which Decision 86-17 is based nor does it claim that this order would unduly prejudice its financial position. None of the other orders made in Decision 86-17 are challenged.

The appellant claims that the purpose of the challenged order was to provide telephone users with a remedy against interim rates which turned out to be excessive on the basis

of the findings of fact made by the appellant following a final hearing held in the summer of 1986 for the purpose of setting rates to be charged by the respondent in the years 1985 and following. These findings of fact are reported in Decision 86-17. Since this case turns on the proper characterization of the one-time credit order made in Decision 86-17, it is important to describe the procedural history of the administrative proceedings which led to the order now contested by the respondent.

I - The facts

On March 28, 1984, the respondent applied for a general rate increase under Part VII of the *CRTC Telecommunications Rules of Procedure*, SOR/79-554, which provides for a summary public process to deal with special applications. The respondent claimed that the Canadian Government's restraint program restricting rate increases of federally regulated utilities to 5 per cent and 6 per cent was sufficient justification to dispense with the normal procedure for general rate increase applications set out in Part III of the *CRTC Telecommunications Rules of Procedure*. In Telecom Decision CRTC 84-15, the appellant rejected this application on the ground that the respondent had failed to use the appropriate procedure set out in Part III of these rules. However, the appellant indicated that if the respondent was to suffer financial prejudice as a result of the delays involved in preparing for the more complex procedure set out in Part III, it could always apply for interim relief pending a hearing and a decision on the merits (at pp. 8-9):

> The Commission recognizes that, in 1985 and beyond, in the absence of rate relief, a deterioration in the Company's financial position could occur. In this regard, if the Company should find it necessary to file an application for a general rate increase under Part III of the Rules, the Commission would be prepared to schedule a public hearing on such an application in the fall of 1985. Should Bell consider it necessary to seek rate increases to come into effect earlier in 1985 than this schedule would allow, it may of course apply for interim relief. In the event Bell were to seek such interim relief, it would be open to the Company to suggest that the Commission's traditional test for determining interim rate applications is overly restrictive in light

> of the Commission hearing schedule and to put forward proposals for an alternative test for consideration. [Emphasis added.]

On September 4, 1984, the respondent filed an application for a general rate increase based on 1985 financial data which would come into effect on January 1, 1986. At the same time, the respondent applied for an interim rate increase of 3.6 per cent.

In Telecom Decision CRTC 84-28 ("Decision 84-28") rendered on December 19, 1984, the appellant set out the following policy previously adopted in Telecom Decision CRTC 80-7 with respect to the granting of interim rate increases (at pp. 8-9):

> The Commission's policy concerning interim rate increases, enunciated in Decision 80-7, is as follows:
>
> > The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an applicant absent a general interim increase. [Emphasis added.]

The respondent argued that its financial situation warranted an interim rate increase and did not question the reasonableness of this policy. The appellant agreed with the respondent's submission that, in the absence of interim rate increases, it might suffer from serious financial deterioration and awarded an interim rate increase of 2 per cent. In this decision, the appellant required the respondent to prepare for a hearing to be held in the fall of 1985 for the purpose of assessing the respondent's application for a final order increasing its rates on the basis of two test years, 1985 and 1986. Decision 84-28 also states at p. 10 the reasons why the interim rate increase was set at 2 per cent:

> In determining the amount of interim rate increases required under the circumstances, the Commission has taken into account the following factors:
>
> 1) While the company stated that an interest coverage ratio of 4.0 times is required, the Commission regards the maintenance of the coverage ratio of 3.8 times, projected by the Company for 1984, as sufficient for the purposes of this interim decision.
>
> 2) With regard to the level of ROE ["return on equity"], the Commission is of the view that, for 1985, and subject to review in the course of its consideration of the Company's general rate increase application in the fall of 1985, 13.7% is appropriate for determining the amount of rate increases to be permitted pursuant to this interim increase application.
>
> 3) With regard to the Company's 1985 expense forecasts, the Commission notes that the inflation factor used by the Company is higher than the current consensus forecast of the inflation rate for 1985 and considers that Bell's forecast of its 1985 Operating Expenses could be overestimated by approximately $25 million.
>
> Taking the above factors into account, the Commission has decided that an interim rate increase of 2% for all services in respect of which rate increases were requested by the Company in the interim application is appropriate at this time. This increase is expected to generate additional revenues of $65 million from 1 January 1985 to 31 December 1985. To permit the review of the Company's 1985 revenue requirement by the Commission at the fall 1985 public hearing, Bell is directed to file its 4 June 1985 general rate increase application on the basis of two test years, 1985 and 1986. [Emphasis added.]

The reasons set out in the appellant's decision indicate that the interim rate increase was calculated on the basis of financial information provided by the respondent without placing this information under the scrutiny normally associated with hearings made under Part III of the *CRTC Telecommunications Rules of Procedure*. Furthermore, the appellant clearly expressed the intention to review this interim rate increase in its final decision on the respondent's application for a general rate increase on the basis of financial information for the years 1985 and 1986. Given the content of the appellant's final decision, it is also important to note that the 2 per cent interim rate increase was calculated on the assumption that the respondent's return on equity for 1985 should be 13.7 per cent, subject to review in the final decision.

The respondent's financial situation later improved thereby reducing the necessity to proceed with an early hearing for the purpose of obtaining a general and final rate increase. By letter dated March 20, 1985, the respondent asked for this hearing to be postponed to February 10, 1986, suggesting however that the 2 per cent interim increase be given immediate final approval. In CRTC Telecom Public Notice 1985-30 dated April 16, 1985, the appellant granted the postponement but refused to grant the final approval requested by the respondent without further investigation into this matter. The Commission added that it would monitor the respondent's financial situation on a monthly basis and ordered the filing of monthly statements (at p. 4):

> In view of the improving trend in the Company's financial performance, the Commission further directs as follows:
>
> Bell Canada is to provide to the Commission for the balance of 1985, within 30 days after the end of each month, commencing with April 1985, a full year forecast of revenues and expenses on a regulated basis for the year 1985, together with the estimated financial ratios including the projected regulated return on common equity.
>
> The Commission will monitor the Company's financial performance during 1985, in order to determine whether any further rate action may be necessary. [Emphasis added.]

Again, the appellant clearly expressed its intention to prevent abuse of interim rate increases.

After a review of the July financial information filing ordered in CRTC Telecom Public Notice 1985-30, the appellant asked the respondent to provide reasons why the interim rate increase of 2 per cent should remain in force given its improved financial situation. The respondent was unable to convince the appellant that this interim increase remained necessary to avoid financial deterioration and was accordingly ordered to file revised tariffs effective as of September 1, 1985, at pp. 4-5 of Telecom Decision CRTC 85-18:

> In view of the improving trend in Bell's financial performance, the Commission is satisfied that the company no longer needs the 2% interim increases which were awarded in Decision 84-28 in order to avoid serious financial deterioration in 1985. Accordingly, Bell is directed to file revised tariffs forthwith, with an effective date of 1 September 1985, to suspend these increases.
>
> In arriving at its decision the Commission has estimated that, with interim rates in effect for the complete year, the company would earn an ROE ["return on equity"] of approximately 14.5% in 1985, a return well in excess of the 13.7% considered appropriate for determining the 2% interim rate increases. The Commission also projected that interest coverage would be approximately 3.9 times. This would improve on the actual 1984 coverage of 3.8 times. These estimates are not significantly different from Bell's current expectation of its 1985 results.
>
> The Commission will make its final determination of Bell's revenue requirement for the year 1985 in the general rate proceeding currently scheduled to commence with an application to be filed on 10 February 1986. [Emphasis added.]

As a result of this decision, the respondent was forced to charge the rates effective before its application for a rate increase filed on March 28, 1984. However, even though the rates effective as of September 1, 1985, were numerically identical to the rates in force under the previous final decision prior to the interim increase, these new rates remained interim in nature. In fact, the appellant reiterated its intention to review the rates actually charged during 1985 and 1986.

On October 31, 1985, the respondent decided not to proceed with its application for a general rate increase and requested that its procedures be withdrawn. In CRTC Telecom Public Notice 1985-85, the appellant decided to review the respondent's financial situation and therefore the appropriateness of its rates notwithstanding its request to withdraw its initial application for a general rate increase (at pp. 3-4):

> In light of these forecasts and the degree to which the company's rate structure is expected to be considered in separate proceedings, Bell stated that it wished to refrain from proceeding with the application scheduled to be filed on 10 February 1986. Accordingly, the company requested the withdrawal of the amended Directions on Procedure issued by the Commission in Public Notice 1985-30.

> The Commission notes that the appropriate rate of return for Bell has not been reviewed in an oral hearing since the proceeding which culminated in *Bell Canada - General Increase in Rates*, Telecom Decision CRTC 81-15, 20 September 1981 (Decision 81-15). The Commission considers that, given Bell's current forecasts, it would be appropriate to review the company's cost of equity for the years 1985, 1986 and 1987 in the proceeding scheduled for 1986. Such a review would allow consideration of the changing financial and economic conditions since Decision 81-15 and the impact of Bell's corporate reorganization on its rate of return. The Commission notes that other issues arising from the reorganization would also be addressed in the 1986 proceeding. [Emphasis added.]

This interim decision indicates that the appellant wished to continue the original rate review procedure initiated by the respondent in March of 1984. Thus, the rates in force as of January 1, 1985 until the final decision now challenged by the respondent were interim rates subject to review.

The hearing which led to the final decision lasted from June 2 to July 16, 1986 and this final decision, Decision 86-17, was rendered on October 14, 1986. In this decision, the appellant first established appropriate levels of profitability for the respondent on the basis of its return on equity. The appellant then calculated the amount of excess revenues earned by the respondent in 1985 and 1986 along with the necessary reduction in forecasted revenues for 1987. It was found that the respondent had earned excess revenues of $63 million in 1985 and $143 million in 1986 for a total of $206 million (at p. 93):

> After making further adjustments for the compensation for temporarily transferred employees and including the regulatory treatment for non-integral subsidiary and associated companies, the Commission has determined that a revenue requirement reduction of $234 million would provide the company with a 12.75% ROE ["return on equity"] on a regulated basis in 1987. Similarly, the Commission has determined that $143 million is the required revenue reduction to achieve the upper end of the permissible ROE on a regulated basis in 1986, 13.25%. With respect to 1985, after making the adjustments set out in this decision, the Commission has determined that Bell earned excess revenues in the amount of $63 million, the deduction of which would provide 13.75%, the upper end of the permissible ROE on a regulated basis.

It is important to note that the evidence and the arguments presented by the interested parties as well as interveners were carefully scrutinized by the appellant at pp. 77 to 92 of Decision 86-17. It is for all practical purposes impossible to engage in such a meticulous and painstaking analysis of all relevant facts when faced with an application for interim relief. Finally, it is also useful to note that the permissible return on equity of 13.7 per cent allowed by the appellant in its interim decision, Decision 84-28, was increased to 13.75 per cent in Decision 86-17. Thus, the appellant realized that the interim rates approved for 1985 yielded greater rates of return than initially anticipated and that the rate of return actually recorded for that year even exceeded the greater allowable rate of return fixed in the final decision, Decision 86-17. Such differences between projected and actual rates of return are common and certainly call for a high level of flexibility in the exercise of the appellant's regulatory duties.

The Commission decided that the respondent could not retain excess revenues earned on the basis of interim rates and issued the order now challenged by the respondent in order to provide a remedy for this situation. This order reads as follows, at pp. 95-96:

> Concerning the excess revenues for the years 1985 and 1986, the Commission directs that the required adjustments be made by means of a one-time credit to subscribers of record, as of the date of this decision, of the following local services: residence and business individual, two-party and four-party line services; PBX trunk services; centrex lines; enhanced exchange-wide dial lines; exchange radio-telephone service; service-system service and information system access line service. The Commission directs that the credit to each subscriber be determined by pro-rating the sum of the excess revenues for 1985 and 1986 of $206 million in relation to the subscriber's monthly recurring billing for the specified local services provided as of the date of this decision. The Commission further directs that the work necessary to implement the above directives be commenced immediately and that the billing adjustments be completed by no later than 31 January 1987. Finally, the Commission directs the company to file a report detailing the implementation of the credit by no later than 16 February 1987.
>
> The Commission considers that 1987 excess revenues are best dealt with through rate reductions to be effective 1 January 1987. [Emphasis added.]

Although the respondent always charged rates approved by the appellant, the appellant found it necessary to make sure that its assessment of allowable revenues for 1985 and 1986 would be complied with. The appellant argues that the order now challenged by the respondent was the most efficient way of redistributing these excess revenues to the respondent's customers even though they would not necessarily be refunded to those who actually had to pay the rates in force during that period.

It is therefore obvious that the appellant only allowed interim rates to be charged after January 1, 1985 on the assumption that it would review these rates in a hearing to be held in order to deal with an application for a general rate increase. Every interim decision which led to Decision 86-17 confirmed the appellant's intention to review the interim rates at the final hearing. Finally, the interim rates were ordered for the purpose of preventing any serious deterioration in the respondent's financial situation while awaiting for a final decision on the merits. Of necessity, these interim rates were determined on the basis of incomplete evidence presented by the respondent. It cannot be said that the purpose of the interim rate increase ordered by the appellant was to serve as a temporary final decision.

II - The Issue and the Arguments Raised by the Parties

In this Court as well as in the Federal Court of Appeal, the parties have agreed that the only issue arising out of the facts of this case is whether the appellant had jurisdiction to order the respondent to grant a one-time credit to its customers. The appellant's findings of fact, its determination with respect to the respondent's revenue requirements for 1985 and 1986 and its computation of the amount of excess revenues earned during this period are not contested by the respondent. In my opinion, this issue can be divided in two subquestions:

1- whether the appellant had the legislative authority to review the revenues made by the respondent during the period when interim rates were in force;

2- whether the appellant had jurisdiction to make an order compelling the respondent to grant a one-time credit to its customers.

The main arguments raised by the appellant can be summarized as follows:

1- the *Railway Act* and the *National Transportation Act* grant the appellant the power to review the period during which a regulated entity was allowed to charge interim rates for the purpose of comparing the revenues earned during this period to the appropriate level of revenues set in the final decision;

2- the power to make a one-time credit order is necessarily ancillary to the power to review the period during which interim rates were charged and the appellant has jurisdiction to determine the most efficient method of providing a remedy in cases where excess revenues were made.

The main arguments raised by the respondent can be summarized as follows:

1- the power to set tolls and tariffs does not include the power to review and make orders with respect to the respondent's level of revenues;

2- the appellant has no power to make a one-time credit order with respect to revenues earned as a result of having charged rates which the respondent, by

virtue of the *Railway Act*, was obliged to charge, whether these rates were set by interim order or by a final order.

Counsel for the National Anti-Poverty Organization ("NAPO") has also argued that the appellant's decisions concerning the interpretation of statutes which grant them jurisdiction to deal with certain matters are entitled to curial deference and cannot be reviewed unless they are patently unreasonable. This argument raises the issue of the scope of review allowed by s. 68(1) of the *National Transportation Act*, R.S.C., 1985, c. N-20, (now the *National Telecommunications Powers and Procedures Act*), and must be dealt with prior to any analysis of the relevant statutory provisions claimed to be the source of the appellant's jurisdiction to make the one-time credit order found in Decision 86-17.

The present case raises difficult questions of statutory interpretation and it will therefore be necessary to examine the relevant provisions of the *Railway Act*, R.S.C., 1985, c. R-3, and the *National Transportation Act* before moving to a detailed analysis of the decision of the Federal Court of Appeal and the arguments raised by the parties.

III - Relevant Legislative Provisions

The appellant derives its power to regulate the telephone industry from ss. 334 to 340 of the *Railway Act* ("*Provisions Governing Telegraphs and Telephones*") and from ss. 47 *et seq.* of the *National Transportation Act* ("General Jurisdiction and Powers in Respect of Railways"). The *Railway Act* sets out the general criteria concerning the setting of rates and tariffs to be charged by telephone utility companies whereas the *National Transportation Act* sets out the appellant's procedural powers in the context of decisions concerning, amongst other matters, telephone rates and tariffs.

Sections 335(1), 335(2) and 335(3) of the *Railway Act* (formerly ss. 320(2) and 320(3)) state the principle upon which the appellant's regulatory authority rests, namely that telephone rates and tariffs are subject to approval by the appellant, cannot be changed without its prior authorization and may be revised at any time by the appellant:

> **335.** (1) Notwithstanding anything in any other Act, all telegraph and telephone tolls to be charged by a company, other than a toll for the transmission of a message intended for reception by the general public and charged by a company licensed under the *Broadcasting Act*, are subject to the approval of the Commission, and may be revised by the Commission from time to time.
>
> (2) The company shall file with the Commission tariffs of any telegraph or telephone tolls to be charged, and the tariffs shall be in such form, size and style, and give such information, particulars and details, as the Commission by regulation or in any particular case prescribes.
>
> (3) Except with the approval of the Commission, the company shall not charge and is not entitled to charge any telegraph or telephone toll in respect of which there is default in filing under subsection (2), or which is disallowed by the Commission ... [Emphasis added.]

The most important requirement governing the appellant's power to set telephone rates is found in s. 340(1) of the *Railway Act* which provides that all such rates must be "just and reasonable":

> **340**. (1) 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. [Emphasis added.]

Section 340 also prohibits discriminatory telephone rates and gives the appellant the power to suspend, postpone, or disallow a tariff of tolls which is contrary to ss. 335 to 340 and substitute a satisfactory tariff of tolls in lieu thereof.

Finally, s. 340(5) of the *Railway Act* gives the appellant the power to make orders with respect to traffic, tolls and tariffs in all matters not expressly covered by s. 340:

> **340.** ...
>
> (5) In all other matters not expressly provided for in this section, the Commission may make orders with respect to all matters relating to traffic, tolls and tariffs or any of them.

Although the power granted by s. 340(5) could be construed restrictively by the application of the *ejusdem generis* rule, I do not think that such an interpretation is warranted. Section 340(5) is but one indication of the legislator's intention to give the appellant all the powers necessary to ensure that the principle set out in s. 340(1), namely that all rates should be just and reasonable, be observed at all times.

Sections 47 *et seq.* of the *National Transportation Act* set out, from a procedural point of view, the appellant's jurisdiction with respect to the powers granted by the *Railway Act*. Section 49(1) gives the appellant jurisdiction over all complaints concerning compliance with the Act while s. 49(3) gives the appellant jurisdiction over all matters of fact or law for the purposes of the *Railway Act* and of ss. 47 *et seq.* of the *National Transportation Act*. However, s. 68(1) provides an appeal to the Federal Court of Appeal, with leave, on any question of law or jurisdiction and it is under this provision that the respondent has challenged Decision 86-17.

In many respects, ss. 47 *et seq.* of the *National Transportation Act* have been designed to further the policy objectives and the regulatory scheme set out in the *Railway Act* governing the approval of telephone rates and tariffs. Thus, s. 52 of the *National Transportation Act* gives the appellant the power to inquire into, hear or determine, of its own motion or upon request from

the Minister, any matter which it has the right to inquire into, hear or determine under the *Railway Act*:

> **52.** The Commission may, of its own motion, or shall, on the request of the Minister, inquire into, hear and determine any matter or thing that, under this part or the *Railway Act*, it may inquire into, hear and determine upon application or complaint, and with respect thereto has the same powers as, on any application or complaint, are vested in it by this Act.

Section 52 is therefore the corollary of the appellant's power to "revise [tolls] ... from time to time" found in s. 335(1) of the *Railway Act*. Thus, the appellant has the power to review, from time to time, its own final decisions on a *proprio motu* basis. Similarly, s. 61 provides that the appellant is not bound by the wording of any complaint or application it hears and may make orders which would otherwise offend the *ultra petita* rule:

> **61.** On any application made to the Commission, the Commission may make an order granting the whole or part only of the application, or may grant such further or other relief, in addition to or in substitution for that applied for, as to the Commission may seem just and proper, as fully in all respects as if the application had been for that partial, other or further relief.

By virtue of s. 60(2) of the *National Transportation Act*, the appellant also has the power to make interim orders:

> **60.** ...
>
> (2) The Commission may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

Finally, by virtue of s. 66 of the *National Transportation Act*, the appellant has the power to review any of its past decisions whether they are final or interim:

> **66**. The Commission may review, rescind, change, alter or vary any order or decision made by it or may re-hear any application before deciding it.

It is obvious from the legislative scheme set out in the *Railway Act* and the *National Transportation Act* that the appellant has been given broad powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. The appellant may revise rates at any time, either of its own motion or in the context of an application made by an interested party. The appellant is not even bound by the relief sought by such applications and may make any order related thereto provided that the parties have received adequate notice of the issues to be dealt with at the hearing. Were it not for the fact that the appellant has the power to make interim orders, one might say that the appellant's powers in this area are limited only by the time it takes to process applications, prepare for hearings and analyse all the evidence. However, the appellant does have the power to make interim orders and this power must be interpreted in light of the legislator's intention to provide the appellant with flexible and versatile powers for the purpose of ensuring that telephone rates are always just and reasonable.

The question before this Court is whether the appellant has the statutory authority to make a one-time credit order for the purpose of remedying a situation where, after a final hearing dealing with the reasonableness of telephone rates charged during the years under review, it finds that interim rates in force during that period were not just and reasonable. Since there is no clear provision on this subject in the *Railway Act* or in the *National Transportation Act*, it will be necessary to determine whether this power is derived by necessary implication from the regulatory schemes set out in these statutes.

IV - The Decision of the Court Below

In the Federal Court of Appeal, the respondent in this Court argued that in order to find statutory authority for the power to make a one-time credit order, it was necessary to find that s. 66 (power to "review, rescind, change, alter or vary" previous decisions) or s. 60(2) (power to make interim orders) of the *National Transportation Act* provide powers to make retroactive orders. Of course, the respondent argued that these provisions did not grant such a power and the majority of the Federal Court of Appeal composed of Marceau and Pratte JJ. agreed with this argument, Hugessen J. dissenting.

Marceau J. held that the appellant in this Court only had the power to fix telephone tolls and tariffs and that it has no statutory authority to deal with excess revenues or deficiencies in revenues arising as a result of a discrepancy between the rate of return yielded from the interim rates in force prior to the final decision and the permissible rate of return fixed by this final decision. Marceau J. was of the opinion that the wording of s. 66 of the *National Transportation Act* is neutral with respect to retroactivity and that the presumption against retroactivity should therefore operate. Marceau J. added that the power to make interim orders does not carry with it the power to remedy any discrepancy between interim and final orders because the respondent could not be forced to reimburse revenues earned by charging rates approved by the appellant. Thus, according to Marceau J., the regulatory scheme set out in the *Railway Act* and the *National Transportation Act* is prospective in nature and, in the context of such a scheme, the power to make interim orders only involves the power to make orders "for the time being".

Pratte J., who concurred in the result with Marceau J., rejected all arguments based on the retroactive nature of the powers granted by ss. 60(2) and 66 of the *National Transportation Act*. Pratte J. was of the opinion that the impugned order was not retroactive in nature since its effect was to force the respondent to grant a credit in the future rather than change the rates

charged in the past in a retroactive manner. Pratte J. then stated that if legislative authority existed for Decision 86-17, it must be found in s. 60(2) of the *National Transportation Act* which provides for "further directions" to be made at a later date following an interim decision. However, Pratte J. was of the opinion that any "further direction" must be in the nature of an order which can be made under s. 60(2) in the first place. It follows from that reasoning that if no one-time credit order can be made by interim order, no "further direction" to that effect can be made under s. 60(2). Pratte J. then agreed with Marceau J. that the respondent could not be forced to reimburse revenues made by charging rates approved by the appellant whether by interim order or by a "further direction" made in a final order.

Hugessen J. dissented on the basis that, within the statutory framework set out in the *Railway Act* and the *National Transportation Act*, all orders whether final or interim can, by virtue of ss. 60(2) and 66 of the *National Transportation Act*, be modified by a further prospective order; thus, the proposed rule that interim orders can only be modified by a further prospective order would, in Hugessen J.'s opinion, effectively eliminate any distinction between final and interim orders and defeat the legislator's intention to provide the appellant with a distinct and independent power to make interim orders. In order to differentiate interim orders from final orders, Hugessen J. was of the opinion that the appellant in this Court must have the power to fix just and reasonable rates as of the date at which interim rates came into effect. Thus, only interim rates can be modified in a retrospective manner by a final order. Hugessen J. then stated that the interim rates in force in 1985 and 1986 must not be divided into the previous rate and the interim rate increase of 2 per cent: the resulting rate must be viewed as interim in its entirety because all the rates charged after January 1, 1985 were authorized by interim orders. Finally, Hugessen J. stated that the one-time credit order was a valid exercise of the power to set just and reasonable rates as of January 1, 1985 and that the choice of the appropriate remedy was an "`administrative matter' properly left for the Commission's determination". Hugessen J. also

noted that the appellant's order was in substance though not in form a "matter relating to tolls and tariffs" within the meaning of s. 340(5) of the *Railway Act*.

V - Analysis

(A) *Curial Deference Towards the Decisions of the CRTC*

NAPO argues that the appellant's decisions are entitled to "curial deference" because of their national importance and that these decisions should not be overturned unless they are patently unreasonable. NAPO cites the following cases as authority for this proposition: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*"); *Douglas Aircraft Co. of Canada Ltd. v. McConnell,* [1980] 1 S.C.R. 245; *Alberta Union of Provincial Employees v. Board of Governors of Olds College,* [1982] 1 S.C.R. 923; *Re Ontario Public Service Employees Union and Forer* (1985), 52 O.R. (2d) 705 (C.A.); *Re City of Ottawa and Ottawa Professional Firefighters' Association, Local 162* (1987), 58 O.R. (2d) 685 (C.A.); *Greyhound Lines of Canada Ltd. v. Canadian Human Rights Commission* (1987), 78 N.R. 192 (F.C.A.); and *Canadian Pacific Ltd. v. Canadian Transport Commission* (1987), 79 N.R. 13 (F.C.A.) ("*Canadian Pacific*").

With the exception of the *Canadian Pacific* case, all these cases involved judicial review of decisions which were either protected by a privative clause or by a provision stating that no appeal lies therefrom. Where the legislator has clearly stated that the decision of an administrative tribunal is final and binding, courts of original jurisdiction cannot interfere with such decisions unless the tribunal has committed an error which goes to its jurisdiction. Thus, this Court has decided in the *CUPE* case that judicial review cannot be completely excluded by statute and that courts of original jurisdiction can always quash a decision if it is "so patently

unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Decisions which are so protected are, in that sense, entitled to a non-discretionary form of deference because the legislator intended them to be final and conclusive and, in turn, this intention arises out of the desire to leave the resolution of some issues in the hands of a specialized tribunal. In the *CUPE* case, Dickson J., as he then was, described the legislator's intention as follows, at pp. 235-36:

> Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

However, it is important to stress the fact that the decision of an administrative tribunal can only be entitled to such deference if the legislator has clearly expressed his intention to protect such decisions through the use of privative clauses or clauses which state that the decision is final and without appeal. As formulated, NAPO's argument on curial deference must therefore be rejected because it fails to recognize the basic difference between appellate review and judicial review of decisions which do not fall within the jurisdiction of the lower tribunal.

Although s. 49(3) of the *National Transportation Act* provides that the appellant has full jurisdiction to hear and determine all matters whether of law or fact for the purposes of the *Railway Act* and of Part IV of the *National Transportation Act*, the appellant's decisions are subject to appeal, with leave, to the Federal Court of Appeal on questions of law or jurisdiction by virtue of s. 68(1) which reads as follows:

> **68.** (1) An appeal lies from the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave therefor being obtained from that Court on application made within one month after the making of the order, decision, rule or regulation sought to be appealed from or within such further time as a judge of that Court under special circumstances allows, and on notice to the parties and the Commission, and on hearing such of them as appear and desire to be heard.

It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.

However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise. The *Canadian Pacific* case is an example of a situation where curial deference towards a decision of the Canadian Transport Commission involving the interpretation of a tariff was appropriate. The decision of the Canadian Transport Commission was appealed to a review committee and then to the Federal Court of Appeal. Urie J. held that the decision of the review committee must not be reversed unless it is unreasonable or clearly wrong, at pp. 16-17:

> On the appeal from that decision to this court, the appellant advanced essentially the same grounds and arguments which it had submitted to the RTC. As to the first ground, I am of the opinion that the RTC correctly interpreted the two items from the tariff and since its view was confirmed by the Review Committee, that committee did not commit an error in construction. No useful purpose would be served by my restating the reasons of the R.T.C. for interpreting the items as they did and I respectfully adopt them as my own. <u>This Court should not interfere with an interpretation made by bodies having the expertise of the R.T.C. and the Review Committee in an area within their jurisdiction, unless their interpretation is not reasonable or is clearly wrong</u>. Neither situation prevails in this case. [Emphasis added.]

Although the very purpose of the review committee is to interpret the tariff and although such questions of interpretation fall within the Review Committee's area of special expertise, it does not follow that its decisions can only be reviewed if they are unreasonable. However the principle of specialization of duties justifies curial deference in such circumstances.

In this case, the respondent is challenging the appellant's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the appellant when it makes interim decisions. This question cannot be solved without an analysis of the procedural scheme created by the *Railway Act* and the *National Transportation Act*. It is a question of law which is clearly subject to appeal under s. 68(1) of the *National Transportation Act*. It is also a question of jurisdiction because it involves an inquiry into whether the appellant had the power to make a one-time credit order.

Except as regards the choice, amongst remedies available to the appellant, of the most appropriate remedy to achieve the goal of just and reasonable rates throughout the interim period, the decision impugned by the respondent is not a decision which falls within the appellant's area of special expertise and is therefore pursuant to s. 68(1) subject to review in accordance with the principles governing appeals. Indeed, the appellant was not created for the purpose of interpreting the *Railway Act* or the *National Transportation Act* but rather to ensure, amongst other duties, that telephone rates are always just and reasonable.

(B) *The Power to Regulate Bell Canada's Revenues*

The respondent argues that the appellant only has jurisdiction to regulate tolls and tariffs and that this power does not include the power to regulate its level of revenues or its return on equity.

The fixing of tolls and tariffs that are just and reasonable necessarily involves the regulation of the revenues of the regulated entity. This has been recognized by this Court interpreting provisions similar to s. 340(1) of the *Railway Act* which prescribe that "[a]ll tolls shall be just and reasonable". In *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia,* [1960] S.C.R. 837, Locke J. said the following about para. 16(1)(*b*) of the *Public Utilities Act*, R.S.B.C. 1948, c. 277, which provided that in fixing a rate the Public Utility Commission of British Columbia should take into consideration the "fair and reasonable return upon the appraised value of the property of the public utility used ... to enable the public utility to furnish the service" (at p. 848):

> 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. [Emphasis added.]

In *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, Lamont J. described the relevant factors in the determination of what are just and reasonable rates as follows (at p. 190):

> 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.

Such provisions require the administrative tribunal to balance the interests of the customers with the necessity of ensuring that the regulated entity is allowed to make sufficient revenues to finance the costs of the services it sells to the public.

Thus, it is trite to say that in fixing fair and reasonable tolls the appellant must take into consideration the level of revenues needed by the respondent. In fact, the respondent would be the first to complain if its financial situation was not taken into consideration when tolls are fixed. By so doing, the appellant regulates the respondent's revenues albeit in a seemingly indirect manner. I would therefore dismiss this argument.

(C) *The Power to Revisit the Period During Which Interim Rates Were in Force*

(i) Introduction

As indicated above, the appellant has examined the period during which interim rates were in force, i.e. from January 1, 1985 to October 14, 1986, for the purpose of ascertaining whether these interim rates were in fact just and reasonable. Following a factual finding that these rates were not just and reasonable, the one-time credit order now contested before this Court was made in order to remedy this situation. Thus, the effect of Decision 86-17 was not retroactive in nature since it does not seek to establish rates to replace or be substituted to those which were charged during that period. The one-time credit order is, however, retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive. Thus, the question before this Court is whether the appellant has jurisdiction to make orders for the purpose of remedying the inappropriateness of rates which were approved by it in a previous interim decision.

This question involves a determination of whether rates approved by interim order are inherently contingent as well as provisional or whether the statutory scheme established by the *Railway Act* and the *National Transportation Act* is so prospective in nature that it precludes such a retrospective review of interim rates approved by the appellant. Finally, it is also necessary to determine whether the appellant has jurisdiction to order the reimbursement of amounts which exceed the revenues actually collected as a direct result of the interim rates.

(ii) The Distinction Between Interim and Final Orders

The respondent argues that the *Railway Act* and the *National Transportation Act* establish a regulatory regime which is exclusively prospective in nature because all rates, whether interim or final, must be just and reasonable. Thus, if interim rates have been approved on the basis that they are just and reasonable, no excessive revenues can be earned by charging such rates; interim rates, by reason only of their approval by the appellant, are presumed to be just and reasonable until they are modified by a subsequent order. According to the respondent, interim orders are therefore orders made "for the time being" until a more permanent order is made.

In his dissenting reasons, Hugessen J. points out quite accurately that if interim orders are simply orders made "for the time being", it will be impossible to distinguish final orders from interim orders within the statutory scheme established by the *Railway Act* and the *National Transportation Act* since all final orders may be revised by the appellant of its own motion and at any time: s. 335(1) of the *Railway Act* and s. 52 of the *National Transportation Act*. It is therefore impossible to say that final orders made under these statutes are final in the sense that they may never be reconsidered. The on-going nature of the appellant's regulatory activities necessarily entails a continuous review of past decisions concerning tolls and tariffs. Thus, all

orders, whether final or interim, would be orders "for the time being" within the statutory scheme established by the *Railway Act* and the *National Transportation Act*.

Both the appellant and Hugessen J. rely heavily on *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.) for the proposition that interim decisions must be distinguished from final decisions in that they may be reviewed in a retrospective manner. This distinction is based on the fact that interim decisions are made subject to "further direction" as prescribed by s. 60(2) of the *National Transportation Act* which, for convenience, I cite again:

> **60.** ...
>
> (2) The Commission may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application. [Emphasis added.]

The statutory scheme analysed by the Alberta Court of Appeal in *Re Coseka* is substantially similar to though more clearly prospective than the statutory scheme established by the *Railway Act* and the *National Transportation Act*. Furthermore, s. 52(2) of the *Public Utilities Board Act*, R.S.A. 1970, c. 302, is identical in wording to s. 60(2) of the *National Transportation Act*. Laycraft J.A., as he then was, cited with approval by Hugessen J., wrote the following with respect to the possibility of revisiting the period during which interim rates were in force for the purpose of deciding whether those interim rates were in fact just and reasonable, at pp. 717-18:

> In my view, to say that an interim order may not be replaced by a final order is to attribute virtually no additional powers to the Board from s. 52 beyond those already contained in either the *Gas Utilities Act* or the *Public Utilities Board Act* to make final orders. The Board is by other provisions of the statute empowered by order to fix rates either on application or on its own motion. An interim order would be the same, and have the same effect, as a final order unless the "further direction" which the statute contemplates includes the power to change the interim order. On

> that construction of the section the interim order would be a "final" order in all but name. The Board would need no further legislative authority to issue a further "final" order since it may fix rates under s. 27 on its own motion without a further application. The provision for an interim order was intended to permit rates to be fixed subject to correction to be made when the hearing is subsequently completed.
>
> It was urged during argument that s. 52(2) was merely intended to enable the Board to achieve "rough justice" during the period of its operation until a final order is issued. However, the Board is required to fix "just and reasonable rates" not "roughly just and reasonable rates". The words "reserve for further direction", in my view, contemplate changes as soon as the Board is able to determine those just and reasonable rates. [Emphasis added.]

I agree with Hugessen J. and with the reasons of Laycraft J.A. in *Re Coseka* where he made a careful review of previous cases. The statutory scheme established by the *Railway Act* and the *National Transportation Act* is such that one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. I hasten to add that the words "further directions" do not have any magical, retrospective content. Under the *Railway Act* and the *National Transportation Act*, final orders are subject to "further [prospective] directions" as well. It is the interim nature of the order which makes it subject to further retrospective directions.

The importance of distinguishing final orders from interim orders is illustrated by the case of *City of Calgary v. Madison Natural Gas Co.* (1959), 19 D.L.R. (2d) 655 (Alta. C.A.). In *Madison*, the Public Utility Board (the "Board") was faced with an application by the City of Calgary for the reimbursement of amounts earned in excess of the rates of return allowed in orders 34 and 41 for the sale of natural gas. The Board had allowed a rate of return of 7 per cent but, due to its lack of useful information to predict the effect of rates on the actual financial performance of the regulated entity, the rates per volume fixed by the Board actually yielded

greater profits than anticipated. The Board refused to grant the demands made in the application because it felt it had no jurisdiction to revisit periods during which rates approved in a final decision were in force. This decision was confirmed by the Court of Appeal on the basis that, contrary to arguments made by the City of Calgary, orders 34 and 41 were final orders not governed by s. 35*a*(3) of the *Natural Gas Utilities Act*, which read as follows:

> **35*a*** -- ...
>
> (3) The Board is hereby authorized, empowered and directed, on the final hearing, to give consideration to the effect of the operation of such interim or temporary order and in the final order to make, allow or provide for such adjustments, allowances or other factors, as to the Board may seem just and reasonable.

Order 34 provided that the price was set at 9 cents per mcf and that "if it should turn out that there is a surplus, it can be dealt with when the time arrives" which led to the argument that this order was in fact an interim order. Johnson J.A. dismissed this argument in the following terms, at pp. 662-63:

> It is the submission of the appellants that O. 34 and O. 41 are interim or temporary orders and the Board can now deal with these surpluses in accordance with s-s (3). As I have mentioned, orders fixing interim prices were made while the Board was hearing the application and considering its report. These, of course, were superseded by the order now under consideration. Orders 34 and 41 are, of course, not final orders in the sense that judgments are final. The Act contemplates that subsequent applications will be made to change the price fixed by these orders. They are nonetheless final so far as each application is concerned.

It is useful to note that the respondent relies heavily on the *Madison* case for the proposition that a regulated entity cannot be forced to disgorge profits legally earned by charging rates approved by the relevant regulatory authority on the basis that they are just and reasonable. Since the City

of Calgary sought to obtain the reimbursement of profits earned by charging rates approved by final order, this case does not support the respondent's position.

A consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, unlike final decisions, subject to retrospective review and remedial orders. The appellant may make a wide variety of interim orders dealing with hearings, notices and, in general, all matters concerning the administration of proceedings before the appellant. Such orders are obviously interim in nature. However, this is less obvious when an interim order deals with a matter which is to be dealt with in the final decision, as was the case with the interim rate increase ordered in Decision 84-28. If interim rate increases are awarded on the basis of the same criteria as those applied in the final decision, the interim decision would serve as a preliminary decision on the merits as far as the rate increase is concerned. This, however, is not the purpose of interim rate orders.

Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.

In Decision 84-28, the appellant granted the respondent an interim rate increase on the basis of the following criteria which, for convenience, I cite again (at p. 9):

> The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even on an interim basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an applicant absent a general interim increase.

Decision 84-28 was truly an interim decision since it did not seek to decide in a preliminary manner an issue which would be dealt with in the final decision. Instead, the appellant granted the interim rate increase on the basis that such an increase was necessary in order to prevent the respondent from having serious financial difficulties.

Furthermore, the appellant consistently reiterated throughout the procedures which led to Decision 86-17 its intention to review the rates charged for the test year 1985 and up to the date of the final decision. Holding that the interim rates in force during that period cannot be reviewed would not only be contrary to the nature of interim orders, it would also frustrate and subvert the appellant's order approving interim rates.

It is true, as the respondent argues, that all telephone rates approved by the appellant must be just and reasonable whether these rates are approved by interim or final order; no other conclusion can be derived from s. 340(1) of the *Railway Act*. However, interim rates must be just and reasonable on the basis of the evidence filed by the applicant at the hearing or otherwise available for the interim decision. It would be useless to order a final hearing if the appellant was bound by the evidence filed at the interim hearing. Furthermore, the interim rate increase was granted on the basis that the length of the proceedings could cause a serious deterioration in the financial condition of the respondent. Only once such an emergency situation was found to exist did the appellant ask itself what rate increase would be just and reasonable on the basis of the

available evidence and for the purpose of preventing such a financial deterioration. The inherent differences between a decision made on an interim basis and a decision made on a final basis clearly justify the power to revisit the period during which interim rates were in force.

The respondent argues that the power to revisit the period during which interim rates were in force cannot exist within the statutory scheme established by the *Railway Act* and the *National Transportation Act* because these statutes do not grant such a power explicitly, unlike s. 64 of the *National Energy Board Act*, R.S.C., 1985, c. N-7. 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. I have found that, within the statutory scheme established by the *Railway Act* and the *National Transportation Act*, the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force. The fact that this power is provided explicitly in other statutes cannot modify this conclusion based as it is on the interpretation of these two statutes as a whole.

I am bolstered in my opinion by the fact that the regulatory scheme established by the *Railway Act* and the *National Transportation Act* gives the appellant very broad procedural powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. Within this regulatory framework, the power to make appropriate orders for the purpose of remedying interim rates which are not just and reasonable is a necessary adjunct to the power to make interim orders.

It is interesting to note that, in the context of statutory schemes which did not provide any power to set interim rates, the United States Supreme Court has held that regulatory agencies have both the power to impose interim rates and the power to make reimbursement orders where the interim rates are found to be excessive in the final order: *United States v. Fulton*, 475 U.S. 657 (1986), at pp. 669-71; *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978), where Brennan J. wrote the following comments at pp. 654-56:

> Finally, petitioners contend that the Commission has no power to subject them to an obligation to account for and refund amounts collected under the interim rates in effect during the suspension period and the initial rates which would become effective at the end of such a period.... In response, we note first that we have already recognized in *Chessie* that the Commission does have powers "ancillary" to its suspension power which do not depend on an express statutory grant of authority. We had no occasion in *Chessie* to consider what the full range of such powers might be, but we did indicate that the touchstone of ancillary power was a "direc(t) relat(ionship)" between the power asserted and the Commission's "mandate to assess the reasonableness of ... rates and to suspend them pending investigation if there is a question as to their legality." 426 U.S., at 514.
>
> ...
>
> Thus, here as in *Chessie*, the Commission's refund conditions are a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation," in that they allow the Commission, in exercising its suspension power, to pursue "a more measured course" and to "offe(r) an alternative tailored far more precisely to the particular circumstances" of these cases. Since, again as in *Chessie*, the measured course adopted here is necessary to strike a proper balance between the interests of carriers and the public, we think the Interstate Commerce Act should be construed to confer on the Commission the authority to enter on this course unless language in the Act plainly requires a contrary result.

This approach to the interpretation of statutes conferring regulatory authority over rates and tariffs is only the expression of the wider rule that the court must not stifle the legislator's intention by reason only of the fact that a power has not been explicitly provided for.

The appellant has also argued that the power to "vary" a previous decision, whether interim or final, found in s. 66 of the *National Transportation Act*, includes the power to vary these decisions in a retroactive manner. Given my conclusion based on the inherent nature of interim orders, it is unnecessary for me to deal with this argument.

(iii) The Relevance of the Distinction Between Positive Approval and Negative Disallowance Schemes of Rate Regulation

Much was said in argument about the difference between positive approval schemes and negative disallowance schemes with respect to the power to act retrospectively. The first category includes schemes which provide that the administrative agency is the only body having statutory authority to approve or fix tolls payable to utility companies; these schemes generally stipulate that tolls shall be "just and reasonable" and that the administrative agency has the power to review these tolls on a *proprio motu* basis or upon application by an interested party. The second category includes schemes which grant utility companies the right to fix tolls as they wish but also grant users the right to complain before an administrative agency which has the power to vary those tolls if it finds that they are not "just and reasonable". It has generally been found that negative disallowance schemes provide the power to make orders which are retroactive to the date of the application by the ratepayer who claims that the rates are not "just and reasonable". On the other hand, positive approval schemes have been found to be exclusively prospective in nature and not to allow orders applicable to periods prior to the final decision itself. A full discussion of this issue was made by Estey J. in *Nova v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437, at pp. 450-51, and I do not propose to repeat or to criticize what was said in that case with respect to the power to review rates approved by a previous final order. I am of the opinion that the regulatory scheme established by the *Railway Act* and the *National Transportation Act* is a positive approval scheme inasmuch as the respondent's rates are subject

to approval by the appellant. However, the *Nova* case only dealt with the power to review rates approved in a previous final decision and, as I have said before, entirely different considerations apply when interim rates are reviewed.

It has often been said that the power to review its own previous final decision on the fairness and the reasonableness of rates would threaten the stability of the regulated entity's financial situation. In *Regina v. Board of Commissioners of Public Utilities* (1966), 60 D.L.R. (2d) 703, Ritchie J.A., wrote the following comments on this issue, at p. 729:

> The distributor contends that in the absence of any express limitation or restriction or an express provision as to the effective date of any order made by the board, the jurisdiction conferred on the board by the Legislature includes jurisdiction to make orders with retrospective effect. Reliance is placed on *Bakery and Confectionery Workers International Union of America, Local 468 v. Salmi, White Lunch Ltd. v. Labour Relations Board of British Columbia*, 56 D.L.R. (2d) 193, [1966] S.C.R. 282, 55 W.W.R. 129 which it is contended must be applied when interpreting s. 6(1) of the Act.
>
> The clear object of the Act is to ensure stability in the operation of public utilities and the maintenance of just, reasonable and non-discriminatory rates. That object would be defeated if the board having, on November 14, 1962, made an order fixing the rates to be paid by the distributor for natural gas purchased from the producer, reduced those rates on February 19, 1966, more than three years later, and directed the reduced rates be effective as from January 1, 1962, or as from any other date prior to February 19, 1966.

and further at p. 732:

> In no section of the Act do I find any wording indicating an intention on the part of the Legislature to confer on the board authority to make orders fixing rates with retrospective effect or any language requiring a construction that such authority has been bestowed on the board. To so interpret s. 6(1) would render insecure the position of not only every public utility carrying on business in the Province but also the position of every customer of such public utility.

However, Ritchie J.A.'s comments deal with the *Public Utilities Act*, R.S.N.B. 1952, c. 186, which did not provide the Board with any power to make interim orders. I readily agree that Ritchie J.A.'s concerns about the financial stability of utility companies are valid when one is faced with the argument that a Board has the power to revisit its own previous final decisions. Since no time limit could be placed on the period which could be revisited, any power to revisit previous final decisions would have to be explicitly provided in the enabling statute. Furthermore, even if final orders are "for the time being", it does not necessarily follow that they must be stripped of all their finality through the judicial recognition of a power to revisit a period during which final rates were in force.

However, there should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. In fact, in this case, the respondent asked for and was granted interim rate increases on the basis of serious apprehended financial difficulties. The added flexibility provided by the power to make interim orders is meant to foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable.

Even though Parliament has decided to adopt a positive approval regulatory scheme for the regulation of telephone rates, the added flexibility provided by the power to make interim orders indicates that the appellant is empowered to make orders as of the date at which the initial application was made or as of the date the appellant initiated the proceedings of its own motion. The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to

make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in *obiter* in *Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission* (1978), 87 D.L.R. (3d) 727 (B.C.C.A.), with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final decision for the period during which they are in effect so as to achieve just and reasonable rates throughout that period.

(iv) The Power to Make a One-time Credit Order

Once it is decided, as I have, that the appellant does have the power to revisit the period during which interim rates were in force for the purpose of ascertaining whether they were just and reasonable, it would be absurd to hold that it has no power to make a remedial order where, in fact, these rates were not just and reasonable. I also agree with Hugessen J. that s. 340(5) of the *Railway Act* provides a sufficient statutory basis for the power to make remedial orders including an order to give a one-time credit to certain classes of customers.

CNCP Telecommunications argues that the one-time credit order should be limited to the amount of revenues actually derived as a direct result of the 2 per cent interim rate increase

and that these excess revenues should be refunded to the actual customers who paid them. The presumption behind this argument is that the portion of the interim rates corresponding to the final rates in force prior to the beginning of the proceedings cannot be held to be unjust or unreasonable until a final decision is rendered. As I have held that the appellant has jurisdiction to review the fairness and the reasonableness of these interim rates in their entirety because the rate-review process starts as of the date of the beginning of the proceedings, this argument must be dismissed.

Finally, it is true that the one-time credit ordered by the appellant will not necessarily benefit the customers who were actually billed excessive rates. However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one-time credit is not the perfect way of reimbursing excess revenues. However, in view of the cost and the complexity of finding who actually paid excessive rates, where these persons reside and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in weighing the many factors involved in apportioning respondent's revenue requirement amongst its several classes of customers to determine just and reasonable rates, the appellant's decision was eminently reasonable and I agree with Hugessen J. that it should not be overturned.

VI - Conclusion

In my opinion, the appellant had jurisdiction to review the interim rates in force prior to Decision 86-17 for the purpose of ascertaining whether they were just and reasonable, had jurisdiction to order the respondent to grant the one-time credit described in Decision 86-17 and has committed no error in so doing.

I would allow the appeal and confirm the appellant's decision, with costs in all courts.

Appeal allowed with costs.

Solicitor for the appellant: Avrum Cohen, Hull.

Solicitors for the respondent: Clarkson, Tétrault, Montréal.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Consumers' Association of Canada: Janet Yale, Ottawa.

Solicitor for the intervener Canadian Business Telecommunications Alliance: Kenneth G. Engelhart, Toronto.

Solicitor for the intervener the CNCP Telecommunications: Michael Ryan, Toronto.

Solicitors for the intervener the National Anti-Poverty Organization: Andrew Roman and Glenn W. Bell, Ottawa.

ATTACHMENT 2

EUB DECISION 2005-099 AUGUST 29 2005

Decision 2005-099

ATCO Gas

2005-2007 General Rate Application
Interim Rate Application

August 29, 2005

Alberta Energy and Utilities Board

ALBERTA ENERGY AND UTILITIES BOARD
Decision 2005-099: ATCO Gas
2005-2007 General Rate Application
Interim Rate Application
Application No. 1404168

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Contents

1 INTRODUCTION 1

2 PARTICULARS OF THE APPLICATION 1

3 POSITIONS OF AG AND THE INTERVENERS 2

4 VIEWS OF THE BOARD 6

5 ORDER 9

APPENDIX 1 10

ALBERTA ENERGY AND UTILITIES BOARD
Calgary Alberta

ATCO GAS
2005-2007 GENERAL RATE APPLICATION **Decision 2005-099**
INTERIM RATE APPLICATION **Application No. 1404168**

1 INTRODUCTION

ATCO Gas (AG) filed a General Rate Application (GRA) for the 2005-2007 test period on May 13, 2005. On June 8, 2005, AG filed an application (the Application) with the Board requesting approval for proposed rates on an interim basis. AG proposed that the interim rates would be effective September 1, 2005, and would reflect an increase in revenue from existing 2004 rates in the amount of $9.3 million for ATCO Gas North (AGN). No interim rate increase was requested for ATCO Gas South (AGS).

2 PARTICULARS OF THE APPLICATION

AG provided the following information in support of the Application:

- In the Overview of the GRA, AG indicated that the 2005 revenue shortfall for AGN was $18.5 million. ATCO submitted that this was a substantial shortfall and that the forecast shortfalls for 2006 and 2007 were substantially higher at $26.6 million and $34.5 million respectively. The requested interim increase of $9.3 million represented approximately 50% of the forecast 2005 shortfall and was proposed to be collected between September 1, 2005 – December 31, 2005.

AG also proposed that the interim increase should be applied to all customer rates on an across-the-board basis, and provided detailed calculations of the billing determinants and proposed rates for each rate class for AGN customers.

AG indicated that, to minimize rate shock and maintain intergenerational equity, it would be in the best interests of customers to implement an interim increase in rates for AGN. AG also indicated that an interim increase in the level proposed would be consistent with the last approved increase for AGN and was in the range of historic approvals for Northwestern Utilities (NUL) and Canadian Western Natural Gas Ltd (CWNG). Since past rate applications involved contentious changes to capital structure and return on common equity that would not be an issue in this proceeding, AG asserted that the request for 50% of the estimated shortfall was reasonable. AG provided excerpts from previous Board Decisions in support of its requested increase and its request that the interim increase be applied across-the-board.

By letter dated July 15, 2005, the Board requested that interested parties provide submissions with respect to the Application by July 22, 2005, and that AG provide a response to those submissions by July 29, 2005. However, a submission was received on July 8, 2005 from the Consumer Group (CG) to which AG replied on July 13, 2005. CG filed a response to AG's reply in a letter dated July 15, 2005.

3 POSITIONS OF AG AND THE INTERVENERS

The CG disagreed with AG that implementation of the applied for interim rate would minimize rate shock. In their July 15 response letter to AG, CG contended that the difference between $9.3 million and $18.5 million only constituted a 1% difference to customer end bills. As such, CG concluded that rate shock and intergenerational equity should not be considered issues in this instance.

CG argued that AGN should not receive an interim rate adjustment. CG claimed that there were significant amounts that AGN included in its Application that had been reduced or denied by the Board in previous proceedings. Additionally, CG stated that there were other amounts that represented unusually large increases over 2004 amounts. In total CG suggested that $19.3 million in reductions should be applied to AGN's forecasted shortfall. Since this amount exceeded AGN's total revenue deficiency, CG asserted that no interim rate adjustment ought to be approved. CG's support for the $19.3 million in reductions is described below.

CG noted that in its application AG forecasted a one-time Federal deferred income tax refund for the North. This amount is required to be refunded to customers in accordance with direction set out in Decision 2003-072.[1] CG argued that as no interest was being paid on this amount, it should be used to offset the 2005 forecasted revenue shortfall rather than applied to offset projected expenditures in 2006 as proposed by AG.

CG also noted the Board's direction in Decision 2003-072 which directed AG:

> … to re-evaluate the MRRP [Meter Relocation and Replacement Project] and incorporate in its Refiling, a revised proposal for replacement of meters with underground entries over a 10-year timeframe, and replacement/relocation of meters with aboveground entries on a schedule coincident with the recall program.[2]

CG noted that the AG GRA application forecast that the MRRP will cost $30 million per year; an amount greater than the cost of $28 million forecast in the last rate application. For this reason, CG requested that for interim purposes, the MRRP should be limited to $25 million per year. This was the amount approved by the Board for MRRP expenditures for 2004 in Decision 2004-036.[3]

CG also argued that AG's forecast expenditures on urban mains replacements was too high at $19.1 million for 2005. CG considered that the Board directed AG in Decision 2003-072:

> … to reduce the 2004 test year forecast for Urban Mains Replacements to $7.092 million.[4]

In its previous forecast, AG budgeted $15.1 million for urban mains replacements in 2004. Therefore, CG submitted that AG's forecast amount for urban mains replacements in 2005 should be reduced to $7 million per year.

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1 Decision 2003-072 – ATCO Gas 2003/2004 General Rate Application, Phase I, dated October 1, 2003
2 Decision 2003-072, p. 81
3 Decision 2004-036 – ATCO Gas 2003/2004 General Rate Application – Compliance Filing, dated April 28, 2004
4 Decision 2003-072, p. 47

For the 2005 test year, AG forecast a $5 million increase in movable equipment as compared to 2003 and 2004 actual expenditures. As was noted by CG, the 2005 moveable equipment expenditure forecast was significantly greater than 2006 and 2007 forecast amounts. CG submitted that, for interim purposes, AG's 2005 moveable equipment forecast be reduced by $5 million.

In total, CG submitted that the net impact on AG's capital expenditure forecasts pertaining to the above noted items is a reduction of $22 million. The net effect on the revenue requirement of these reductions would be $2.1 million, of which CG argued that $1.1 million should be attributed to AGN.

In Decision 2003-072, the Board determined that AG had not established that monthly meter reading was necessary. Therefore, the Board directed AG to revise its forecast to reflect the costs of reading meters on a bi-monthly basis. However, CG noted that AG has continued to provide monthly meter reading and has included forecast monthly meter reading costs in its 2005-2007 GRA. CG stated that in Decision 2003-072, ATCO Gas estimated monthly meter reading expenses at $5.5 million plus capital costs of $577,000. CG argued that none of the costs of monthly meter reading should be included in the interim rates and argued that AGN's interim request should be reduced by $3 million.

Also noted by the CG, AG forecasted the addition of 84 full-time employees (FTEs) in 2005. Including labour and benefits expenses, CG noted that the average estimated cost per new FTE was $62,300 per year. Without further testing, CG contended that this amount was front loaded and only the costs of 42 FTEs should be considered for the purpose of interim rates. CG remarked that this would reduce AG's forecast 2005 expenses by $2.5 million, of which CG argued $1.3 million ought to be attributed to AGN.

CG noted that Account 701 advertising expense was forecast to be $6.0 million in 2005; an increase over the $3.0 million allowed by the Board in Decision 2003-072 for the 2003-2004 test years. CG observed that in its 2003-2004 GRA, AG applied for a similar increase. CG submitted that for interim purposes the Account 701 advertising costs should be limited to $3 million for AG. CG argued that $1.5 million of this amount should be attributed to AGN.

In addition, CG remarked that in Decision 2005-039[5] the Board reduced Customer Communication Costs by $250,000 reflecting the costs associated with the GCRR for which AG was no longer responsible. CG asserted that this amount should also be excluded from interim rates.

Furthermore, CG noted that the Board reduced AG's administration costs to reflect the transfer of the retail function to Direct Energy Regulated Services (DERS). CG indicated that AG stated in its latest compliance filing that it had reduced administrative expenses by $1.029 million in the north and by $1.068 million in the south. These amounts reflected savings in administrative costs in the last 7 months of 2004. CG contended that since AG argued that there should not be any reductions in administrative costs as a result of the transfer, it was unlikely that AG would have

[5] Decision 2005-039 – ATCO Gas 2003/2004 GRA Impact of the Retail Transfer and ITBS Volume Forecast, dated May 3, 2005

removed any of these costs from its 2005-2007 GRA. Therefore, CG asserted that for interim purposes, AGN's administrative costs should be reduced by $1.675 million for 2005.

CG stated that AG included in its forecast expenses an amount of $500,000 for external legal fees in excess of the Board Scale for 2005, half of which would be attributable to AGN. Since hearing costs in excess of the Board Scale are not allowed for any participants (either companies or interveners), CG argued for a $0.3 million reduction to expenses for AGN interim rates.

Similarly, CG submitted that $339,000 for donations included for 2005 should be excluded from both the GRA and the interim rate application. CG argued that historically the Board ruled that donations were not a cost to be borne by customers. As such, CG contended AGN's forecasted expenses be reduced by $0.3 million.

CG noted that AG proposed changes to its depreciation study that would result in a net depreciation expense increase of $1.683 million for the 2005 test year. CG asserted that there was no urgent or compelling reason for AG to recover increased depreciation expense caused by changes to service life and net salvage assumptions. CG contended that for interim purposes AGN depreciation expense should be reduced by $0.9 million.

CG and the Utilities Consumer Advocate (UCA) noted that AG has forecast an increase of $3 million in ATCO I-Tek charges from 2004 to 2005. The unit prices were based on an MSA that was renewed early in 2005 and included a 3.8% inflation increase for labour. CG and the UCA indicated that the areas relating to Distributed Hardware and Application Service Provider (ASP) applications were forecasted to have the largest increases. Since the Board previously directed ATCO Gas to reduce ATCO I-Tek charges by 7.5% in Decision 2002-069,[6] CG and the UCA contended that ATCO I-Tek charges should be reduced by 10% for interim purposes. The result would be a $0.7 million reduction for AGN in 2005.

CG also submitted that I-Tek Business Services (ITBS) charges ought to be reduced by 11.1%. CG noted that these charges were reduced by the Board in Decision 2002-069 by this amount. The $22.5 million that AG forecast in spending on ITBS was based on a new Master Service Agreement (MSA). CG contended that it was unlikely that the 11.1% reduction ordered by the Board was incorporated in this Application. Therefore, for the purposes of interim rates, CG argued that ITBS charges to ATCO Gas should be reduced by $2.5 million with $1.3 million of that amount being attributable to AGN.

CG noted that Industrial Gas Consumers Association of Alberta (IGCAA) submitted evidence in an ATCO Pipelines Application No. 1393613[7] suggesting that costs allocated to unregulated portions of the network, (the Muskeg River Pipeline) have been understated by approximately $1.6 million at the expense of ATCO Pipelines other customers. CG argued that if this evidence was found to be compelling in the ATCO Pipelines proceeding, that it could have a significant impact for AG. CG estimated that charges to AGN could be reduced by as much as $0.6 million for 2005.

[6] Decision 2002-069 – Affiliate Transactions and Code of Conduct Proceeding, Part A: Asset Transfer, Outsourcing Arrangements, and GRA Issues, dated July 26, 2002

[7] Muskeg River Pipeline Module

In addition, ATCO Pipelines was expected to receive $4 million worth of TBO (Transportation By Others) revenues from NOVA Gas Transmission Limited (NGTL). Of this amount, CG contended that $0.4 million would accrue to AGN.

Finally, if NGTL's proposed rate design was accepted by the Board, CG claimed that ATCO Pipelines would save 13% over current rates. CG argued that this amount would translate to savings for AGN of $0.15 million.

CG maintained that the outcome of the ATCO Pipelines and NGTL proceedings could have a significant impact on the AGN's costs. For this reason, CG submitted that AGN's interim revenue should be reduced by $1.15 million.

AG reviewed CG's submission and replied that the focus of an interim rate application should not be to pre-judge contentious issues, but rather to avoid rate shock and provide intergenerational equity. AG stated that an intervener's suggestion of an issue being contentious should not automatically make it so. AG argued that it was for this reason that it only requested 50% of the forecast revenue shortfall as opposed to the full amount. AG noted that it would be unlikely that it would be able to implement adjusted rates based on the outcome of the GRA Decision before March 2003. ATCO Gas asserted that if the full amounts of the shortfall for 2005 and 2006 were approved by the Board, customers would face a significant increase in rates at that time. AG concluded that in order to mitigate any possible rate shock, the Application should be approved as filed.

In response to CG's assertion that the forecast federal deferred income tax refund should be repaid in 2005, AG responded that the $6 million refund would almost fully offset $6.9 million of one-time charges for AGN customers that would occur in 2006. AG argued that moving the repayment to 2005 would cause a significant increase in rates for 2006 which may contribute to rate shock.

With respect to the proposed changes in depreciation analysis, ATCO Gas noted that CG did not find the amount to be contentious. Rather, AG argued that CG disputed the timing of those amounts. AG submitted that CG was again ignoring the impact of rate on customers and that its request for a $0.9 million reduction was unjustified.

AG submitted that it considered it inappropriate for CG to speculate on the outcome of other proceedings that may impact ATCO Pipelines. AG argued that for this reason the $1.1 million reduction sought by CG was unwarranted.

AG submitted that removing the above noted items from CG's analysis decreased CG's proposed reduction from $19.3 to $11.3 million. Therefore, AG noted that, following the reasoning of CG, an interim rate increase of at least $7.2 million should be allowed. An award of such an amount, however, would have to be premised on the assumption that the Board would completely agree with the interveners regarding the contentious issues which AG considered unlikely. AG therefore argued that the Application should be approved as filed.

4 VIEWS OF THE BOARD

AG argued that to mitigate potential rate shock, promote rate stability and maintain intergenerational equity; an interim rate adjustment would be in the best interests of customers. CG identified a number of contentious issues to be debated during the hearing. The Board recognizes that there are significant differences between AG and the interveners regarding the appropriate forecast revenue requirement.

With respect to the criteria that the Board should utilize when evaluating the need for an interim rate increase, the Board has considered the arguments of the parties and prior interim rate decisions. In Decision E92036[8] the Public Utilities Board (PUB) indicated at pages 10 and 11:

> The Board considers that an effective approach which could be used by a utility to determine an appropriate level of interim rates is to look at areas which may be contentious and to exclude all or some portion of those amounts from the amount to be collected through interim rates. In this manner the potential of over-collection from interim rates would be minimized which in turn reduces potential fluctuations to customers' rates.

In Order E93028[9] the PUB stated at page 14:

> The Board considers that interim rate increases are generally warranted where the forecast revenue deficiency identified for a given period is probable and material. The Board considers it generally appropriate that customers' rates for a period reflect the costs associated with that period in order to maintain intergenerational equity. Furthermore, approving interim rates in a timely manner avoids rate spikes that may otherwise result if recovery of the revenue deficiency is delayed.

Further, at page 18 the PUB denied NUL's request to implement an interim rate increase in respect of certain classes only, stating:

> The Board is not persuaded at this time that a need exists to change its long maintained position that interim rates should be based on an existing rate structure and costing methodology….The Board considers that this method least influences the existing Board approved rate structure.

[8] Interim Decision E92036, Canadian Western Natural Gas Company Limited, Re: Interim Rates effective April 1, 1992, dated April 2, 1992

[9] Order E93028, Northwest Utilities Limited, Re: Interim Rates for 1993, dated March 31, 1993

In Decision 2002-115[10] the Board stated at page 10:

> In the present circumstances, the Board considers that interim rate increases are generally warranted given that the forecast 2003 revenue deficiency is material. An interim rate increase aimed at recovering a portion of any shortfall that is ultimately demonstrated and approved provides for a leveling out of the impact of any final rate increase, thereby promoting rate stability and easing any rate shock to customers at a later date. The Board also considers it appropriate that customers' rates for a given period reflect the costs associated with that period in order to maintain intergenerational equity. While acknowledging the submission of the CG that ATCO has not claimed financial harm or an inability to continue safe utility operations without an interim rate increase, the Board considers it appropriate, given the magnitude of the forecast 2003 revenue deficiencies for AGS and AGN, that some degree of interim rate increase is warranted.

Further at page 11 of Decision 2002-115, the Board considered the award granted in the context of previous awards and found the percentage increase granted to be "in line with those awarded by the Board in previous interim rate Decisions."

The Board also notes the discussion in Decision 2002-108[11] of the use of carrying costs as a means of keeping parties whole and thereby potentially avoiding interim rate changes. The Board also discussed the need to consider large forecasted impacts to rates when evaluating a requested interim rate increase that appears at page 12:

> However, if large rate adjustments are forecast, the Board might decide that the need of appropriate price signals to customers is more significant than the need to minimize the number of changes in rates.

The foregoing excerpts reference a number of factors that the Board has employed in evaluating an application for an interim rate increase. These factors can be grouped into two categories, those that relate to the quantum of, and need for, the rate increase and those that related to more general public interest considerations.

Quantum and need factors are those which relate to the specifics of the requested rate increase and include:

- The identified revenue deficiency should be probable and material
- All or some portion of any contentious items may be excluded from the amount collected
- Is the increase required to preserve the financial integrity of the applicant or to avoid financial hardship to the applicant?
- Can the applicant continue safe utility operations without the interim adjustment?

If all or a portion of the suggested rate increase appears appropriate after a consideration of the quantum and need factors, the Board must assess certain general public interest factors to see if a rate increase is justified, these include:

[10] Decision 2002-115, ATCO Gas 2003/2004 General Rate Application Interim Rate Application, dated December 24, 2002
[11] Decision 2002-108, ATCO Electric Ltd. 2003 Distribution Tariff and Transmission Facility Owner's Tariff Part A: 2003 Interim DT and TFO Tariff, dated December 11, 2002

- Interim rates should promote rate stability and ease rate shock
- Interim adjustments should help to maintain intergenerational equity
- Can interim rate increases be avoided through the use of carrying costs
- Interim rate increases may be required to provide appropriate price signals to customers
- It may be appropriate to apply the interim rider on an across-the-board basis

The Board recognizes that the above listed considerations may be given different weighting depending on the specific circumstances surrounding each application. The Board has considered the above factors in its deliberations.

The Board notes AG's comment regarding the impact of revenue shortfalls on AG's financial results for 2005[12] as stated in AG's discussion with the Board and parties in the June 14, 2005 Information Workshop. In this Application, the Board considers that the forecast shortfall of $18.5 million could be considered a material amount if the entire amount had to collected from customers.

AG suggested that $9.3 million or approximately 50% of the forecast 2005 revenue shortfall would be a reasonable interim rate adjustment. In determining the reasonableness of the requested amount, the Board notes the number of contentious issues and the amounts of revenue increases related to those issues. The Board has balanced the quantum of contentious revenue related issues with the quantum of the forecast shortfalls and the impact to rates that would be associated with a range of shortfall collection scenarios. While the amount of the requested rate increase would only constitute 2% of current customer bills, the Board considers that by the time the GRA decision is rendered and amended rates have been implemented, AG may have to collect all of the 2005 and some portion of 2006 shortfalls. Given the potential magnitude of these shortfalls, the Board considers it appropriate to award some degree of interim rate adjustment to avoid future rate shock. The Board also considers that applying the interim increase on an equal percentage basis to the energy, fixed and demand charges for all rate classes[13] is a reasonable method of applying the interim increase that is simple and cost effective to apply.

The Board considers that an increase in rates, on an interim basis, to generate an amount of $7.0 million in additional revenue in 2005 compared with current rates, will mitigate the risk of future rate shock caused by additional rate increases during 2006, maintain intergenerational equity, ensure rate stability and provide a reasonable level of revenue to the Applicant. The Board considers that this level of increase is sufficient to recognize the possibility of some increase being awarded with respect to rates in 2005 and therefore alleviating the impact of collecting shortfalls during 2006.

The Board has prepared Appendix 1 showing the Interim Rates to be applicable to billings on and after September 1, 2005 until replaced by subsequent decisions or orders of the Board.

In determining the level of interim rates for AGN, the Board is not making any finding or determination with respect to any of the matters to be considered in the upcoming GRA. The Board recognizes that the evidence before it is untested and that a number of areas of concern identified by the interveners could result in an adjustment to forecasted shortfalls.

[12] AG Application letter June 8, 2005 P1
[13] Equivalent to the "Across-the-board" basis per AG submission

5 ORDER

IT IS HEREBY ORDERED THAT:

(1) Appendix 1, Rider G of this Decision is hereby approved as an additional rider to the current rate schedules, on an interim basis for ATCO Gas North service zone, applicable to billings on and after September 1, 2005 until replaced by subsequent orders of the Board.

Dated in Calgary, Alberta on August 29, 2005.

ALBERTA ENERGY AND UTILITIES BOARD

(original signed by)

B. T. McManus, Q.C.
Presiding Member

(original signed by)

Gordon J. Miller
Member

(original signed by)

Laurie J. Bayda
Acting Member

APPENDIX 1

Effective by Decision 2005-099
On consumption September 1, 2005

ATCO GAS NORTH
RATE RIDER "G" TO DELIVERY SERVICE RATES

Applicable to the fixed and variable charges in ATCO Gas North DSP Delivery Service Rates 1, 11, 3, 13 and 13b. Effective on all consumption commencing September 1, 2005.

Surcharge to Fixed Charge, Variable Charge and Demand Charge	9.96%

Hydro Québec

Press Release

For immediate release
Montréal, August 3, 2010

Hydro-Québec: No Rate Increase in 2011

Hydro-Québec Distribution filed a rate proposal yesterday with the Régie de l'énergie that would maintain its current electricity rates for the years 2011-2012.

This rate proposal, which covers the period from April 1, 2011, to March 31, 2012, testifies to Hydro-Québec Distribution's commitment to provide high-quality customer service and to its flexible approach to energy supply, while it continues to improve efficiency.

Hearings on this rate proposal will be held by the Régie over the coming months. The Régie is the body mandated by law to set electricity rates in Québec.

Improved efficiency

The low increase in costs related to electricity distribution and customer service is the result of Hydro-Québec Distribution's efforts to improve its operational performance.

Energy efficiency

Hydro-Québec Distribution will invest $333 million in its Energy Efficiency Plan, which is expected to generate 805 GWh in additional energy savings for the 2011–2012 rate year.

Low-income customers

Hydro-Québec Distribution reiterates its commitment to low-income customers. In 2011, $27.7 million will be allocated to meet their particular needs. This amount includes $15.3 million for energy efficiency measures for these customers, of which $7 million will go to a new refrigerator replacement program launched in 2010.

Investments

In 2011, the Distributor plants to invest $869 million to meet the growth in the number of customer accounts, to maintain its assets, and to improve service quality.